

- The basics
- Appointment, resignation and removal
- Duties under the Act
- Breaches
- Liability

## *I am a Director of a BVI Company. Now What?*

“

*Directors of BCs have significant levels of responsibility placed on them both by the Act and under the common law when they engage in the process of making decisions on behalf or that BC.*

*Given the share volume of British Virgin Islands Business Companies (BCs) in existence, there is at any given time in some part of the world a transaction involving a BC. Pursuant to the British Virgin Islands Business Companies Act (the Act), the business and affairs of that BC shall be managed by or under the direction or supervision of an individual or corporate entity that consented to and was appointed to act as a director. The purpose of this note is to provide an overview of some of the salient points that should be borne in mind by a director of a BC (which is restricted herein to mean a non-regulated company limited by shares) when undertaking the decision making process.*

### **The basics**

In order to become a director of a BC, the Act states that you cannot be:

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

The memorandum or articles (**M&A**) of the BC can go further and disqualify other categories of persons from being directors in relation to that BC. However there is a proviso in the Act which deems a person to be a director where a person who is disqualified acts as a director in relation

to any provision of the Act and imposes a duty or obligation on such a deemed director.

There are a couple of tangentially interesting features that directors have under the Act that are worth mentioning here: -

- (i) Under the Act there is no requirement for any of the directors of a BC to be residents of the BVI. One has to, however, be very careful with this option as there has been a recent up-trend by cash strapped Inland Revenue departments in certain countries to make the determination that corporate tax residency is based on where its mind and management are located rather than the jurisdiction where that company it is registered. The Laerstate case (*Laerstate BV v Revenue and Customs Commissioners* [2009]UKFTT 209 (TC)) is a recent example of this. In a nutshell a Netherlands incorporated company was held by the HMRC to be UK tax resident and liable for taxes during a certain period of time on the basis that central management and control was exercised by an individual who himself was a UK resident.
- (ii) A director of a BC may (and as always, subject to its M&A), appoint someone to act as her alternate. The alternate may be another director or any other person of that director's choosing once they are not disqualified as set out above. Once appointed and in the absence of the appointing director, the alternate is entitled to attend meetings and to vote in place of the director who appointed him.
- (iii) It is usual (but not a good idea) for a BC to have only one shareholder who is an individual and that shareholder is also the sole director of the BC. This structure creates a significant problem when the sole shareholder/director dies as there is no one left who can deal with the day to day affairs of the business. The Act has a unique option which can avoid this outcome by allowing the sole director/shareholder, during the course of her life time to nominate another person as a "reserve director" of the BC. This reserve director is only able to act in the place of the sole shareholder/director in the event of her death as it allows for the smooth continuation of the business until probate and the share transfer issues are resolved.

## **In or out? Appointment, resignation and removal**

### *Appointment*

The registered agent of the BC must within six months of its incorporation appoint its first directors. It should be noted that a person shall not be appointed as a director or an alternate director or nominated as a reserve director unless that person has consent to do so in writing prior to her appointment. After this initial phase any additional directors would be appointed by resolution of members or resolution of directors as per the requirements of that BC's M&A.

### *Resignation*

A director can resign by giving written notice to the BC of her resignation, which takes effect from the date the notice is received by the BC or a later date if set out in the notice. If at any time during her appointment the director falls within one of more of the categories of disqualification set out above or contained in the BC's M&A, then that director must resign immediately.

### *Removal*

A director may be removed with or without cause by way of a resolution of members passed at a meeting for the sole or one of the purposes being removal of that director. Any notice for such a meeting of members must

state that the removal is the purpose (or one of the purposes) of the meeting. Alternatively a director can be removed by a written resolution of members approved by at least 75 per cent of members who are entitled to vote. Additionally and again subject to the M&A's of a BC, the other directors may also be able to remove one of their own at a meeting of directors specifically called to remove that director, or is effected by way of a written resolution of directors approved by a majority of 75 per cent or more.

\*In terms of a reserve director, their appointment, resignation and removal are slightly different in that the nomination of the reserve director would cease to have effect where, before the death of the sole member/director who nominated the reserve director; that person resigns as the 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.

## Decisions, decisions....

In making decisions relating to the business and affairs of the BC, the directors are bound not only by the codified duties contained in the Act, but also by common law and equitable duties.

### *Duties under the Act*

The main duty of a director under the Act is to act honestly and in good faith and in what the director believes to be in the best interests of the BC. The first element of this duty, to act honestly and in good faith, is an objective test. This objective test is then extended to include a subjective element of what the director believes to be in the best interests of the BC. Following on from this, directors have a duty to act for a proper purpose and not act or agree to the BC acting in a manner that contravenes either the Act or the BC's M&A.

The Act also deals with the potential for conflict that may face directors when performing their duties. A director of a BC is required, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the BC to disclose her interest to the full board of the BC and/or to the shareholders of the BC. However, a director of a BC may not be required to comply with this duty where:

- (i) the transaction or proposed transaction is directly between the director and the BC; and
- (ii) the transaction or proposed transaction is or is to be entered into in the ordinary course of the BC's business and on usual terms and conditions.

The Act also provides guidance as to the standard of care which is expected of a director when exercising powers or performing duties as a director to the extent that she must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation (i) the nature of the BC; (ii) the nature of the decision; and (iii) the position of the director and the nature of the responsibilities undertaken.

In exercising this standard of care, the Act recognises that directors must be able to access information that would aid in their decision making processes. As such the Act expressly provides that directors, 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 BC, 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.

### *Duties under common law*

There are few decided cases from the Eastern Caribbean Supreme Court (of which the High Court of the British Virgin Islands is a member) which affect directors' duties and these taken along with applicable decisions from the English High Court may be condensed to the following duties:

- (a) to act bona fide in what the director considers to be in the best interests of the BC as a whole and not for a collateral purpose;
- (b) to act for a proper purpose and to exercise their powers for the purposes for which they are conferred;
- (c) to avoid conflicts of interest (both actual or potential conflicts);
- (d) to disclose personal interests in contracts involving the BC;
- (e) not to make secret profits from the director's office; and
- (f) to act with skill and care.

Under the common law the degree of skill and care required to satisfy the proper execution of these duties was looked at from a subjective stand point. Here a director only needed to show a degree of skill that would be reasonably expected from a person of like knowledge and experience. In recent times however, English case law seems to be moving towards a more objective test which is similar to that set out in the Act. The statutory conduct required of a director is that of a reasonably diligent person having general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions carried out by the relevant director with the general knowledge, skill and experience of that particular director. This means that the common law is drawing closer to an objective standard for directors which places a heavier burden on a director that has specialist knowledge, skill or experience or if she is being remunerated for providing specific professional services.

### **Breaches**

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. In relation to duties derived from common law, compensation for damages resulting from the breach would usually be the remedy sought. In some instances under common law, a breach of a directors' duty could be ratified by the shareholders of the BC after full and frank disclosure, so long as this does not go beyond the general powers of the BC.

### **Liability**

Generally speaking, no director of a BC may be liable for any debt, obligation or default of the company, unless such a liability is specifically provided for pursuant to the Act and except to the extent that she is liable for her own acts or conduct. However, a director who vacates office remains liable under any provision of the Act which imposes a liability on her in respect of any acts or omissions or decision made whilst she was a director. The fact that there is any defect in the appointment of a director would not absolve a director from this obligation. The acts of a director are valid even if there was a defect in her appointment or where she acted at a time when disqualified to act as a director under the Act.

## Indemnity

A BC (subject to its M&A) may indemnify current directors, former directors or other persons who acted in such a capacity of the BC or who at the request of the BC, served 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). None of the persons may be indemnified by the BC unless they acted honestly and in good faith and in what they believed to be in the best interests of the BC (in the case of criminal proceedings, where the director had no reasonable cause to believe that her conduct was unlawful). A purported indemnity in breach of the honesty and good faith requirement is void. Furthermore, such a person must be indemnified by the company if he has been successful in the defence of any proceedings. Additionally, the BC 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 she is not entitled to be indemnified.

One should exercise caution when considering availability of an indemnity as the M&A of the BC could be amended to remove the ability to indemnify or advance expenses to directors and/or former directors. A prudent director should therefore consider entering into a separate agreement with the BC dealing with the provision of an indemnity by the BC. This would allow the director to have some degree of control over the indemnification process and not subject to changing directives of the BC after she has left the BC.

## Conclusion

Directors of BCs have significant levels of responsibility placed on them both by the Act and under the common law when they engage in the process of making decisions on behalf of that BC. In this light they need to be mindful of the circumstances under which they are asked to consider and their abilities before they come to a conclusion. As such directors need to understand and seek out all the protection the law can afford them and any additional guarantees that they can obtain from the BC as it would be a serious error for them not to weigh their position both before and after they cease to be a director.

For more information please contact:

[Jason Jagessar](#)

+1 284 494 2158

[jason.jagessar@harneys.com](mailto:jason.jagessar@harneys.com)

British Virgin Islands

[www.harneys.com](http://www.harneys.com)

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation.

© Harneys, November 2014