

Guidance on the Continuation of Companies to the British Virgin Islands



One of the many attractions of the British Virgin Islands (BVI) as an international financial centre is the ability of companies to redomicile— or “continue”— in or out of the jurisdiction. Part X of the BVI Business Companies Act 2004 (the “**Act**”) sets out the procedure to be followed for both continuing into the BVI, and for continuing out of the BVI.

This article focuses on the very popular practice of companies continuing into the BVI, and one particular issue, relating to information that needs to be provided to the BVI Registry of Corporate Affairs (the “**BVI Registry**”) about the company applying to continue to the BVI, which has arisen in practice when companies are going through the process of applying to continue. This article provides an explanation of the issue, how it has affected applications to continue under the Act, and provides a recommended solution to avoid difficulties arising with an application submitted to the BVI Registry to continue under the Act.

CONTINUATION TO THE BVI UNDER THE ACT

Section 180(1) of the Act provides that a foreign company may continue as a company incorporated under the Act, if the laws of the jurisdiction in which it is registered permit it to continue into another jurisdiction (including the BVI).

Section 181(1) of the Act outlines what is required in an application to continue under the Act. An application by a company under the Act is to be

made by filing: (a) a certified copy of the company’s certificate of incorporation, or such other document as evidences its incorporation; (b) a memorandum and articles of association in the usual form required by section 9 of the Act, but requiring additional information (being (i) the name of the company at the date of the application and the name under which it proposes to be continued; (ii) the jurisdiction under which it is incorporated, registered or formed, and (iii) the date on which it was incorporated, registered or formed); (c) evidence satisfactory to the BVI Registry that the application to continue and the proposed memorandum and articles have been approved (i) by a majority of the company’s directors (or the other persons charged with exercising the powers of the company), or (ii) in such other manner as may be established by the company for exercising the powers of the company; and (d) evidence satisfactory to the BVI Registry that the company is not disqualified from continuing in the BVI under section 180.

Section 180(2) provides that a foreign company may not continue as a company incorporated under the Act if:

- (a) it is in liquidation, or subject to equivalent insolvency proceedings, in another jurisdiction;
- (b) a receiver or manager has been appointed in relation to any of its assets;
- (c) it has entered into an arrangement with its creditors, that has not been concluded; or

(d) an application made to a Court in another jurisdiction for the liquidation of the company or for the company to be subject to equivalent insolvency proceedings has not been determined.

Once the BVI Registry is satisfied that all the requirements of the Act in relation to continuation have been complied with, the BVI Registry shall issue a certificate of continuation to the company in the approved form. The certificate of continuation is, pursuant to section 182(2), conclusive evidence that all of the requirements of the Act as to continuation have been complied with, and the company is incorporated as a company continued under the Act.

When a company continues to the BVI under the Act, section 183(1) of the Act states that the Act applies to the company as if it had been incorporated under the Act; the company is capable of exercising all the powers of a company incorporated under the Act, and the company is no longer to be treated as a company incorporated under the laws of the relevant jurisdiction outside of the BVI. Section 183(2) states that the continuation of a company under the Act does not affect either the continuity of the company as a legal entity, or the assets, rights, obligations or liabilities of the company.

Importantly, section 183(3) confirms that: (a) no conviction, judgement, ruling, order, claim, debt, liability or obligation due or to become due, and no cause existing, against the company any member, director or agent of the company is released or impaired by its continuation as a company under the Act, and (b) no proceedings (whether civil or criminal) pending at the time of the issue by the BVI Registry of a certificate of continuation by or against the company are abated or discontinued, but the proceedings may be enforced, prosecuted, settled or compromised by or against the company or against the member, director, officer or agent thereof, as the case may be.

PRACTICAL ISSUES IN APPLYING TO CONTINUE TO THE BVI

The rather vague language in section 181(1)(d) in relation to providing evidence satisfactory to the Registrar that the company is not disqualified from continuing in the BVI has caused some challenges in

its practical application.

The BVI Registry has on occasion initially rejected applications for not fully complying with section 181(1)(d), on the basis that the BVI Registry did not receive satisfactory evidence that the company is not disqualified from continuing in the BVI under section 180(2).

Where applications tend to initially fall short of the BVI Registry's requirements is in relation to section 180(2)(a) and (d), that is, the application sufficiently evidencing that the applicant is not prohibited from continuing into the BVI on the ground of section 180(2)(a) and/or (d).

The BVI Registry has appeared to interpret "another jurisdiction" in those subsections to mean *any* jurisdiction, and not just the jurisdiction where the foreign company is incorporated.

It thus becomes a requirement which is difficult to satisfy in practice given its scope.

In February 2006, the BVI Financial Services Commission (the "FSC") released Circular No. 9 of 2006 (the "**Circular**") to provide guidance as to what would constitute satisfactory evidence to the Registrar that a company is not disqualified from continuing in the BVI under Section 180(2). The FSC stated that evidence provided for the purposes of section 180(2) would only be satisfactory and acceptable: (a) when submitted from a registry or its equivalent of the jurisdiction from which the company is discontinuing; (b) or in the form of a legal opinion from a lawyer or law firm on its respective letterhead. The Circular also stated that the originals of the document(s) submitted to the BVI Registry to satisfy section 180(2) must be provided, and must expressly state that the documents are being provided in satisfaction of section 180(2).

Following this guidance, it was common for applications to continue to the BVI to be supported by both a letter from the registry or equivalent body of the jurisdiction where the company is presently incorporated, along with an opinion from a

recognised law firm practising in the jurisdiction where the company is incorporated in satisfaction of Section 180(2).

One difficulty which arises, however, is that typically the registry and/or the law firm in the jurisdiction where the company is currently incorporated will only be prepared to confirm the status of the company within that particular jurisdiction. For example, if a company is incorporated in Gibraltar and there is an application for that company to continue to the BVI, a Gibraltar law firm will typically only be prepared to opine on the status (including whether or not there are any liquidation proceedings) of the company within Gibraltar. The law firm will, understandably, state that it is not qualified to confirm, nor has the resources to confirm, whether or not the company is in good standing in any jurisdictions other than Gibraltar.

A legal opinion dealing only with the status of a company in Gibraltar is unlikely to be accepted by the BVI Registry for the purposes of sub-sections 181(1)(a) and (d) as it does not address the status of the company in other jurisdictions. We have also found that the BVI Registry is unlikely to accept a legal opinion from, say, a law firm in Gibraltar which opines on the status of the company in Gibraltar, but merely provides assumptions regarding the status of the company outside of Gibraltar. Assumptions will typically not be sufficient.

A RECOMMENDED SOLUTION

How then to deal with what appears to be a divergence between what the FSC is seeking from foreign law firms in their opinions to satisfy sub-sections 181(1)(a) and (d), and what law firms are prepared or are in a position to provide to the BVI Registry?

The practical operation of section 181(1)(d) certainly is an issue, particularly given the literal application of the section by the BVI Registry. In our view, however, based on recent experience in dealing with

the BVI Registry, section 181(1)(d) can be satisfied through providing the BVI Registry with a legal opinion from a law firm in the jurisdiction in which the company is discontinuing, accompanied by a directors certificate of the company (preferably notarised and apostilled) confirming that the company satisfies each of the requirements in section 180(2) (and expressly referring to each provision of section 180(2)).

Ideally, the legal opinion which is submitted would expressly refer to this directors certificate provided to the BVI Registry, and would confirm that the director or directors that have signed the certificate on behalf of the Company are authorised to sign, and are validly appointed to the board of directors of the Company (with such appointment confirmed in the Company's register of directors or equivalent record in the jurisdiction).

The BVI office of Appleby has advised on a large number of applications to continue to the BVI, and has a wealth of experience in dealing with the BVI Registry on a host of issues relating to continuation applications. Accordingly, we would be pleased to assist wherever possible with such applications.

Should you have any questions or requests for further information please contact:

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