



Guide to
Directors and their Duties under
the BVI Business Companies Act 2004

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PREFACE

The British Virgin Islands (“**BVI**”) is a leading jurisdiction for the incorporation of business companies, with over 400,000 active companies currently registered in the jurisdiction. Thus, at any one time, on some continent and in a certain time zone, a decision is being made by an individual or company appointed as a director of a BVI-incorporated company.

The purpose of this Guide is to outline the statutory rules and obligations relating to directors of companies incorporated in the BVI. Attention is given to Part VI of the BVI Business Companies Act 2004 (the “**Act**”), which is the key part of the Act dealing with directors and their duties.

It is recognised that this Guide will not completely answer the detailed questions that company directors and their advisers may have. It is intended to provide a sketch of the statutory provisions in the BVI relating to directors of BVI companies. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive review of particular issues.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of BVI law should be obtained.

Appleby
Road Town, Tortola
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1. DIRECTORS OF COMPANIES IN THE BVI

a. General

The Act provides that, subject to a BVI company's memorandum ("memorandum") or articles ("articles") of association, "the directors of a company have all the powers necessary for managing, and for directing and supervising, the business and affairs of the company".¹ Significantly, there is no requirement under the Act for any of the directors to 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.² 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 appointed as a director), but not "shadow directors" (meaning persons according to whose instructions or directions actual directors are accustomed to act).

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

- (a) an individual under 18 years;³
- (b) a disqualified person under section 260(4) of the Insolvency Act 2003 (meaning a person subject to a disqualification order under the Insolvency Act);⁴
- (c) a restricted person under section 409 of the Insolvency Act (meaning a person subject to a bankruptcy restriction order or undertaking);⁵ and
- (d) an undischarged bankrupt.⁶

The memorandum or articles of the company can also disqualify additional categories of persons from being directors in relation to that company.⁷ A person who is 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.⁸

A director may, subject to the company's memorandum or articles, appoint an alternate.⁹ This person need not be a director at the time, but in the absence of the director, an alternate is entitled to attend meetings and to vote in place of the director who appointed him.¹⁰

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 that the appointing director dies.¹¹ This provides a very useful succession mechanism for sole member/directors.

¹ Section 109(2) of the BVI Business Companies Act 2004. Subsequent statutory references are references to the BVI Business Companies Act 2004, unless otherwise specified.

² Section 2, definition of 'director'.

³ Section 111(1)(a).

⁴ Section 111(1)(b).

⁵ Section 111(1)(c).

⁶ Section 111(1)(d).

⁷ Section 111(1)(e).

⁸ Section 111(2).

⁹ Section 130(1).

¹⁰ Section 130(2).

¹¹ Section 113(7).

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 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).¹²

The number of directors may be fixed by the company's articles.¹³ 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.¹⁴ If a company does not have a director for any period of time, then the person who manages (or supervises the management of) the company is deemed to be a director for the purposes of the Act.¹⁵

b. Appointment, Resignation and Removal

i. Appointment

A company's first directors must be appointed by the company's registered agent within six months of the company's incorporation.¹⁶ Following this, a director is appointed by the members of the company (subject to the company's memorandum or articles)¹⁷ or, when permitted by the company's memorandum or articles, by the directors,¹⁸ for whatever term is specified in the resolution.¹⁹ 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.²⁰ In filling a vacancy, the directors may not appoint a director for a term which exceeds the term which remained of the person who ceased to be a director.²¹

A director is required to consent in writing to their appointment.²² Subject to the company's memorandum or articles, the directors can determine the emoluments of fellow directors.²³

ii. Resignation

A director can resign from office by providing the company with written notice of the resignation, which takes effect from the date the notice is received by the company (or a later date if specified in the notice).²⁴ A director is, however, required to resign if they become disqualified from acting as a director.²⁵

¹² Section 113(8).

¹³ Section 109(5).

¹⁴ Section 109(4) and (4A).

¹⁵ Section 109(6).

¹⁶ Section 113(1).

¹⁷ Section 113(2)(a).

¹⁸ Section 113(2)(b).

¹⁹ Section 113(3).

²⁰ Section 113(4).

²¹ Section 113(5)(b).

²² Section 112.

²³ Section 119.

²⁴ Section 115(1).

²⁵ Section 115(2).

Importantly, if a director resigns (or indeed is removed), they remain liable for any acts or omissions whilst they were a director.²⁶

iii. Removal

A director may be removed by way of a resolution of members which is passed at a meeting with 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 members who are entitled to vote.²⁷ 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.²⁸

A director of a BVI company can also be removed by the directors, provided that such removal is permitted by the company's memorandum or articles, and that removal is passed either at a meeting of directors specifically called to remove the director, or is effected by a written resolution of directors approved by a majority of 75% or more.²⁹

2 STATUTORY DUTIES OF DIRECTORS IN THE BVI

The main duties of directors are contained in sections 120-3 of the Act. The statutory duties of directors under the Act, to a large extent, 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 or her equitable duty not to put themselves in a position where their duty and interest may conflict.

The main statutory duty of directors is to act honestly, in good faith and in what the director believes to be in the best interests of the company.³⁰ 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 association of the company,³¹ 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 and the position of the director and the responsibilities undertaken by the director.³²

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 their 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 the director's or committee's designated authority.³³

²⁶ See sections 117(a)-(b).

²⁷ Sections 114(2)(a) and (b).

²⁸ Section 114(3).

²⁹ Sections 114(2) and (3).

³⁰ Section 120(1).

³¹ Section 121.

³² Section 122.

³³ Section 123(1)(a)-(c).

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.³⁴ The Act does not provide, however, that the director will necessarily satisfy his or her statutory or additional common law/equitable duties if they do rely upon such information or advice.

The above duties work together to comprise the standard of care expected of a director of a BVI company.

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, so long as the company's memorandum or articles expressly permit, directors may act in the best interests of:

- the company's holding company where the company is wholly-owned, despite the fact that the action may not be in the best interests of the wholly-owned company;
- the company's holding company where the company is not wholly-owned, despite the fact that the action may not be in the best interests of the company, provided that prior agreement of all shareholders (other than the holding company) has been obtained; and
- the member(s) (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.³⁵

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.³⁶ 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, even though these decisions are 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.³⁷

³⁴ Section 123(2).

³⁵ See section 120(2)—(4).

³⁶ See, for example, the New South Wales decision of *Brunninghausen v. Glavanics* (1999) 46 NSWLR 538. In this case, the court held that a director who was also a shareholder in a small company with a fellow director and shareholder owed a duty to the fellow director/shareholder, when selling his shares to a third party after negotiating a deal with that third party, to inform the fellow director/shareholder of the terms of that deal and how it may affect the share price. This duty can arise when the transaction does not concern the company, but only the other shareholder. Furthermore, it must not compete with a director's overriding duty to the company.

³⁷ See, for example, *Bamford v Bamford* [1970] Ch 212.

3. DISCLOSURE OF DIRECTOR INTERESTS

The Act completely redrafted and tightened the provisions dealing with the disclosure of directors' interests, and includes a comprehensive regime dealing with disclosure.³⁸ The main aspects of this regime are:

(i) **Circumstances where disclosure is required:** Under the Act, 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).³⁹ The duty to disclose such an interest will be complied with if the director makes a disclosure to the board (to each and every director⁴⁰) 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.⁴¹

The Act facilitates the making of Regulations to prescribe the circumstances in which a director is "interested" in a transaction⁴² (though no Regulations have been made up to now). All that the Act provides is 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.⁴³

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".⁴⁴

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 of association, which may contain relevant limitations on the objects and powers of the company).

It is an offence (punishable by a fine of US\$10,000) if a director fails to make appropriate disclosure where required under the Act.⁴⁵

(ii) **Voidable transactions:** 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 or her interest unless:

- the interest is not required to be disclosed by virtue of section 124(3) of the Act, that is the transaction or proposed transaction is between the director and the company, and the transaction

³⁸ See sections 124 and 125 of the Act.

³⁹ Section 124(1).

⁴⁰ Section 124(6) provides that a disclosure is not made to the board unless it is made or brought to the attention of every director on the board.

⁴¹ Section 124(4).

⁴² Section 124(2).

⁴³ Section 124(2).

⁴⁴ Section 124(3).

⁴⁵ Section 124(7).

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.⁴⁶

- 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;⁴⁷ or
- the company received "fair value" for the transaction.⁴⁸ 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.⁴⁹

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 (iii) sign a document on behalf of the company or any other thing in his or her capacity as a director, in relation to the transaction.⁵⁰

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 ("the transferor"); (b) for valuable consideration, and (c) without any knowledge of the circumstances of the transaction whereby the transferor acquired the property from the company.⁵¹

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).⁵² Most of the day-to-day powers of directors can be delegated in this way, however there are certain powers that cannot be delegated, notwithstanding anything to the contrary in the company's memorandum and/or articles. These powers include amending the memorandum and/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.⁵³

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.⁵⁴

Directors may appoint agents for the company (including another director).⁵⁵ An agent has the powers as set out in a company's memorandum or articles or in the resolution of directors appointing him or her, however an

⁴⁶ Section 125(1)(a) and (b).

⁴⁷ Section 125(2)(a).

⁴⁸ Section 125(2)(b).

⁴⁹ Section 125(3).

⁵⁰ Section 125(4).

⁵¹ Section 125(5).

⁵² Sections 110(1)(a) and (b).

⁵³ Sections 110(2)(a) to (h).

⁵⁴ Section 110(4).

⁵⁵ Section 131(1).

agent does not 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).⁵⁶

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.⁵⁷ Directors have the statutory power to remove an agent, and may also vary or revoke the power conferred on an agent.⁵⁸

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 or her own conduct. There are, however, two important exceptions:

- 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;⁵⁹ and
- fraud.⁶⁰

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 incurred).⁶¹ 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 or her conduct was unlawful.⁶²

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 or she is not entitled to be indemnified.⁶³

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 they are 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.⁶⁴

⁵⁶ Section 131(2)(a)-(k).

⁵⁷ Section 131(3).

⁵⁸ Section 131(4).

⁵⁹ Sections 30 and 108.

⁶⁰ In the BVI, committing fraud is also a criminal offence.

⁶¹ Section 132(1).

⁶² Section 132(2).

⁶³ Sections 131 (3A) and (3B).

⁶⁴ Section 132(4).

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.⁶⁵

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.⁶⁶ 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.⁶⁷

Again subject to the company's memorandum and articles, one or more directors of the company may convene a board meeting⁶⁸ 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,⁶⁹ 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).⁷⁰ The presence of a director at the meeting, in person or by telephone, is deemed to constitute waiver on his or her part pursuant to the Act.⁷¹ The inadvertent failure by a director to give notice, or the fact a director does not receive notice, does not invalidate the meeting.⁷²

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.⁷³

As an alternative to physically meeting in person, any action that may be taken by the directors at a board meeting (or a meeting of a committee of directors), may be taken by a resolution of directors (or committee of directors) consented to in writing - or by telex, telegram, cable or other written electronic communication.⁷⁴

Significantly, the Act does not define the requisite majority that is needed to pass a resolution of directors—whether this is at a physical meeting or by written consent. Accordingly, the majorities that are required need to be specified in the memorandum or articles of the company. Typically, we find that the requisite majority will be specified in the articles and will be a simple majority (that is, more than 50% of those directors present and entitled to vote) where a physical meeting is held, and all of the directors where a resolution is to be consented to in writing.

⁶⁵ Section 133.

⁶⁶ Section 126(1).

⁶⁷ Section 126(2).

⁶⁸ Section 126(1A).

⁶⁹ Section 127(1).

⁷⁰ Section 127(2).

⁷¹ Sections 126(2) and 127(2).

⁷² Section 127(3).

⁷³ Section 128.

⁷⁴ Section 129(1).

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.⁷⁵ The Act does not require the register to be filed publicly, and in practice most companies do not file their register of directors publicly.

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,⁷⁶ and (ii) provide written notification to the registered agent within 15 days of any changes in the register.⁷⁷

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.⁷⁸

⁷⁵ Section 118.

⁷⁶ Section 96(2)(b). Further, where the physical address is changed, the company must provide the registered agent with details of the change within fourteen days (section 96(3)).

⁷⁷ Section 96(2)(a).

⁷⁸ Section 100(1).

For more specific advice relating to company directors and their duties under the BVI Business Companies Act 2004, we invite you to contact one of the following:

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