



Guide to Doing Business in the British Virgin Islands

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PREFACE

The purpose of this Guide is to assist the reader in making a decision to establish an independent and physical office of a business in the British Virgin Islands (“BVI”) by providing pertinent BVI legal advice.

The Guide does not address the position of “Belongers”¹ to the BVI looking to set up an independent and physical office in the Territory. Further, this Guide does not deal with certain regulated businesses operating in the BVI (e.g. trust companies, banks, insurance businesses, persons carrying on investment business, funds) which are subject to additional requirements, including initial approval by the BVI Financial Services Commission (“FSC”).

This Guide is not a legal opinion and only contains general legal advice in relation to particular matters of BVI law, including immigration, employment and taxation. In each case, our commentary is provided with a view to assisting a business in reaching a decision on establishing a physical presence in the BVI. The Guide only highlights those issues which we considered to be material in the context of the decision and is not a complete analysis or summary of all applicable laws or regulations.

Appleby
Road Town, Tortola, BVI
October 2010

¹ Under section 2(2) of the BVI Constitution Order 2007, a person belongs to the BVI if that person—

- (a) is born in the BVI and at the time of the birth his or her father or mother is or was—
 - (i) a British overseas territories citizen (or a British Dependent Territories citizen) by virtue of birth, registration or naturalisation in the BVI or by virtue of descent from a father or mother who was born in the BVI; or
 - (ii) settled in the BVI; and for this purpose “settled” means ordinarily resident in the BVI without being subject under the law in force in the BVI to any restriction on the period for which he or she may remain, but does not include persons on contract with the Government of the BVI or any statutory body or Crown corporation;
- (b) is born in the BVI of a father or mother who belongs to the BVI by birth or descent or who, if deceased, would, if alive, so belong to the BVI;
- (c) is a child adopted in the BVI by a person who belongs to the BVI by birth or descent;
- (d) is born outside the BVI of a father or mother who is a British overseas territories citizen by virtue of birth in the BVI or descent from a father or mother who was born in the BVI or who belongs to the BVI by virtue of birth in the BVI or descent from a father or mother who was born in the BVI;
- (e) is a British overseas territories citizen by virtue of registration in the BVI;
- (f) is a person to whom a certificate has been granted under section 16 of the Immigration and Passport Act 1977 of the BVI (basically meaning someone who has resided in the BVI who has resided in the BVI continuously for at least the last seven years) and has not been revoked under section 17 of the Act; and (without prejudice to the right of any person to apply for the grant of such a certificate under the Act) a British overseas territories citizen by virtue of naturalisation in the BVI has a right by virtue of this Constitution to apply for the grant of such a certificate;
- (g) is the spouse of a person who belongs to the BVI and has been granted a certificate under section 16 of the Act; or
- (h) was immediately before the commencement of the Constitution deemed to belong to the BVI by virtue of the Virgin Islands (Constitution) Order 1976(1[c]).

1. INTRODUCTION

Other than a registered office for service of process, there is no requirement that a company registered in the BVI establish its own physical office in the BVI.

However, a number of companies either registered in or outside the BVI have indeed established a physical business office in the BVI for various reasons. In part this may have been done in order to further strengthen the company's independence and separate legal identity, or to confirm that the central management and control of the company actually resides in the BVI, or indeed simply to conduct business within the BVI.

2. INCORPORATION OR REGISTRATION

Usually a person or entity seeking to establish a business office in the BVI will incorporate a BVI company pursuant to the BVI Business Companies Act 2004 (the "Business Companies Act"), and this company will be the legal person that will conduct business in the Territory.

A BVI company must have a registered agent and registered office in the BVI. Appleby's affiliate, Appleby Corporate Services (BVI) Limited, can assist with the application to incorporate a BVI company, and can also provide registered agent and registered office services. Further information on incorporating a BVI company is set out in Appleby's "Guide to Companies in the British Virgin Islands", available from our website (www.applebyglobal.com). There is an annual government licence fee of US\$350 for a company with less up to 50,000 shares, and US\$1,100 for a company with more than 50,000 shares.

In some circumstances, however, a company incorporated outside of the BVI may choose to do business in the BVI without establishing a BVI company for this purpose. Under the Business Companies Act, such a company is referred to as a "foreign company" and may only "carry on business" in the BVI if it has first obtained the permission of the Registrar of Companies (the "Registrar") in the BVI. Once permission is granted by the Registrar, the foreign company's details are included in the BVI Register of Foreign Companies.

The Business Companies Act deems that a foreign company is not "carrying on business" in the BVI, and therefore does not require the permission of the Registrar, solely by reason of the fact that in the BVI, the company is or becomes party to legal proceedings (or settles a legal proceeding or dispute); holds a directors' or members' meeting or carries on any other activity concerning its internal affairs; opens a bank account; sells a property by way of an independent contractor; solicits or procures an order that becomes a binding contract, but only if the order is accepted outside the BVI; invests any of its funds or holds property; secures or collects any of its debts or enforces any security rights in relation to these debts; creates evidence of a debt, or creates a charge on property, or conducts an "isolated transaction" that is completed within a period of 31 days, meaning it is not one of a number of similar transactions repeated from time to time.

Under the Business Companies Act, an application for registration as a foreign company needs to be made to the Registrar in a form that is approved by the Registrar, and needs to be accompanied by evidence of its incorporation; a certified copy of its constitution or similar document(s); a list of the company's directors at the date of application (providing their full name, nationality, address and date of appointment), and a notice providing the name of the person appointed as the foreign company's registered agent in the BVI (with this notice endorsed by the registered agent confirming their agreement to act).

A foreign company that carries on business in the BVI (as defined in the Business Companies Act) without being registered commits an offence and is liable upon conviction to a fine of US\$10,000.

The Business Companies Act also requires that a registered foreign company file annual returns. A registered foreign company must file, on or before 31 March each year, an annual return that is made up to 31 December of the previous year. The annual return must be certified as correct by a director of the foreign company or by its registered agent.

If a foreign company ceases to carry on business in the BVI, it must file a notice in the approved form with the Registrar within seven days of it ceasing business.

The fee to register as, and the annual licence fee for, a foreign company under the Business Companies Act is US\$300.

3. PROFESSIONAL OR TRADE LICENCE

In order to conduct business in the BVI, all persons and companies must obtain a trade licence, pursuant to the Business, Professions and Trade Licences Act 1989 (the “Act”). Given the time that it can take to obtain a trade licence, applying for this licence should be the first step taken to establish a physical office in the BVI (in conjunction with the application for a Non-Belongers Land Holding Licence mentioned below, if applicable).

A trade licence is obtained by first completing and submitting in duplicate a Trade Licence Application Form (“Application Form”), which is available from (and is to be submitted to) the Trade and Investment Promotion Department (“Department”), within the Office of the Premier. A cover letter and supporting documents are required to accompany the Application Form. In terms of supporting documents, if the applicant is a company (the application procedure is different depending on whether the applicant is an individual or company), the Application Form must be accompanied by:

- An outline of the operation and activities of the company;
- A copy of the company’s certificate of incorporation;
- A copy of the company’s Memorandum and Articles of Association;
- Details of the company’s shareholdings;
- Register of directors (the applicant must provide for each director, a 2 x 2 passport sized photo, personal reference, business reference, financial reference (in relation to an account maintained for not less than three years), a police record or clearance certificate (from a jurisdiction where the director has resided for not less than 12 months), copy of the picture page of passport, along with general information on work history, qualifications and experience); and
- For BVI owned companies, documentation to prove that at least 60% of the shareholders and at least 60% of the directors are Belongers.

Each of the above documents must either be submitted in original form, or as duplicate copies certified by either a notary public or justice of the peace from within the BVI.

In granting a trade licence, the Department can impose one or more conditions upon the licence, including a licence for professional or vocational services. For example, the business premises of a restaurant will typically need to be inspected before a licence can be issued or, if issued, before the business can commence operation.

There is currently no application fee for a trade licence but a fee is payable when the licence is issued. Schedule 1 of the Act sets out the fees for a trade licence, which differ for Belongers and Non-Belongers and for the class of business. Annual fees are typically between US\$350 and \$600 (the licence to operate a professional services firm, such as an accounting or law firm, is typically US\$600).

A trade licence is granted for one year, and must be renewed annually at the end of each calendar year (each licence expires on 31 December, including in the first year of business). In respect of a licence issued after 31 March in any year, the Act states that the licensee shall pay the proportionate amount of the annual fee for the remaining quarter of the year, and for the purpose of computing the proportionate amount every portion of a quarter of the year shall be computed as a full quarter.

4. IMMIGRATION, EMPLOYMENT AND ASSOCIATED ISSUES

Work Permits

Under the BVI Labour Code 2010 (the “Labour Code”), employers in the BVI are prohibited from employing expatriates where there is a suitably qualified local person, a Belonger, or the holder of a certificate of residency available to fill the position.

A work permit must be obtained by any expatriate who wishes to engage in employment in the BVI, whether it is paid or unpaid, full-time or part-time. Employers must advertise any position in a local newspaper in the BVI for three consecutive weeks, and preference must be given to any Belonger who has applied and is qualified for the position.

Before the employment of an expatriate will be permitted, that individual’s qualifications and experience must be proven to be necessary and sufficient for the position to be filled. Also, it must be proven that there is no Belonger who is able and available to fill that position. Work permits are obtainable for one-year periods and employees on work permits are generally prohibited from working for other employers. An application for a new work permit in the BVI is filed with the Labour Department by the prospective employer on behalf of the expatriate seeking employment in the BVI. The application must include the following information in relation to the particular applicant:

- country of origin;
- training and experience;
- number, date and place of issue of passport;
- date of arrival in the BVI;
- period of stay granted by Immigration Authorities;
- intended employer;
- salary or wage; and
- business, trade, occupation or profession.

The following documents are required to be submitted in support of the application:

- 1) one copy of the newspaper advertisement for the position;

- 2) statement signed by the employer, or his representative, as to whether there were Belonger applicants and, if so, the reason why none was offered employment;
- 3) copy of the letter to each unsuccessful Belonger applicant, if applicable;
- 4) two recent full-faced passport size photographs of the applicant;
- 5) copies of the applicant's qualifications, resume, and letters of reference;
- 6) a copy of the work contract, or the completed "Notice of Employment and Statement of Working Conditions" form provided by the Department of Labour, signed by the applicant and employer;
- 7) one professional reference; and
- 8) the completed work permit application form signed by both the employer and the employee.

The Minister of Labour and Natural Resources may prescribe different fees for different persons or categories of persons and for persons receiving different wages or salaries. The application process generally takes 8-12 weeks. Once a work permit is granted, the Labour Commissioner prepares a work permit clearance letter which is then submitted to the Immigration Department.

The Chief Immigration Officer will then review the work permit application to ensure that the applicant meets the Immigration Department's requirements for an entry permit. If approved by the Officer, the work permit clearance letter is stamped and sent to the applicant along with an attached medical form. If the applicant is in the BVI, they must leave at this time, and upon return (or arrival for the first time for someone coming in from outside the BVI), s/he must present the stamped work permit clearance letter, the completed medical form, along with any other information requested by the Immigration Department to the Immigration Officer at the port of entry in the BVI. The applicant is then given a period of time to complete the process with the Labour and Immigration Departments.

Renewal of Work Permit

A work permit may be granted for a period not exceeding 3 years at a time. However, at this time, the category of workers that are entitled to apply for the 3-year permits has not yet been determined. Accordingly, it is expected that permits will continue to only be issued for up to one year at a time for the time being.

A work permit renewal application must be submitted four to six weeks prior to expiration of the current work permit. If the applicant has more than one work permit, i.e. in the case of a part-time employee, the permits should be renewed at the same time. The following documents are required to be submitted when applying for a work permit renewal:

- 1) the completed application for renewal of work permit signed by both the employer and the employee;
- 2) the applicant's work permit card (no photos are necessary unless the card needs to be changed); and
- 3) a copy of the trade licence (if the applicant is self employed).

Employment Contract and Issues

In establishing a physical office in the BVI, and employing people to work within that office, it is important to note that the business will be subject to the general labour law requirements of the BVI set down in the Labour Code. These requirements need to be taken into account when negotiating and drafting employment contracts with persons to be employed in the BVI.

i. Formalities

Every employer in the BVI is required to provide employees with a written statement setting forth the employee's working conditions which includes:

1. the general responsibilities and related duties for which the employee is being hired;
2. the regular hours of work and rest periods;
3. the starting salary;
4. the term of employment if other than indefinite;
5. the probationary period (if any); and
6. the employee's leave and vacation privileges.

ii. Probationary Period

A new employee's probationary period may not exceed 4 months unless the employee has the rank of supervisor or above, in which case the probationary period may not exceed 6 months.

iii. Minimum Wage

The minimum basic wage payable for employment in the BVI is US\$4.00 per hour. The minimum wage payable to students enrolled in secondary school is US\$3.00 per hour.

iv. Sick Leave

An employee (who has been employed for a continuous period of not less than four months), is entitled to a minimum of at least 12 sick days per year, during which an employee would receive the same basic wage or salary as if they had worked those days. However, any social security benefits received by the employee for illness or other physical incapacitation for work for those days may be deducted from the basic wage payable to the employee by the employer.

v. Vacation

Employers must grant employees with less than ten years of service at least one vacation day per month (after they have successfully passed their probationary period, if any) during which an employee would receive the same basic wage or salary as if they had worked that day. Such vacation leave is in addition to, and does not include, any public holiday or sick leave. An agreement between an employer and an employee by which the employee would forego the taking of earned vacation leave is not to be deemed to deny the employee the right to vacation leave at a future time to be mutually agreed between the employer and the employee. Any employee whose employment is terminated for any reason shall receive in respect of every day of vacation leave due to them the remuneration for each such day.

vi. Public Holidays

Where an employee does not work on a public holiday, employees are to be paid the basic wage they would have received for work performed on that day had it not been a public holiday provided that the employee worked their scheduled workday immediately before and after the public holiday and the public holiday did not fall on one of the employee's scheduled workdays.

In the event that an employer causes an employee to work on a public holiday, the employer is required to pay to the employee an hourly wage of at least one and one half times the employee's basic rate for each hour worked on that day.

5. TAXATION AND SOCIAL SECURITY

There is no income tax in the BVI. Furthermore, there are no capital gains, capital transfer, inheritance or estate tax or death duties.

The principal taxes that apply to businesses and their employees in the BVI are payroll tax and a social security levy. This is in addition to the stamp duty applied when transferring real property and other dispositions in the BVI, discussed in Part 6 below.

i. Payroll Tax

In the BVI, payroll tax is payable in respect of earned income from employment and the total payroll tax-take is shared between the employee and the employer. An employee is generally liable to tax of up to 8% of his remuneration with the employer being subject to up to 6% of such remuneration.

ii. Social Security

(a) Registration

Businesses in the BVI must arrange for all of their employees between the ages of 15 and 65 years to register with the Social Security Board and obtain a BVI Social Security card regardless of whether the employee is a Belonger or expatriate or whether the person is under a contract of service or is self-employed.

(b) Contribution

Social Security is a compulsory insurance plan to which employers, employees and self-employed individuals must contribute and is designed to protect insured persons from financial distress by providing partial income replacement when particular contingencies arise. Sickness, maternity, invalidity, age, funeral grant, survivor and employment injury benefits are available to qualified persons. If an employee receives social security benefits for illness or other physical incapacitation, those payments may subsequently be deducted from the wages to be paid by the employer to the employee.

Contributions for employees in the private sector and self-employed persons amount to 8½ percent of insurable earnings. Employees contribute 4 percent of that total and 4½ percent is contributed by the employer. Civil servants contribute 7½ percent with 3½ percent paid by the employee and 4 percent by Government. Social Security contributions can also be voluntary for persons who have worked in the BVI and are living abroad or for persons who no longer work but have not reached the eligible age of 65 to collect benefits.

6. REAL PROPERTY ISSUES

In order for a non-Belonger company to purchase land in the BVI for the purpose of conducting business it is necessary to obtain a Non-Belonger Land Holding Licence. An application for a Non-Belonger Land Holding Licence is made under the Non-Belongers Land Holding Regulation Act (Cap. 122) (the "Land Holding Act"),

and needs to be approved by the Executive Council (the Cabinet) of the BVI Government. Under the Land Holding Act, a non-Belonger Company is defined as a company, whether incorporated in or outside the BVI, in which any one of its directors is a non-Belonger or where any of the company's non-Belonger shareholders own more than one-third of its shares ("Non-Belonger Company").²

If a Non-Belonger Company is renting office space in the BVI on an annual tenancy basis, a licence is not required. According to current practice, a licence is not required even if there is an option to renew the tenancy. If, however, a non-Belonger is leasing a commercial property in the BVI, and that specific property (e.g. area/floor of a commercial building) is not defined in the Land Register of the BVI (meaning that the specific property has not been registered and assigned a specific Block and Parcel in the Land Register), the current practice seems to be that the Ministry (Ministry of Natural Resources and Labour) does not require the applicant to hold a licence, even when the lease is not an annual tenancy. It is still advisable, however, to apply for the licence in case of a change of policy by the Ministry.

As a matter of practice, it is advisable to submit the application for a Non-Belonger Land Holding Licence and Trade Licence at the same time since if the Non-Belonger Land Holding Licence is granted, the Trade Licence will be automatically granted.

An application for a Non-Belonger Land Holding Licence is to be submitted to the BVI Ministry of Natural Resources and Labour, and is to be accompanied by a US\$500.00 application fee for companies. Once the licence is approved, a further US\$1,000.00 is to be paid upon collection of the licence.

If the application is to purchase property, then the property needs to be advertised for four consecutive weeks prior to submission of the licence application, in order to provide Belongers with an opportunity to purchase the property.

² Section 6 of the Land Holding Act goes somewhat further than this, by providing that a company is a "non-belonger company":

- (a) if any of its directors is an unlicensed non-belonger,
- (b) if more than one-third of the votes exercisable at any meeting of the company or which would be exercisable if a meeting of the company was held are vested in unlicensed non-belongers, or
- (c) in the case of a company having a share capital, if more than one-third of the nominal amount of its issued shares are held by unlicensed non-belongers, or
- (d) in the case of a company not having a share capital, if more than one-third in number of its members are unlicensed non-belongers, or
- (e) if the amount paid or payable in any period of twelve months as dividends to those members of the company who are unlicensed non-belongers exceeds one-third of the total amount paid or payable by the company as dividends in the same period, or
- (f) if more than one-third of the nominal value of the outstanding debentures of the company are held by unlicensed non-belongers, or
- (g) if the annual interest on the debentures of the company for the time being held by unlicensed non-belongers exceeds one-third of the annual interest on all the debentures of the company for the time being outstanding.

The application for a licence must be accompanied by:

- (a) two character references for each shareholder and director;
- (b) two financial references from the applicant's bank, employer or accountant, which must indicate that the applicant is able to purchase and develop the property (if that is why the licence is required);
- (c) a police certificate evidencing that each director and shareholder is/are of good standing;
- (d) a passport sized photo of each director and shareholder;
- (e) four consecutive newspaper advertisements for the property;
- (f) a letter sized cadastral survey showing the land and surrounding properties;
- (g) a valuation report from a licensed surveyor; and
- (h) additional supporting documentation (including a copy of the relevant Agreement of Sale, and copy of the company's Memorandum and Articles of Association, Certificate of Incorporation, current Certificate of Good Standing and register of members or a Certificate of Incumbency from the Company's Registered Agent).

The usual (and recommended) process is for a lawyer qualified in the BVI to be engaged to prepare and submit the application, and then deal with the Ministry during the consideration of the application.

Applications typically take between three and eight months to process. If an application is granted, the successful applicant needs to provide the Ministry with a registered copy of the licence and the registered instrument of the land transfer within three months of the date of the licence, for record keeping.

It is important to note that stamp duty also needs to be paid by the purchaser of land in the BVI before a transfer can be registered. The present rate is 12% of the consideration or the market value of the property, whichever is higher. In relation to a lease, the stamp duty payable for a term of 20 years or more is 1.5% of the total of rent payable for 20 years and other money consideration, however described, to be paid under the lease. For a lease with a term of less than 20 years, the stamp duty is 1.5% of the total rent payable for the period and other money consideration, however described, to be paid under the lease.

If property in the BVI is being purchased with a view to developing it, the Non-Belonger Company is typically required to enter into a financial commitment to develop the land. The commitment period will usually be three years or less. The development commitment is calculated by the government based on environment and planning considerations, and will usually not be less than US\$250,000.00. Where the owner does not honour the development commitment, the government is entitled to fine the buyer up to 40% of the sales price. Additionally, the owner is only allowed to sell the property once the development commitment has been completed.

For the purposes of assistance in any aspect of the establishment of an office in the BVI please feel free to contact one of the designated partners below.

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