

GUIDE TO DIRECTORS' DUTIES UNDER THE BVI BUSINESS COMPANIES ACT 2004

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PREFACE

This Guide outlines the statutory rules and obligations relating to directors of companies incorporated in the British Virgin Islands (**BVI**). Attention is given to Part VI of the BVI Business Companies Act 2004, as amended, (the **Act**), which is the key part of the Act dealing with directors and their duties.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the Corporate Department, using the [contact information](#) provided at the end of this Guide.

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1. DIRECTORS OF COMPANIES IN THE BVI

1.1 General

The Act provides that, subject to any modifications or limitations in the memorandum of association (**memorandum**) or articles of association (**articles**) of a company incorporated under the Act (**company**), “the directors of a company have all the powers necessary for managing, and for directing and supervising, the business and affairs of the company”. Significantly, the Act does not require that any directors be residents of the BVI.

The Act defines a “director” to include a person occupying or acting in the position of a director — by whatever name called. This definition therefore includes “*de facto* directors” (meaning persons who act as directors and carry out the functions of a director, but who are not formally elected or appointed as a director) while the commonly held view is that it does not include “shadow directors” (meaning persons according to whose instructions or directions directors elected or appointed as such are accustomed to act). We note that the definition of “director” in the BVI Insolvency Act 2003 is broad enough to capture shadow directors, but the applicability of that statute is beyond the scope of this Guide.

Particular categories of persons are disqualified from being appointed as directors of a BVI company under the Act. These include:

- an individual under 18 years of age;
- a person subject to a disqualification order under the Insolvency Act 2003;
- a person subject to a bankruptcy restriction order or undertaking; and
- an undischarged bankrupt.

The memorandum or articles of the company can also disqualify additional categories of persons from being directors in relation to that company. A person who acts as a director while disqualified is nevertheless deemed to be a director of a BVI company in relation to any provision of the Act which imposes a duty or obligation on a director.

A director may, subject to the company’s memorandum or articles, appoint an alternate who is not disqualified from appointment as a director, to exercise the appointing director’s powers and carry out the appointing director’s responsibilities in relation to the taking of decisions by the directors in the absence of the appointing director. The appointing director may, at any time, terminate the alternate’s appointment. An alternate director has the same rights as the appointing director in relation to any directors’ meeting and any written resolution circulated for written consent.

The Act also includes the concept of “reserve director”. Under the Act, where a company has only one member who is also the director of the company, the sole member/director may appoint a person as a reserve director of the company to act as sole director in the event the appointing director dies. This provides a very useful succession mechanism for sole member/directors. The nomination of a reserve director ceases to have effect in accordance with the Act if, before the death of the sole member/director who nominated the reserve director, the person nominated resigns as a reserve director, the sole member/director revokes the nomination in writing, or the sole member/director who nominated the reserve director ceases to be the sole member/director (for any reason other than his death).

The number of directors may be fixed by the company’s articles. Apart from the time between the incorporation of the company and the appointment of the first directors by the registered agent, a company must always have at least one director. If a company does not have a director for any period of time, then

the person who manages, or who directs or supervises the management of, the business and affairs of the company is deemed to be a director for the purposes of the Act.

1.2 Appointment, Resignation and Removal

(a) Appointment

A company's first directors must be appointed by the company's registered agent within six months of the company's incorporation. If, before a company has any members, a sole director appointed resigns, dies or ceases to exist, or all the directors appointed resign, die or cease to exist, the registered agent may appoint one or more persons as directors of the company. Subsequent directors are appointed by the members of the company (subject to the company's memorandum or articles) or, when permitted by the company's memorandum or articles, by the directors, for whatever term is specified on his appointment. The directors can fill a vacancy on the board (e.g. if a director dies before the expiration of their term in office), unless otherwise provided in the company's memorandum or articles. In filling a vacancy, the directors may not appoint a director for a term which exceeds the remaining term of the person who ceased to be a director.

A director is required to consent in writing to his appointment. Subject to the company's memorandum or articles, the directors can determine the emoluments of fellow directors in respect of services to be rendered in any capacity to the company.

(b) Resignation

A director can resign from office by providing the company with written notice of his resignation, which takes effect from the date the notice is received by the company (or a later date if specified in the notice). A director is, however, required to resign forthwith if he becomes disqualified from acting as a director.

Importantly, if a director resigns (or indeed is removed), he remains liable for any acts or omissions or decisions whilst he was a director.

(c) Removal

Subject to the memorandum and articles of a company, a director may be removed by way of a resolution of members which is passed at a meeting called for the express purpose of removing the director (or for purposes including the removal of the director), or by a written resolution of members approved by at least 75% of the votes of the members entitled to vote. Any notice for a meeting of members which is called for the purpose of removing a director must state that the removal is the purpose (or one of the purposes) of the meeting.

A director of a company can also be removed by the directors, provided that such removal is permitted by the company's memorandum or articles and is authorised by a resolution passed at a meeting of directors specifically called to remove the director or by a written resolution of directors approved by at least 75% of the votes of the directors entitled to vote.

2. STATUTORY DUTIES OF DIRECTORS IN THE BVI

The main duties of directors are contained in sections 120-3 of the Act. To a large extent, the statutory duties of directors under the Act codify the equitable and common law duties of directors, but they do not replace the common law or equity. For example, a director can still be liable to the company under common law principles relating to negligence, or could be found to have breached his equitable duty not to put himself in a position where his duty and his own interests may conflict.

The main statutory duty of directors is to act honestly, in good faith and in what the director believes to be the best interests of the company. Other statutory duties of directors include exercising their powers for a proper purpose, which includes not acting or agreeing to act in a manner that contravenes the Act or the memorandum and articles of the company, and a duty to exercise their powers and perform their duties with a level of care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account (amongst other things) the nature of the company, the nature of the decision, the position of the director and the responsibilities undertaken by the director.

The Act expressly provides that directors, when exercising their powers and performing their duties, are entitled to rely upon the register of members and books, records, financial statements and other information supplied and/or professional or expert advice given by: (a) an employee of the company, but only where the director believes on reasonable grounds that the employee is reliable and competent; (b) a professional adviser or expert, where the director believes on reasonable grounds that the matter is within his professional or expert competence; and (c) another director, or a committee of directors in which the director did not serve, in relation to matters within such director's or committee's designated authority.

Directors may only act upon the above information or advice where they: (a) act in good faith; (b) make proper inquiry where the need for such an inquiry is indicated by the circumstances; and (c) have no knowledge that such reliance is not warranted. The Act does not provide, however, that the director will necessarily satisfy his statutory or additional common law/equitable duties if he does rely upon such information or advice.

The above duties together comprise the standard of care expected of a company's director.

The Act also responds to the potential for conflict confronting directors in group company structures and joint venture scenarios. In doing so, the Act has extended the duties of directors beyond the traditional principle that fiduciary duties are owed only to the company. The Act provides that if expressly permitted by the company's memorandum or articles, directors may act in the best interests of:

- the company's holding company where the company is a wholly-owned subsidiary, despite the fact that the action may not be in the best interests of the company;
- the company's holding company where the company is not a wholly-owned subsidiary, despite the fact that the action may not be in the best interests of the company, provided that prior agreement of all its shareholders (other than the holding company) has been obtained; and
- the member who appointed the director, in circumstances where the company is carrying out a joint venture between the members, despite the fact that the action may not be in the best interests of the company.

The duties of directors at both common law and under the Act are owed to the company as a whole, not to individual shareholders. There are, however, "special circumstances" where the common law holds that a director may owe a duty resembling a fiduciary duty to shareholders. In terms of understanding the common law duties of directors in the BVI, reference is usually made to decisions of English courts and courts in other Commonwealth jurisdictions, as these decisions will be of persuasive value to, but not binding on, BVI courts.

It is important to note that the consequences of breaching the duties of directors are not specified in the Act in every case. Accordingly, the positions at common law, and in equity, need to be considered. For example, for breaches of duties derived from equity, an account of profits may be the appropriate remedy. In relation to duties derived from common law, damages (to compensate for damages resulting from the breach) would typically be the remedy sought.

Based on the general position at common law, a breach of a directors' duty could be ratified by the shareholders of the company after full and frank disclosure, so long as this does not go beyond the general powers of the company.

3. **DISCLOSURE OF DIRECTOR INTERESTS**

Directors are required to disclose to every other director on the board any "interest" in a transaction entered into (or to be entered into) by the company as soon as they become aware of this interest (which may be after the transaction is entered into, if applicable). The duty to disclose such an interest will be complied with if the director discloses to the board (to each and every director) that he is a member, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person.

The Act facilitates the making of Regulations to prescribe the circumstances in which a director is "interested" in a transaction (though no Regulations have been made so far). The Act only provides that circumstances which give rise to an "interest" of a director in a particular transaction may include a director's relationship with another person who will or may obtain a benefit from the transaction.

The director is not required to disclose the interest if:

- the transaction is between the director and the company; and
- the transaction is or is to be entered into in the "ordinary course of the company's business" and on "usual terms and conditions".

Interestingly, the Act does not define what is in the "ordinary course of the company's business" or what are "usual terms and conditions", and accordingly this is a matter for the director's personal judgment (with reference and subject to the Act and the company's memorandum and articles, which may contain relevant limitations on the objects and powers of the company).

It is an offence punishable by a significant fine if a director fails to make appropriate disclosure where required to do so under the Act.

A transaction entered into by the company where a director is "interested" is voidable at the option of the company where the director does not, prior to the company entering into the transaction, disclose his interest unless:

- the interest is not required to be disclosed because the transaction or proposed transaction is between the director and the company, and the transaction or proposed transaction is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions;
- the material facts of the director's interest are known to those members entitled to vote at a meeting of members, and the transaction is approved or ratified by a resolution of members; or
- the company received "fair value" for the transaction. What is "fair value" for the transaction is to be determined based on information known to the company and the interested director at the time the transaction was entered into.

A director of a company who is interested in a transaction entered into, or which may be entered into, by the company may, subject to the company's memorandum or articles, do the following: (a) vote on a matter relating to the transaction; (b) attend a meeting of directors in which a matter relating to this transaction arises (and be included among the directors present at the meeting for the purposes of

establishing a quorum); and (c) sign a document on behalf of the company or any other thing in his capacity as a director, in relation to the transaction.

Importantly, any avoidance of a transaction arising from this disclosure regime does not affect another person's interest in property, if the property was acquired: (a) from a person other than the company; (b) for valuable consideration; and (c) without any knowledge of the circumstances of the transaction whereby the transferor acquired the property from the company.

4. **DELEGATION**

Directors may, subject to the memorandum or articles of the company, delegate their powers to board committees (consisting of one or more directors). While most of the day-to-day powers of directors can be delegated in this way, certain powers cannot be delegated, notwithstanding anything to the contrary in the company's memorandum or articles. These powers include amending the memorandum or articles of the company; appointing or removing directors and agents; approving a plan of merger, consolidation or arrangement; delegating power to committees (except for the power to appoint, and delegate to, sub-committees); and the power to make a declaration of solvency or approve a liquidation plan.

The directors as a whole will continue to remain responsible for the exercise of power by a committee unless they believed on reasonable grounds that the committee would exercise the power in conformity with the statutory duties imposed on the directors.

Directors may appoint agents for the company (including another director). An agent has the powers as set out in a company's memorandum or articles or in the resolution of directors appointing him. An agent does not, however, have the power or authority in relation to matters which directors cannot delegate to committees or to do certain other things (e.g. to change the registered agent or office of the company, to authorise the company to continue to a jurisdiction outside of the BVI, or to fix the emoluments of directors).

Where the directors appoint a person to be an agent of the company, they may also authorise that agent to appoint one or more delegates or substitutes to exercise some or all of the powers conferred on the agent. Directors have the statutory power to remove an agent, and may also vary or revoke the power conferred on an agent.

5. **PERSONAL LIABILITY FOR COMPANY DEBTS**

The general rule is that a director of a BVI company is not liable for any debt, obligation or default of the company arising from his own conduct. There are, however, two important exceptions:

- (a) when a company has no members, any person doing business in its name or on its behalf may be personally liable for the payment of the company's debts; and
- (b) fraud.

6. **INDEMNITIES AND INSURANCE**

A BVI company may, subject to its memorandum and articles, indemnify any person who is or was a director of the company or is or was, at the request of the company, serving in a similar capacity for another company or a partnership, joint venture, trust or other enterprise, against all expenses (including legal fees and all judgments, fines and amounts paid in settlement and reasonably incurred). This indemnity is permitted only where the director acted honestly and in good faith and in what the director believed to be the best interests of the company and, in the case of criminal proceedings, where the director had no reasonable cause to believe that his conduct was unlawful.

The company may advance expenses (including legal fees) incurred by a director or former director in defending proceedings prior to the final determination of proceedings, provided that the director or former director provides an undertaking to repay the company if it is determined that he is not entitled to be indemnified.

If a person who is or was a director of the company or is or was, at the request of the company, serving in a similar capacity for another company or a partnership, joint venture, trust or other enterprise is successful in defence of proceedings, the Act confirms that he is entitled to be reimbursed for all expenses (including legal fees, and against all judgements, fines and amounts) paid in settlement and reasonably incurred in connection with the proceedings.

A company may also purchase and maintain insurance in relation to any person who is or was a director of the company, or who at the request of the company is or was serving in a similar capacity for another company or a partnership, joint venture, trust or other enterprise, against any liability asserted against the person and incurred by the person in that capacity, whether or not the company has or would have had the power to indemnify the person under the Act.

7. **DIRECTORS' MEETINGS**

The Act provides that, subject to the company's memorandum or articles, the directors of the company may meet at such times and in such manner and places (either within or outside the BVI) as the directors deem necessary or desirable. A director can attend the meeting by way of telephone or other electronic means, provided that all directors participating in the meeting are able to hear each other.

Again subject to the company's memorandum and articles, one or more directors of the company may convene a board meeting and a director is to be provided with reasonable notice of a meeting of directors. What is "reasonable notice" is subject to any requirements regarding notice contained in the company's memorandum or articles, but the requirement for reasonable notice can be waived by all of the directors entitled to vote (or the majority requirement specified in the company's articles or memorandum). The presence of a director at the meeting, in person or by telephone, is deemed to constitute waiver on his part pursuant to the Act. The inadvertent failure to give notice, or the fact a director does not receive notice, does not invalidate the meeting.

In order for resolutions to be implemented at a board meeting, there must be a quorum. The Act provides that the quorum for a board meeting is that fixed by the memorandum or articles. However, if the memorandum or articles does not deal with quorum, a board meeting is considered to be properly constituted if at the commencement of the meeting one half of the total number of directors are present in person or by alternate.

Subject to the memorandum and articles, a resolution of directors is passed at a meeting of directors by a majority of the votes cast by the directors who are present at the meeting and entitled to vote on the resolution.

A resolution of directors may also be passed, subject to the memorandum and articles, as a written resolution consented to in writing or by telex, telegram, cable or other written electronic communication, without the need for any notice.

A written resolution of the directors is passed by such majority of the votes of the directors entitled to vote on the resolution as may be specified in the memorandum or articles; or in the absence of any provision in the memorandum and articles, by all of the directors entitled to vote on the resolution. The articles may provide for weighted voting.

A written resolution may consist of several documents, including written electronic communications, in like form each signed or assented to by one or more directors.

8. REGISTER OF DIRECTORS

A company must maintain a register setting forth the names and addresses of the directors (and reserve directors, if any), the date of appointment for each director (or reserve director), and the date they cease to be a director.

Companies incorporated on or after 1 April 2016 are required to file (and keep updated) copies of the register of directors with the Registrar. Existing companies have until 31 March 2017 to file. A further six month extension may be allowed if the Registrar is satisfied that the existing company has taken steps to meet the requirements and the delay in complying is due to its registered agent's inability to file the register of directors on account of large filings that the registered agent has to undertake or for some other good reason acceptable to the Registrar.

The register of directors may be in such form as the directors approve. If it is in electronic form, the company must be able to produce legible evidence of its contents. The register of directors is *prima facie* evidence of any matters required to be in it.

The company is required to notify the Registrar of changes to the information in the register of directors by filing an updated copy within 21 days of the change.

The filed register of directors is not publicly available.

The register of directors (or a copy of it) must be kept with the registered agent in the BVI. If a copy, as opposed to the original, is kept with the registered agent, the company is required to: (i) provide the registered agent with a written record of the physical address in which the original register of directors is kept, and (ii) provide written notification to the registered agent within 15 days of any changes in the register.

9. INSPECTION OF BOOKS AND RECORDS

A director is entitled, upon providing reasonable notice, to inspect the documents and records of the company without charge, and to make copies or take extracts.

For more information on directors' duties under the BVI Business Companies Act 2004, please contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).