



BVI Financial Services Commission

Registry of Corporate Affairs

User Guides on the BVI Business Companies Act

User Guide No. 6

Re-registration of Companies Act Companies Under the BVI Business Companies Act

This is one of a series of User Guides published by the Registry of Corporate Affairs that are intended to provide general information about different aspects of the BVI Business Companies Act ["the Act"].

The Guide is not intended to provide, and is not a substitute for, legal advice and is not intended to address the circumstances of any individual case. The Act has been summarised to make the Guide easier to read and the Guide should be read together with the Act. You should always consider carefully whether you might benefit from legal, accounting or other professional advice concerning your particular circumstances or the circumstances of your company.

Introduction

For over twenty years, the British Virgin Islands has had two different company laws, the Companies Act [Cap. 285] and the International Business Companies Act [Cap. 291]. The International Business Companies Act, which dates back to 1984, was designed to be used exclusively by offshore companies. International business companies, or "IBCs" as they became known, were therefore not permitted to carry on any business in the BVI. If a company was needed to trade, or hold land, within the BVI, it had to be incorporated under the Companies Act. Companies Act companies became known as "Caps", "CapCos" or "local companies" (we refer to them in this Guide as "CapCos").

In December, 2004, Legislative Council enacted a completely new companies law, the BVI Business Companies Act. This new Act is intended to replace both the International Business Companies Act and the Companies Act. All IBCs have already been re-registered under the new Act and any CapCos that do not voluntarily re-register [see below], will be re-registered under the Act on 1 January, 2009. From their re-registration under the Act, IBCs and CapCos become BVI business companies.

This re-registration process may be either **voluntary** (on application by the CapCo to the Registrar) or **automatic** (if a CapCo does not apply for voluntary re-registration within the time period allowed). The difference between the two types of re-registration is explained later in this Guide.

There are very significant differences in the way that the Act applies to automatically and voluntarily re-registered CapCos. It is therefore very important for directors and shareholders of CapCos to consider carefully whether it would be better for their company to apply to re-register voluntarily (which is likely to be the better option for most CapCos) or whether automatic re-registration would be preferable.

The purpose of this Guide is to explain the re-registration process for CapCos and the consequences of voluntary and automatic re-registration. This should assist directors and shareholders of CapCos to make an informed decision about whether or not their company should apply for voluntary re-registration.

The statutory provisions governing re-registration, which are summarised in this Guide, are contained in Schedule 2 of the Act.

This Guide does not cover the re-registration of IBCs under the Act.

Why was a new companies law considered to be necessary?

There were a number of reasons for the Government's decision to enact a new companies law, including the following:

1. The British Virgin Islands, as a British Territory, is bound by the European Union Code of Conduct on Business Taxation. This Code requires local and offshore companies to be treated equally for tax purposes. The most straightforward way for us to comply with the Code was to abolish the distinction between local and offshore companies altogether.
2. The Government expects that at some point over the next few years, international regulatory standards will prohibit, or at least strongly discourage, jurisdictions from applying different regulatory standards and controls to local and offshore companies. By anticipating this, the BVI has been able to develop new legislation applicable to all companies in its own time rather than having to react at the last moment after international standards have changed.
3. The Companies Act is very outdated. It was first enacted in 1882 and has been amended only infrequently since. The Government considered that it was no longer acceptable for local businesses to be deprived of the modern company law that has been available to BVI's international clients through the IBC Act since 1984. The IBC Act also needed to be updated and, as there is no longer any advantage in having two types of company, it was considered more efficient, and a better solution, to draft a completely new Act rather than upgrading the two existing Acts separately.

Although the offshore company sector is extremely important to the economy of the BVI, the Act has been designed with the interests of both local and offshore users in mind. It has sufficient inbuilt flexibility to enable the differing requirements of both local and offshore users to be catered for.

Key dates

These are the key dates for CapCos:

- 30 November, 2008:** This is the last date on which application can be made to re-register a CapCo **voluntarily** under the Act.
- 1 January, 2009:** This is the date on which all CapCos that have not re-registered voluntarily will **automatically** be re-registered under the Act.
- 28 February, 2009:** This is the last date for the appointment of a registered agent by a CapCo that is automatically re-registered.

Voluntary re-registration

As re-registration on application is voluntary, a CapCo may continue as a CapCo until 31 December, 2008 and it will automatically be re-registered under the Act as a BVIBC on 1 January, 2009. In order to be voluntarily re-registered, a CapCo must apply to the Registrar of Companies with a new memorandum and articles of association¹. Directors and shareholders of some CapCos may therefore be tempted to take what seems to be the easy course of action and allow the company to be re-registered automatically. However, it would be a mistake to do this without fully considering the consequences.

Why should a CapCo consider re-registering voluntarily?

There are very significant differences between the BVI Business Companies Act and the Companies Act. The BVI Business Companies Act is a modern flexible company law whereas the Companies Act is outdated and very inflexible. Given these differences, the legal documents that constitute a CapCo (the memorandum and articles of association), which would have been drafted to enable the company to operate under the Companies Act, will not be suitable for a BVIBC. The re-registration process must take this into account and it does so through the two types of re-registration (voluntary and automatic) which we will now look at in more detail.

Voluntary re-registration

Where a CapCo re-registers voluntarily, it becomes a “fully-fledged” BVIBC. From the date of its re-registration under the Act, it is regarded and treated as if it had originally been incorporated as a BVIBC. As its existing memorandum and articles would not be consistent with its status as a BVIBC, it is necessary to require a CapCo that re-registers voluntarily to adopt and file with the Registrar completely new memorandum and articles of association that are fully compliant with the Act. The new memorandum and articles will take effect from the date of its voluntary re-registration.

Where a company re-registers voluntarily, therefore, it will be able to take full advantage of the flexibility that the Act provides.

Automatic re-registration

Where a CapCo is re-registered automatically, it will be re-registered with its existing Companies Act memorandum and articles. As these will be inconsistent and non-compliant with the Act there is an obvious problem. It is therefore necessary to continue to apply some parts of the Companies Act to automatically re-registered CapCos instead of the Act. This will permit a CapCo to be automatically re-registered with its existing memorandum but where the Act is inconsistent with the memorandum and articles of a CapCo, the Act is disapplied and the Companies Act continues to apply. In effect, the CapCo does not become a fully-fledged BVIBC and many of the benefits of the Act, and much of its flexibility, will not be available to the company. This is discussed in more detail in the section of this Guide covering the effects of automatic re-registration.

An alternative solution was considered - the imposition of an Act compliant memorandum and articles on an automatically re-registered CapCo. This would have would enable automatically re-registered CapCos to become fully-fledged BVIBCs as if they had been voluntarily re-registered. However, the memorandum and articles is a contract between the shareholders and it was considered that it would not be right for the Act to impose a new contract on the shareholders of the company. This solution was not, therefore, adopted.

Decision required of CapCos

The directors and shareholders of a CapCo therefore have an important decision to make: should their company apply to voluntarily re-register before 30 November, 2008 so that the company becomes a fully fledged BVIBC, or are they prepared to accept the fact that on

¹ See User Guide No 3 for further details of the memorandum and articles of a BVIBC.

automatic re-registration, the company will not be able to take advantage of all the benefits and flexibility of the Act?

It is also important to appreciate that, even if a CapCo is re-registered automatically, it can at any time subsequently adopt a new memorandum and articles that is compliant with the Act. Once the new memorandum and articles is filed with the Registrar, the company will become a fully fledged BVIBC from that date.

Registered Agent

The Act provides that every BVIBC must appoint a licensed company manager or trust company as its registered agent. It makes no difference whether the company is a local trading company or an offshore company. Every BVIBC must appoint a registered agent and maintain a registered agent throughout its life. The registered agent will be responsible for filing documents and paying fees on behalf of the company. In most cases, a company will no longer be able to file its own documents.

International business companies have always been required to appoint a registered agent in the BVI. Since 1991, only licensed professional service providers have been able to provide registered agent services. A list of licensed registered agents can be found on the Financial Services Commission website (www.bvifsc.vg). On the other hand, CapCos have never been required to appoint a registered agent.

There are two very important reasons for this requirement:

Access to statutory records

Many countries require certain basic statutory information about companies, for example the details of a company's shareholders and directors, to be filed at the Companies Registry and to be updated within a short period of any change. This enables both the public and regulatory and law enforcement agencies to obtain access to certain essential information concerning the company. Although the Act requires some information and documentation to be filed, this does not extend to details of the directors and shareholders (although this may be optionally filed).

As this basic company information is not required to be filed at the Companies Registry, it is essential that it is kept up to date and is readily available should it be needed by, for example, the police in a criminal investigation. This is also a requirement of international standards.

In order to ensure that this information may be obtained quickly in case of need, the Act requires the information to be kept at the office of the company's registered agent. The registered agent, as a professional service provider, will have the knowledge and experience to maintain the company's statutory records properly and should they be needed, they are very accessible.

Maintenance of Records

It is in the best interests of companies that their statutory obligations, such as filing documents and paying fees, are complied with. Failure to comply with the Act can result in the company being struck off or even put into liquidation. This could be very costly, or in the event of a liquidation, impossible to remedy.

By employing a registered agent, a BVIBC will have the benefit of professional assistance in complying with these obligations.

It is also very time consuming for the Registry to have to deal with incorrectly completed or filed documents. The requirement for all documents to be filed by registered agents therefore assists the Registry to provide a timely and efficient service to all users.

Obligations on CapCos re-registering under Act

The obligations on a CapCo with respect to the appointment of a registered agent depend upon whether it is re-registering voluntarily or whether it is automatically re-registered.

Voluntary re-registration: Application to re-register a CapCo can only be made by the person who will become the CapCo's registered agent after it has re-registered as a BVIBC. A CapCo that wishes to re-register voluntarily must, therefore, first appoint a person to be its registered agent on re-registration. The re-registration process is considered in more detail in the next section.

Automatic re-registration: An automatically re-registered CapCo must appoint a registered agent, and file a notice of its registered agent with the Registrar, within 2 months of its automatic re-registration, that is on or before 28 February, 2009. If it fails to do this, it may be struck off the Register of Companies.

Voluntary Re-registration

Process

In this section of the guide we will consider how a CapCo re-registers voluntarily.

As already explained, a CapCo can only re-register voluntarily if it adopts a new memorandum and articles of association that complies with the requirements of the Act. The memorandum and articles, and the application to re-register, must be approved by a resolution of the members of the CapCo. The memorandum and articles of association are important legal documents that are binding on all the members of the company, and its directors. It is therefore important that proper advice is obtained about what should be covered by the memorandum and articles. It would therefore make sense for all CapCos to choose a person to be the company's registered agent before adopting these documents so that the registered agent can assist in their preparation. The directors and members of a CapCo should also consider whether it would be appropriate to seek legal advice.

Once the new memorandum and articles are approved and adopted, they will be signed by the person appointed to be registered agent who will file with the Registrar:

- The newly adopted memorandum and articles; and
- The registered agent's consent to act.

No fee is payable to the Registrar for the voluntary re-registration of a CapCo under the Act.

Standard articles

It is intended that regulations will be issued setting out standard articles which may be adopted by a CapCo. These articles will contain provisions suitable for many CapCos. However, they will not be suitable for all CapCos and it is the responsibility of the members and directors of a CapCo to consider them and obtain appropriate advice on their suitability.

Is an application to Court required?

Some lawyers expressed concern that a CapCo that is re-registering voluntarily would need to first apply to Court for approval. This is because the Companies Act prohibits a CapCo from reducing its share capital without the approval of the Court. This is intended to protect the creditors of a company. However, it is very inflexible and, in fact, provides creditors with very little protection. The Act provides much better protection for creditors by prohibiting a BVIBC from distributing any moneys or other assets to the members unless, after the

distribution, the company is able to pay all its creditors. The Act does not, therefore, require a company to have share capital at all.

These lawyers were concerned that, when a CapCo adopts a memorandum that does not state the company's capital, this will amount to a reduction of capital under the Companies Act that will need the approval of the Court.

This would obviously be very inconvenient and costly for CapCos. The transitional provisions therefore provide that this is not necessary as long as certain conditions are met. The conditions are that:

- The resolution to adopt the new memorandum is passed by the members of the CapCo unanimously;
- The number of shares issued by the company is not reduced;
- The maximum number of shares that the company is authorised to issue under the new memorandum is equal to or greater than the number of shares into which the capital is divided under the new memorandum and articles; and
- The par value (or the face value) of the shares remains the same.

Re-registration

Provided that the application to re-register voluntarily is submitted on or before 30 November, 2008 and that there are no problems with the application, the company will be re-registered voluntarily with the newly adopted memorandum and articles. The processing time needed by the Registrar will depend upon how many other applications to voluntarily re-register have been submitted. It is likely that the closer to the deadline that an application is submitted, the longer it will take to be processed.

Once the application has been approved, the Registrar will issue a certificate of re-registration to the company. From that point on, it will be treated in all respects as if it had been incorporated under the Act.

Automatic Re-registration

Every CapCo that does not re-register voluntarily will be automatically re-registered with effect from 1 January, 2009.

However, as stated above, the company will not be treated as if it had been incorporated under the Act. Instead, the company will be subject to special provisions, including that certain parts of the Companies Act will continue to apply to it.

These special provisions include the following²:

1. A CapCo that is automatically re-registered will be of the same type as it was under the Companies Act. For example, if it was a company limited by shares under the Companies Act, it will be a company limited by shares under the Act. If it was a company limited by guarantee, it will be a company limited by guarantee under the Act.
2. The company will not be issued with a certificate of re-registration, although it may apply for a certificate, for which a fee will be payable.
3. The memorandum and articles of the company under the Companies Act will continue to be its articles under the Act until memorandum and articles that are fully compliant with the Act are filed.

² Reference should be made to the transitional provisions for the full list.

4. The restrictions in the Companies Act on reduction of capital will continue to have effect. A CapCo that re-registers automatically will therefore continue to need the approval of the Court to reduce its capital.
5. The company will continue to be required to hold a general meeting of its members at least once each year (this is not required in the case of a BVIBC unless the memorandum or articles require it).

Where a company is automatically re-registered, it may at any time adopt a new memorandum and articles that comply with the Act and file them together with a notice of election and from the time when the notice is registered by the Registrar, the company will be treated as a company incorporated under the Act and the special transitional provisions will no longer apply to it.

Liquidation and Striking off

There are special transitional provisions concerning the liquidation and strike off of CapCos, both before and after re-registration. These are summarised in User Guide No. 5, "Liquidation and Administrative Strike Off".