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New year, new BVI Business Companies Act: What changes from 1 January 2023?

SEPTEMBER 2022

Further to our update earlier this year we are now able to advise how the BVI Business Companies Act, 2004 (the **Act**) will change from 1 January 2023.

As anticipated, the main changes include the welcome abolition in full of bearer shares and impact struck-off and dissolved companies, record-keeping obligations and the qualifications required to act as a voluntary liquidator of a BVI company.

We now have the detail on those, and other, changes and have prepared a user-friendly comparison table summarising the current regime and the post-1 January 2023 position below, together with our thoughts on the brave new world of BVI corporate law. In this article, the following definitions are used:

FSC means the BVI Financial Services Commission

RA means registered agent

Registrar means the BVI Registrar of Corporate Affairs

The BVI Business Companies (Amendment) Act, 2022 and the BVI Business Companies (Amendment) Regulations, 2022 can be consulted in full here.

	Current rules	Position from 1 January 2023

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Struck off companies	Companies that are struck off (typically for non-payment of fees) are automatically dissolved after a period of seven years of strike off	Newly struck-off companies will be dissolved immediately if they fail to cure the breach within a 90-day grace period; there won't be a period of strike off without dissolution Companies currently in the seven-year strike-off period may apply to be restored before the earlier of (i) the end of that seven-year period and (ii) 1 July 2023
Comment: we anticipated the seven-year period might be shortened to a year, reducing the period during which companies were effectively "in limbo", and could continue to be sued and accrue liabilities, but were operationally disenfranchised. The new regime removes this period of uncertainty while including a sensible grace period to avoid hair trigger default and placing unreasonable administrative burden on RAs		
Dissolved companies	Dissolved companies may be restored for up to ten years post-dissolution by order of the Court	Dissolved companies may be restored within five years of dissolution (or, if struck off prior to 1 January 2023, by the earlier of (i) seven years from dissolution or (ii) 1 July 2023): 1. by application to the Registrar within five years of dissolution if, inter alia (i) the company was operational on dissolution; (ii) an RA will act; (iii) fees are repaid and (iv) the Registrar considers it just and reasonable or 2. by Court Order (i) if dissolved pursuant to a completed liquidation (voluntary or insolvent); (ii) if not carrying on business or in operation on the dissolution date; (iii) to commence or continue legal proceedings or to distribute assets vested in the Crown bona vacantia or (iv) where just and fair

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Comment: the ability of the Registry to restore dissolved (rather than just struck off) companies tempers removal of the seven year strike off period, but this is balanced by a proviso that only operational companies can only be restored by the Registrar; companies that slide into dormancy prior to strike off and dissolution will have to apply to the Court		
Annual return	BVI companies are not required to file an annual return	BVI companies, other than listed companies, regulated entities and BVI tax payers, will be required to file an annual, non-audited return with their RA within nine months of the end of each financial year. This remains private to the RA. The RA must inform the FSC of any filings that are not received within 30 days of the due date which will impact the good standing of the company and attract fines of up to US$5,000
Comment: this development really highlight the BVI's commitment to keeping pace with the most robust global regulatory standards; pace with global regulatory standards; it is hoped that the form of return will be designed with pragmatism in mind and spare RAs from superfluous accounts retention burden		
Voluntary liquidators	Anyone may act as a voluntary liquidator of a BVI company	A voluntary liquidator must be licensed under the BVI Insolvency Act or resident in the BVI for 180 days prior to appointment; joint voluntary liquidators may still be appointed outside of the jurisdiction Incumbent voluntary liquidators are not required to resign and may conclude their liquidations
Comment: in many respects, the liquidator of a solvent company assumes more risk than in an insolvency scenario and it is right that adequately qualified persons should be conducting liquidations. The ability to appoint a joint liquidator outside the jurisdiction is preserved, acknowledging this may avail operating companies of time zone or language advantages		

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Bearer shares	Bearer shares may be held only by a licensed custodian	New bearer shares will not be permitted and existing bearer shares will convert automatically to registered form on 1 January 2023
Comment: it has long been accepted that bearer shares must be abolished in full in order to combat financial crime and money laundering and the BVI financial services industry welcomes this change		
Register of directors	BVI companies must file their register of directors (privately) with their RA	The register of directors will remain private but the FSC will extract names of incumbent directors, which will be available to registered users of VIRRGIN on payment of a fee for searching against company names only; there is no additional filing for companies or their RAs to make, as the data on the register of directors remains private
Comment: there has long been debate over whether the register should be made public, with a balance to be struck between keeping pace with global standards of transparency and protecting the security of individuals, safeguarding their data and avoiding phishing attempts		
Beneficial ownership register	There is no public beneficial ownership register	The legislation anticipates this change in international standard by providing a framework for a future public beneficial ownership register
Comment: the BVI Government has consistently maintained it would introduce beneficial ownership registers at such time as the same became the accepted international standard		

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Continuation out	Companies may continue out of the BVI (corporate migration) on the basis of board consent alone, with notification required only to secured creditors	BVI companies wishing to continue out must now advertise their intention do so and must give advance warning of at least 14 days to all members and creditors; this will put relevant stakeholders on notice for a sufficient period to implement protective measures or seek injunctive relief, if required
Comment: we had already outlined the changes to the continuation regime made to incentivise companies continuing in to the BVI; however, it is recognised that some investors might take advantage of the continuation out regime, to redomicile to a less salubrious jurisdiction where they might disenfranchise or defraud shareholders or frustrate the rights of creditors. Collas Crill documents customarily provide contractual protection against this, but the legislative change will avail stakeholders of additional remedies to breach of contract claims		
Charities	BVI companies may be used for charitable or non-commercial purposes	The ability to use BVI companies for charitable purposes, anywhere in the world, will be recognised by statute, subject to increased oversight – likely including the filing of audited accounts - for overseas charities. This will ensure that the use of BVI companies overseas for charitable purposes cannot be abused by persons seeking to avoid home regulation and oversight
Comment: BVI companies have long been legitimately used for charitable purposes, for example employee foundations, and this is where we most commonly see companies limited by guarantee. Unfortunately, however, the product has been abused and we welcome this development that protects against "satellite charities" operating without regulation		

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