

Manivest International Special Report

The BVI Business Companies Act 2004

Pitfalls and Difficulties faced by Practitioners and End Users

by

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Maninvest International Special Report

Tax and Asset Planning Using Macau Structures

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1 Preamble

The British Virgin Islands (“BVI”) Business Companies Act 2004 (the ‘BCA’) was gazetted on 29th December 2004 and became effective on 1st January 2005. Although some see that this is a betterment and a response to the customer demand “for improvements to the International Business Companies Act (the “IBC Act”) as well as for an additional and more flexible range of corporate vehicles¹”; most people see it as a consequence of the international pressure, in particular the OECD accusation of “ring fencing” and the elimination of BVI’s “Harmful Tax Regime”.

Essentially, BCA is more than a combination of the IBC Act and the BVI local Companies Act. It creates new types of vehicles and, most importantly, removes the differences between a local company and the existing International Business Company (“IBC”). After 31 December 2006, all BVI companies will be regulated by the BCA. By then, all IBCs incorporated under the existing IBC Act will have to comply with the compliance requirements of BCA

I have two important observations. First, under the IBC Act, directors have almost all authorities of the shareholders, unless restricted by the Memorandum and Articles. This does not, in most of the time, cause any problem as IBCs are mostly used by individuals holding their assets, or by groups of companies as intermediate holding companies, with the holding company fully controlling the operations of the IBC. However, problems arise when an IBC is used in multi-parties shareholding structures.

BCA effectively moves most of those important authorities from the hands of the directors back to the hands of the shareholders.

Further, under the new BCA there are a lot of fees payable on filing, replacing penalty provisions – some of them are “fixed fees” depending on the date of the filing. This is quite different from the IBC Act, under which filing of documents is always free of charge. Will the Registered Agents still charge fee for their filing services?

¹ See, for example, Harney Westwood & Riegels, “Key Features of the BVI Business Companies Act 2004” 2005, p1

The new BCA will create some opportunities as well as difficulties for practitioners, especially those in Asia. Throughout the BCA, the drafter of the law has tried to struck a balance between flexibility (more power is given to the directors and the role of Registered Agent is strengthened) and the control of the authorities (strengthening government's position of control). I can see that the requirements for maintaining a new BCA company is more stringent then that of an IBC and there are a lot of pitfalls. Strange enough, most of the corporate providers of BVI companies have not alerted those pitfalls to their clients.

My seminar will be divided into two parts. Part A is a simple introduction to what the new BCA is, and its comparison to the IBC Act which I presume everyone of you is familiar with. Part B is a detail and in-depth analysis of the implication of the BCA to practitioners, its opportunities and pitfalls.

I organize these notes so as to reflect the issues that influence us in our daily work, instead of following the sequential arrangement of the sections of the BCA.

The starting point of all these is that, there are now six types of companies which can be formed under the BCA, not only one type (Company Limited by Shares) under the IBC Act. In the notes below, I shall concentrate on the provisions that regulate Company Limited by Shares only.

2 Types of BCA Companies

There are six different types of companies to choose from² under the BCA, namely

- (a) Company limited by shares,
 - i. Under S8 of BCA, **a company limited by shares** can be additionally registered as a “restricted purpose company”.
 - ii. Under S135 of BCA, **a company limited by shares** can be additionally registered as “segregated portfolio company”
- (b) Company limited by guarantee which is not authorised or authorised to issue shares
- (c) Unlimited company which is not authorised or authorised to issued shares

The type “company limited by guarantee which is authorised to issue shares” was available under the Companies Ordinance of Hong Kong, Cap 32 until 2004. This type of company is always used in asset and tax planning in place of a trust. However, I have reservation on the suitability of BVI as a jurisdiction for sophisticated asset planning structures.

² S5 BCA

3 Formation of BVI Companies

S5 to S7 govern the incorporation of BCA companies. There is not much change from the IBC Act, except that:

- (1) It is clearly stated that only Registered Agent can be the applicant (incorporator) for the application³, who will sign the Memorandum and Articles. The IBC Act also permits a solicitor to do the certification and filing.
- (2) A consent to act as the Registered Agent should be signed and submitted
- (3) The provision of “Prescribed document”

The permission of solicitors to incorporate companies is perhaps redundant, as there are only a few solicitors practicing in the BVI and most of their firms are also licensed Registered Agents.

There is no requirement, as in IBC Act that the Registered Agent engaged in the incorporation of the company should certify that the provisions of the legislation have been complied with⁴, but it seems that the Registrar can require any other documents under the “prescribed document” requirements.

Unlike IBC Act, the Registered Agent must appoint directors within 30 days of the incorporation of the company⁵ and that newly appointed directors must also sign consent of appointment⁶.

³ S6(2) BCA

⁴ cf S14(1) IBC Act

⁵ S113(1) BCA

⁶ S 112 BCA

4 IBC incorporated under the previous IBC Act.

There are three methods to deal with those IBCs registered under the IBC Act.

- (1) Continue to other jurisdictions.
- (2) Before 31 December 2006, re-register as a BCA company under the transitional provision, Schedule 2 of the BCA
- (3) Do nothing, and automatically re-register as a BCA company after 31 December 2006.

Consequences if the IBC re-registers before 1 January 2007.

If the company is re-registered under (2) above,

- (1) The Registered Agent shall file the following documents
 - a 、 Application in the Approved Form
 - b 、 Memorandum complies with S9 of BCA (therefore, a new Memorandum), signed by the Registered Agent as applicant.
 - c 、 Consent to act as Registered Agent in Approved Form
 - d 、 Other documents “as prescribed”.
- (2) The application should be authorized by a resolution of the members or directors, as appropriate.
- (3) Upon approval of re-registration, the Register will issue to the company a **re-registration certificate** and allocate a **new number** to the company.

Consequences if the IBC waits to be automatically re-registered.

If the company does not do anything,

- (1) The company will be automatically re-registered under BCA⁷ as on 1st January 2007.
- (2) A **new number** will be allocated to the company⁸
- (3) Its Memorandum and Articles will be **deemed** to have been amended to the

⁷ S4 Schedule 2 BCA

⁸ S4(5) Schedule 2 BCA

extent required to comply with BCA with effect from 1st January 2007⁹. BCA states that the Registrar¹⁰ would issue Regulation dealing with these issues¹¹.

(4) Certificate of re-registration **will not** be issued automatically to the company¹²; the company must apply for that and **pay an appropriate fee**¹³.

I could not find the appropriate fee in the BCA, but it will probably be USD25.

As the IBC company number will not be the same as the BCA number, this will cause confusion and appropriate action should be taken in due course. Note that there is no fee payable on the issuance of re-registration certificate for companies applying to re-register before 31 December 2006, but if the company is automatically re-registered after 31 December 2006, the new certificate will only be available on application with the payment of a fee.

⁹ S4(6) Schedule 2 BCA

¹⁰ Registrar of Corporate Affairs, who will replace the Registrar of Companies.

¹¹ S4(7) Schedule 2 BCA

¹² S5(1) Schedule 2 BCA

¹³ S5(1) Schedule 2 BCA

5 Name of BCA Companies

There are not many changes in the requirements and limitations on the name except that **foreign characters name** is permitted under special circumstance.

Special Provisions and Foreign Characters Name

S19 of BCA stipulates that:

“The name of a company may comprises the expression “BVI Company Number” followed by its company number in figures and the ending required by section 17 that is appropriate for the company

This is a very useful provision for Registered Agents who create shelf companies for sales.

S20 (1) of BCA stipulates that:-

“Where the name of a company is in the form permitted under section 19, the company may have an additional foreign character name approved by the Registrar. “

The Registrar can introduce Regulation regarding the administration of this section. .

I really doubt whether this is an attraction for using BVI company or not. Some writers,¹⁴ acclaim that this feature will prove to be very useful for incorporation agents in Hong Kong and Asia. A closer study of the Asia market reveals that, end users prefer English names with a Chinese name; but a ‘numbered’ name + Chinese Name in the form of “BVI company Number 123456 + Chinese Name”? I doubt.

The BCA has also clarified some minor issues, like the use of a full stop after abbreviation¹⁵; or abbreviated from of any word or words as part of its name ¹⁶

¹⁴ for example, Harneys Westwood & Riegels

¹⁵ S17(5) –you can use a full stop if you use abbreviation such as Ltd, Corp or Inc

¹⁶ S17(6)

Re-use of Company Name

A very interesting provision regarding use of name is that in the BCA¹⁷, it allows (through the “Regulation”) the re-use of names previously used by company that have (a) changed their names (b) been struck off the Registrar or (c) been dissolved.

This allows the opportunity for re-organization and restructuring of companies, with ‘switching’ of company names. However, since the detail administration of this section depends on the ‘Regulation’, we are yet to see how this section can be used.

Reservation of Name

As in IBC Act, a proposed company name can be reserved for 90 days¹⁸, however, the application can now only (1) be made by the Registered Agent instead of “any person”, and (2) in the “Approved Form” instead of upon “request”.

Use of Company Name¹⁹

Similar to Companies laws in other well-established jurisdictions²⁰, when a company name is used, the company name must be in full and include, if it has one, its foreign character name, and the company name should be clearly stated in

- (1) All written communications
- (2) All documents issued or signed by or on behalf of the company that evidences or creates a legal obligation of the company.

This is a significant change and requirement, especially in respect of requirement of stating its **full name and its foreign character name**. Although I don’t see that the legal document will be in-validated because of the fact that this section is not complied with, I can see there will be many regulations to follow, and may become a cause of action for disgruntled shareholders, especially there is an associated

¹⁷ S24 BCA

¹⁸ S25 BCA cf S11(7) of IBC Act

¹⁹ S26(1) BCA

²⁰ In this, I mean the Companies law of UK, Hong Kong, Singapore etc.

penalty cause of USD1,000²¹.

There is no such provision in IBC Act.

Change of Name

IBC Act provides that the change of name can be effected by amending the company's Memorandum.²² There is no corresponding provision in the BCA, but under S9 (1), the memorandum of a company shall state the name of the company, it follows that the change of name should be made by way of amending its memorandum.

Under S21, BCA requires that the change of name should be approved by the Registrar, and the change of name is effective, on registration of the company and issuance of a Certificate of the Change of Name to the company.

The difference is that, under IBC Act, the name change is effective when the change of Memorandum is effective (i.e. upon registration), and any objection by the Registrar will be after the registration. Under BCA, the change of name is ONLY effective upon the registration of the new name (thus approval granted) and issuance of the Certificate of Change of Name. This is stated clearly under S23 (1) of BCA, that

"A change of name of a company ... (a) takes effect from the date of the certificate of change of name issued by the Registrar..."

AND that under S23 (2)

"...where the name of a company is changed ... the amendment to the company's memorandum to state the new name has effect on the date of the change of name certificate."

Under the new BCA, the time for the new name to be effective will be out of your control, we therefore have to be very careful at the planning stage²³.

²¹ S26(2) BCA

²² S11(3) IBC Act

²³ BVI has a lot of holidays, which does not coincide with Hong Kong holidays. Note that BVI is also in the hurricane and typhoon zone and every year, the BVI registry has to be closed a few days due to natural causes.

6 Memorandum and Articles

Items to be stated in the Memorandum

The BCA requires fewer items to be stated in the Memorandum

| Items to be stated | BCA ²⁴ | IBC Act ²⁵ |
|---|--|--|
| Name of the company | Yes | Yes |
| Type of Company | Yes | N/A |
| Registered Office Address | Yes | Yes |
| Registered Agent | Yes | Yes |
| Address of the Registered Agent | No | Yes |
| Object of the company | No | Yes |
| Capital | Number of shares authorized to issue and classes of shares authorized to issue, their respective rights and obligations. | Currency, Authorized Capital, Par value, class of shares, their respective rights, no of shares to be issued, registered and bearer, authority of Directors to amend and issue capital |
| State whether the company is authorized to issue bearer shares etc. | Should clearly state the fact that the company is or is not authorized | Should state whether authorized, the manner of issuing, notice etc. |
| State whether the company is authorized to issue fractional shares | Should state to that effect | N/A |
| Limitation on the business | Should contain a statement in the Approved Form specifying the limitation on the business that the company may carry on | A statement that the company may not carry on the activities set forth in the Section 5 (1) of IBC Act |

Amendment of Memorandum or Articles

Amendment of Memorandum or Articles of a BCA company may be effected by

²⁴ S9 BCA

²⁵ S12 IBC Act

the resolution of the company, and if authorized by the Memorandum of the company²⁶ (note: Memorandum only) may be effected by resolution of directors.

However, it should be noted that the authority of directors to amend Memorandum and Articles is statutorily limited²⁷.

After the amendment resolution is passed, the company must file one of the followings with the Registrar for registration

- (1) The **notice** of amendment in the **Approved Form**, or
- (2) A **Restated Memorandum or Articles** incorporating the amendment made²⁸

The amendment is effective **only** from the **date of filing**. The only exception is by application to the court²⁹. Even if application is made to the court³⁰, the court can only make an order that the effective date is a date no earlier than the **date of the resolution**.

The application can be made by any member or any director ('a' member or director)³¹. The implication is that any member or director can apply to the court for delaying the effective date of the resolution. It is important in cases where there is any re-structuring of companies matter and accidentally, one of the key dates of such restructuring cannot be complied with.

One word about the re-stated Memorandum or Articles. It is not necessary for the re-stated Memorandum or Articles to be filed immediately after the resolution of amendment of Memorandum or Articles. BCA provides that the restated Memorandum or Articles can be filed at any time³². This gives practitioners a 'breathing space' so that they can file the notice immediately after passing the resolution but file the restated Memorandum or Articles at a later date.

The difference between IBC Act and BCA is that, under the IBC Act, the resolution or the extract of the resolution is submitted, certified by a solicitor, or the

²⁶ S21(3) BCA

²⁷ S13(5) BCA – see 錯誤! 找不到參照來源。 Page 錯誤! 尚未定義書籤。

²⁸ S13(1) BCA

²⁹ S13(2) and S13(5) BCA

³⁰ By the company, a member, a director or any interested person. – S13(3) BCA

³¹ S13 (3) BCA

³² S15(1) BCA

Registered Agent. Under the BCA, a notice in amended form OR the re-stated Memorandum or Articles is needed.

Power and Capacity of a BCA Company

Identity

BCA provides that a BCA company is a **corporate body**, a clearly distinguished legal entity separated from its members³³ and its liability is always separated from its directors, agent or voluntary liquidator, except it is provided in the BCA or other enactment. However, it is liable for its own acts or conducts.

Ultra Vires and Capacity of a Company

The doctrine of ultra vires, when applied strictly, may sometimes defeat the purpose of setting up an IBC type of company. It may be more of a hindrance than as a protection of shareholders and creditors. Under normal situation, whether a company is acting ultra vires, there should not be a big concern. In case that the company enters into material transactions, for example, acquiring a high-value property or investing into another company, the question of ultra vires will always raise concern.

S27 to S32 of the BCA deal with the problem. Simply speaking, a BCA company has all capacities to do anything that is legal, except when restricted by its own Memorandum or Articles. It has effectively addressed the problem, but indeed the solution is a two-sided blade.

In an IBC, we have to state clearly in the Memorandum that the company is engaged in business and activities that is not prohibited under any law for the time being in force in the BVI, and the company is protected from being considered ultra virus under S12(2) of the IBCA.

BCA companies do not inherently have the ultra vires problem, because BCA does not require a BCA company to have object clauses. It has further elaborated this concept, by statutorily providing a BCA company has “*full capacity to carry on or undertake any business or activities, do any act or enter into any transactions.*”³⁴

The drafter of BCA has also clarified some gray areas, by further expanding and

³³ S27 BCA

³⁴ S28 (1) BCA . Of cause, always subject to the BCA, other enactments and restrictions self-imposed by the Memorandum and Articles.

specifying the power of a BCA company to issue and cancel treasury shares, grant options, issue securities that are convertible into shares, issue debentures, grant guarantee to third parties, and specially **give financial assistance to any person in connection with the acquisition of its own shares**³⁵

Dealing With A Company Which Is Acting Ultra Vires

What if the Memorandum or Articles does restrict the company to do certain acts and the company does that activities notwithstanding the restrictions? S29 of BCA enhances the protection given to a third party dealing with the company.

- 1 S29 provides that

“no act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact that the company did not have the capacity, right or power to perform the act or to transfer or received the assets”.

- 2 Thus even if the Memorandum restricts the right to transfer an asset, the transfer is still valid and the innocent third party will be protected.
- 3 S31 removes the right of the company or the guarantor to rely on the fact that the company has been acting ultra vires, or that its directors, employees, agents, or persons held out to be directors, employees or agents are not properly appointed or that they have no authority³⁶ to act or that a document signed on behalf of the company by them with actual or usual authority to issue the document is not valid or not genuine

The above is subject to two important exceptions:

- (1) The person dealing with the company has, or ought to have **by virtue of his relationship to the company, knowledge of the matters referred to above**. Thus a director in his personal capacity dealing with the company cannot rely on the protection of this section. This “**knowledge**” should be actual knowledge and **not constructive knowledge**. S32 stipulates that a document available for inspection to the person does

³⁵ S28(2)

³⁶ S33(1) BCA and applied to authority that is customarily exercisable by that director.

not follow that that the person has constructive knowledge of the documents, **exception being the register of mortgage and charges.**

- (2) The directors, employees or agents who act fraudulently or forge a documents that appear to have been signed on behalf of the company **and** the person dealing with the company **has actual knowledge of the fraud or forgery.**

The only cause of action for the Company or its members is to rely on taking action against the directors concerned personally³⁷. However, since the provisions are equally applicable to the company and an innocent third party, it can be unfair to an innocent third party. Nevertheless, the third party may get protection by way of guarantee and the equitable doctrine of tracing.

An important difference in the IBC Act and the BCA is that, under the IBC Act, a member can sue against the company and to prohibit the company in acting ultra vires³⁸ or by the company against the directors who do any ultra vires acts.³⁹ However, there are no such equalivent provisions under the BCA. The aggrieved party can only rely on S121 of the BCA that

“A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the Memorandum or Articles...”

and to sue for damages.

Financial Assistance Given by the Company to Acquire Shares

The new BCA gives a BCA company statutory right of giving financial assistance to any person in connection with the acquisition of its own shares⁴⁰. User of the new BCA Company should therefore be very careful to consider amending the Memorandum to exclude this right. A BCA Company used in structures in conjunction with companies of other jurisdictions may face with internal control problems.

³⁷ Under S112, see below

³⁸ S10(1)(a) IBC Act

³⁹ S10(1)(b) IBC Act

⁴⁰ S28(2)

Conclusion

Of course, the power and capacity of a BCA Company is always subject to any restriction in the Memorandum or Articles. In other words, a BCA company can do anything that is not prohibited by law and is not restricted by its own Memorandum or Articles.

A final note on the capacity and power of a BCA company. It seems that the drafter of the BCA has in mind that BCA companies are used for simple structuring and not for complicated corporate group structures. In most of the cases, the shareholders and the directors are the same person. There is only one shareholder and one director who are the same person who uses the BCA Company for asset holding and does not necessary and seldom interacts with third parties.

BCA does effectively addresses the problem of ultra virus found commonly in Common Law companies, but has introduced another problem. A third party can be at ease when dealing with a BCA company, as a BCA company has all power similar to a natural person. However, if the owner (investor / shareholder) is quite separated from the directors, and the directors act independently from the shareholders, it is quite risky from the point of view of the shareholders. Since even if the Memorandum or Articles contains restrictive causes, a wrongful deed by the directors cannot be stopped. The only remedy available to the investor is to rely on S112 and to sue the directors for damages.

8 Records and Registers

All companies are now registered under the “**Registrar of Corporate Affairs**”, which is responsible for the administration of the BCA⁴¹.

Optional Registration of Registers of Members and Directors

A feature retained in the BCA as well as IBC Act is that the company **may** elect to file for registration with the Registrar a **copy** of either or both the register of members and register of directors⁴². First, it is a choice for the company and is not mandatory; second, only a copy of the register is filed – there is no form required.

Note that under the IBC Act, filing of register of mortgages and charges is also optional but there is no such provision in BCA⁴³, as the registration of Mortgage and Charges are now mandatory in order to have priority⁴⁴.

Obligations of the company after election to file registers

For companies that have elected to file copies of register, the following obligations and limitation will apply:

- (1) It should file any changes in the register⁴⁵ until a notice of cessation to file (in Approved From) is filed⁴⁶.
- (2) The company is bound by the contents of the copy register filed

My opinion is that this is a flexible mechanism which can be used for those who think that such filings are desirable.

⁴¹ Sec229(3) BCA

⁴² S231(1) BCA and S111A IBC Act

⁴³ S111B IBC Act

⁴⁴ S166 and S163 BCA

⁴⁵ S231(2) BCA

⁴⁶ S231(3) BCA

New Requirements for Keeping Records and Filing

The requirement of the new BCA in respect of the records to be kept is quite different from that required under IBC Act.

Places of keeping statutory records and seals⁴⁷.

| | BCA | IBC Act |
|-------------------------|--|---|
| Register of Member | Yes, original or copy at office of Registered Agent ⁴⁸ | Yes, Copy of the Share Register kept at Registered Office ⁴⁹ , |
| Register of Director | Yes, original or copy at office of Registered Agent ⁵⁰ | Optional, copy kept at Registered Office ⁵¹ , |
| Memorandum and Articles | Registered Agent | ? |
| Register of Charges | Registered Office or office of Registered Agent ⁵² | Optional, kept at Registered Office ⁵³ , |
| Minutes | Office of Registered Agent or other places as directors may determine ⁵⁴ | Registered Office or other places as directors may determine ⁵⁵ |
| Financial Records | May keep at any place records that are sufficient to show and explain the company's transactions and will at any time enable the financial position of the company to be determined with reasonable accuracy ⁵⁶ | Shall keep such accounts and records as the directors consider necessary or desirable in order to reflect the financial position of the company. ⁵⁷ Shall be kept at the registered office of the company or at such other places as the directors determine. ⁵⁸ |
| Seal | The company may have a common seal, and if it has a seal, an imprint of the seal shall be kept at the office of the Registered Agent | . Shall have a common seal and an imprint thereof shall be kept at the Registered Office of the Company ⁵⁹ |

⁴⁷ See generally, S96 of BCA and S66 of IBC Act.

⁴⁸ S96 BCA

⁴⁹ S28(4) IBC Act

⁵⁰ S96 BCA

⁵¹ S43A (3) IBC Act

⁵² S162 (2) BCA, or keep at the office of Registered Agent

⁵³ S70A(1) IBC Act

⁵⁴ S97 BCA

⁵⁵ S66(3) IBC Act and

⁵⁶ S98 BCA

⁵⁷ S66(1) IBC Act

⁵⁸ S66(3) IBC Act

⁵⁹ S66(3A) IBC Act

Other obligations:

| | BCA | IBC Act |
|--|--|----------------------|
| Keep at the office of the Registered Agent | copies of all notices and other documents filed by the company in the previous ten years ⁶⁰ | No |
| Filing requirements: (a) if COPY of the register of member and director is kept in the office of Registered Agent | Within 15 days of any change in the register, notify the registered agent in writing of the change ⁶¹ | N/A |
| | Provide the Registered Agent with a written record of the physical address of the place or places at which the original register of the member or original register of director is kept ⁶² and inform the Registered Agent of any change in the location within 14 days ⁶³ | No such requirement. |
| (b) if minutes and resolutions of directors and members are not kept at Registered Agent | Provide the Registered Agent with a written record of the physical address of the place or places at which such document is kept ⁶⁴ and inform the Registered Agent of any change in the location within 14 days ⁶⁵ | No such requirement. |

In general, S102 of BCA requires the company to keep minutes of all meetings of directors and members and copies of all resolutions consented to by directors and members⁶⁶

Note that members can “inspect” and “make copies or take extracts from” but there is no requirement to allow the member to request the director to “provide copy of “ the documents”.

⁶⁰ S96(1) BCA

⁶¹ S96(2)(a) BCA

⁶² S96(2)(b) BCA

⁶³ S96(3) BCA

⁶⁴ S97(2)(b) BCA

⁶⁵ S97(3) BCA

⁶⁶ s102 BCA

Share Register (Register of Member)

BCA stipulates that “A Company shall keep a register of members...”⁶⁷ but IBC Act stipulates, “A company... shall cause to be kept **one or more** registers...” That is to say, under IBC Act, the register of Directors is optional, while under BCA, it is mandatory.

Content of both registers are similar,

Place of keeping the Members Registers

Under the IBC Act, a copy of which should be kept at the registered office⁶⁸, that is to say, the original could be kept in the hands of the directors or clients or their agents. However, under the BCA, the **original** or **copy** of the share register should be kept in the hands of the Registered Agent.

This should not prove any difficulties under the present administration relationship between agents and clients in Asia, as the agents will automatically file the necessary forms with the Registered Agents in BVI.

However, under S96(2) of BCA, if the original is not kept at the Registered Agent, the Registered Agent should be notified of the place where the original is kept. This rule, reflecting the importance of the share register, is a corresponding requirement to the fact that the members register is a prima facie evidence of title.

The importance of Share Register

Under the BCA, the share register is a more important document than the share certificate, as “...*The entry in the register of members of a person is the holder of a share is prima facie evidence of the title of the member to the shares...*”⁶⁹

The importance of the share register is exemplified by S78 of BCA, the definition

⁶⁷ S41(1) BCA

⁶⁸ S28(4) IBC Act

⁶⁹ S41(3) BCA

of shareholder, which states that:

““shareholder”, in relation to a company, means a person whose name is entered in the register of members as the holder of one or more shares, or fractional shares, in the company;

Register of Directors

BCA stipulates that “A Company shall keep a register of directors...”⁷⁰ but IBC Act stipulates, “A company... **may keep a registers...**”⁷¹

Content of both registers are similar,

Registered Agent’s Role

Under the new BCA, only the registered agent of the company can file the document on behalf of the company.⁷² (See Page 錯誤! 尚未定義書籤。 for discussion of Registered Agent)

Right of Inspection of Records

Public’s right of inspection

Under S233 of BCA, the public can inspect

- (1) Registers maintained by the Registrar of Corporate Affairs (maintained pursuant to S230 (1))
- (2) Documents (Qualified documents) retained by the Registrar

Under various sections of the BCA, various documents can be retained by the Registrar. In fact, BCA does not allow the Registrar to retain any document filed that is not a qualifying document⁷³.

Qualifying document mean any document which is required or expressly permitted to be filed under the BCA or the Regulations or any other enactments;

⁷⁰ S118(1) BCA

⁷¹ S43A(1) IBC Act

⁷² S232 BCA

⁷³ S230(4)(b) BCA

and the document complies with the requirements of and is filed in accordance with the BCA, Regulations and any other enactments.⁷⁴

That means, (1) the company may not file any document which is not permitted by the BCA or the Regulation (2) the document filed must comply with the form (Approved Format).

Right of public for requesting a copy document filed with the Register.

In addition to the right of inspection, under the BCA, the public can request for⁷⁵

- (1) A certified or uncertified copy or extract of the following documents: -
 - (a) Certificate of Incorporation
 - (b) Certificate of merger
 - (c) Certificate of consolidation
 - (d) Certificate of arrangement
 - (e) Certificate of Continuation
 - (f) Certificate of Dissolution
 - (g) Certificate of Good Standing
- (2) A copy or extract of any documents / part of the document which the register has custody.

These documents are prima facie evidence of the matters contained therein and is admissible in evidence in any proceedings as if it was the original document.⁷⁶

Inspection of records by directors

Directors can inspect records without charge at any reasonable time⁷⁷.

Members can only inspect Memorandum and Articles, Register of member and Register of directors and Minutes of Members⁷⁸, but their power is limited, as the directors can refuse to permit the members to inspect the document "if they are

⁷⁴ S230(5) BCA

⁷⁵ S233(1)(c) BCA

⁷⁶ S233(2) BCA

⁷⁷ S100(1) BCA

⁷⁸ S100(2) BCA

satisfied that it would be contrary to the company's interests" to allow the members to inspect⁷⁹. The aggrieved member may apply to the court for relief⁸⁰.

Under IBC Act, Section 67, similar right is given to the members, but they may inspect the share register, books records minutes etc, "in furtherance of a proper purpose", by "request in writing". By furtherance of a proper purpose, it means a purpose reasonably related to the member's interest as a member.⁸¹ And of course, the company may by a resolution of directors determines that it is not in the best interest of the company or of any other members, and may refuse the request⁸²

Note the difference – in the BCA, the member is **"entitled"** to inspect those registers and documents, but in IBC Act, the member **may** by written request to inspect. It seems that under the BCA, the inspection is member's right and the directors must have a strong reason to refuse, but under the IBC Act, the directors merely **'determine'** whether it is the best interest of the company.

Certificate of Good Standing

A certificate of good standing is a certificate issued by the Registrar of Corporate Affairs, under his hand and **Seal**, certifying a company is of good standing, which means,

- (1) The company is on the Register
- (2) The company has no outstanding fees, annual fess or penalties due and payable.

The certificate of good standing also contains information on

- (1) Whether the company has filed articles of merger or consolidation that have not yet become effective
- (2) Whether the company has filed articles of arrangement that have not yet become effective

⁷⁹ S100(3) BCA

⁸⁰ S100(4) to S100(6) BCA

⁸¹ S67(2) IBC Act

⁸² S67(3) IBC Act

- (3) The company is in the process of being wound up and dissolved
- (4) Any proceedings to strike the name of the company off the register have been instituted

These do not differ from the provisions of the previous IBC Act and contain quite detail information about the content of the certificate.

9 Shares and Capital

Nature of Share

A share in a company is personal property⁸³. Personal property is a chattel in contrast with “real” property, which must be transferred by deed only. Although a personal property can be transferred by an agreement, even an oral agreement, the BCA restricts the mode of transfer in form of written instrument (see Page 33 **Transfer of Shares**). The same provision can be found in the IBC Act⁸⁴

Increase and Reduction of Capital

One of the major differences in the new BCA is the abolishment of the concept of **Authorized Capital**. The memorandum of a BCA company only requires to state the maximum number of shares that the company is authorized to issue and the classes of shares that the company is authorized to issue, as well as the rights privileges restrictions and conditions attaching to each class of shares.⁸⁵ Thus the change of this “**authorized number of shares to be issued**” may be changed by amending the Memorandum of the Company. In addition to the procedures that should be followed for amendment of Memorandum, a notice in Approved Form should also be filed ⁸⁶.

There is also no need to state the par value or currency denomination of capital.

The implication of this is, together with no-par-value capital, if this is authorized by the Memorandum and Articles, the directors may have the right to raise whatsoever amount of capital, without restrictions. There is no need to state the “currency” to be denominated (in contrast, as provided under the IBC Act⁸⁷), thus this is very important to have built-in safe-guard in the Memorandum and Articles when using BCA Company for multi-parties shareholding structures.

In this connection, there is no need in the new BCA to have provision regulating the designation of amount to be “capital “ and “surplus” regarding issue of

⁸³ S33 BCA

⁸⁴ S26 IBC Act

⁸⁵ S9(1)(e) BCA

⁸⁶ S40 BCA

⁸⁷ S21A (1) IBC Act

non-par-value shares⁸⁸. And there is no provision regulating the authorized capital, as in S24 and S25 of the IBC Act, in respect of increase of authorized capital and division and combination of shares.

Authority to Issue Shares

S17A of the IBC Act corresponds to S45 of the BCA, which gives the right of determination of the time, terms and target of issuance (allotment) of shares or granting options to the directors

Directors can issue shares at such terms and consideration they think fit⁸⁹. A new feature of the new BCA is that the company need not state in the Memorandum and Articles the number of shares in each class of shares.

Therefore, if not restricted by the Memorandum and Articles, the directors have the right to issue different amounts of different classes of shares at their discretion.

Authority to issue different classes of shares

Furthermore, company can only issue different classes of shares if it is “expressively authorized by its memorandum in accordance with section 9(1)(e)⁹⁰. There is no corresponding provision in IBC Act. S12 of IBC Act only stipulates that the Memorandum must include *“(g) a statement of the number of classes and series of shares, the number of shares of each such class and series and the part value of shares with par value and that shares may be without par value if that is the case”*

The new BCA clarifies any gray areas so that only when Memorandum has stated the company can issue class of shares can the company issue such shares. Under S34(2) to S37, BCA has given the statutory right of any BCA company to issue more than one class/ all types of shares: redeemable, confer no rights (deferred shares), preferential rights (preference) as to income or distributions;

⁸⁸ Under S22(2), except otherwise provided in the Memorandum and Articles, the part of consideration received on issuance of no-par-value shares must be designated as Capital should not be less than the amount of preference share holder to be entitled upon the company's liquidation.

⁸⁹ S45 BCA

⁹⁰ S34(2) BCA

confer special limited or conditional rights, including voting rights, or to confer no voting rights AND in any currency.

There is one major exception, that is, bearer shares can only be issued, exchanged with registered shares upon express authorization to do so by the company's Memorandum ⁹¹,

Similar provision can be found in various part of IBC Act⁹²

Consideration for Shares

There are basically two different points

- (1) IBC Act provides that all shares should be fully paid⁹³ but the BCA has no such provision.
- (2) As to non-cash payment, IBC Act provides that⁹⁴

"in the absence of fraud, the decision of the directors as to the value of the consideration received by the company in respect of the issue is conclusive, unless a question of law is involved".

And that,

"A share issued... upon conversion of, or in exchange for, another shares or a debt obligation or other security in the company, shall be treated for all purposes as having been issued for money equal to the consideration received or deemed to have been received by the company in respect of the other share, debt obligation or security. "

The directors of the company actually do not have to spend much time in determining the value of such "exchanged assets" as the value of which has already been governed by this statutory provision. This relieves the burden of the directors to prove that they are not negligent in accepting bad assets in exchange of issuance of shares.

⁹¹ S38 BCA

⁹² See, for example, S9 IBC Act. But the BCA provision is more comprehensive.

⁹³ S18 IBC Act

⁹⁴ S20(1) IBC Act

However, BCA asks for a more stringent method of valuation and shifts the burden back to the directors, that is, the directors⁹⁵

“...shall pass a resolution stating

(a) The amount to be credited for the issue of the shares;

(b) Their determination of reasonable present cash value of the non-money consideration for the issue; and

(c) That in their opinion, the present cash value of the non-money consideration for the issue is not less than the amount to be credited for the issue of the shares...”

before the shares can be issued.

Noted that it is provided in the law that **present cash value** method of valuation must be used. The directors may not want to involve themselves with the complexity of calculation, given that the law put the burden of stating “in their opinion”. The alternative is to engage an independent third party, a professional advisor, (e.g. CPA) to advise the board of the appropriate value.

Compulsory Consent Given by Shareholders

BCA requires the new shareholder (or his authorized agent) to furnish evidence that he has agreed, in writing to become a shareholder of the company **if the share increases the liabilities or imposes a new liability on that person**⁹⁶. There is no such corresponding provision in the IBC Act.

“Default” Rights attached to Shares

Part III of the BCA concerns with Shares of a BCA company. BCA defines clearly the rights of the shares attaching to shares and class of shares, but expressly provides that those rights could be modified (restricted, expanded – but see below) by Memorandum. It is quite useful when the Memorandum and Articles does not specifically refer to rights of the shares⁹⁷.

The default rights of a share in a company, if not modified by the Memorandum

⁹⁵ S48 BCA

⁹⁶ S49 – during allotment of new shares (agree in writing) and S54(2) – during transfer of shares (transferee must sign on the Instrument of transfer)

⁹⁷ S34(1) BCA

and Articles are⁹⁸:

“ ...

(a) the right to one vote at a meeting of the members of the company or on any resolution of the members of the company;

(b) the right to an equal share in any dividend paid in accordance with this Act; and

(c) the right to an equal share in the distribution of the surplus assets of the company. “

It further stipulates that a company can issue shares subject to terms that negate, modify or add to the rights specified, if it is “expressively authorized by its memorandum in accordance with section 9(1)(e)⁹⁹. Under S34(2) to S37, BCA has given the statutory right of any BCA company to issue more than one class of shares/ all types of shares : redeemable, confer no rights (deferred shares), preferential rights (preference) as to income or distributions ; confer special limited or conditional rights, including voting rights, or to confer no voting rights.

There is no such provision in IBC Act.

Pre-emptive Rights

Moreover, BCA recognizes pre-emptive right¹⁰⁰, but only applying to cases where the Memorandum or Articles of the company **expressly provides that this section shall apply** to the company. That is to say, in order that the shareholder may exercise the pre-emptive right, such right should have been stated in the Memorandum and Articles. There is no corresponding provision in the IBC Act.

Transfer of Shares

Importance of written instrument

BCA has a more detailed provision in respect of transfer of shares. In IBC Act, the requirements of transferring a registered shares is “easier”. Under the IBC Act the registered share “**may be transferred by a written instrument of transfer signed by**

⁹⁸ S34(1) BCA

⁹⁹ the Memorandum of a company shall state “(ii) the classes of shares that the company is authorized to issue and, if the company is authorized to issue two or more classes of shares, the rights, privileges, restrictions and conditions attaching to each class of shares.”

¹⁰⁰ S46 BCA

*the transferor...*¹⁰¹ and that “*in the absence of a written instrument of transfer... the directors **may** accept such evidence of a transfer of shares **as they consider appropriate**.*”

Under the BCA,¹⁰² the registered shares

- (1) “**are** transferred by a written instrument of transfer signed by the transferor...”¹⁰³ ...
- (2) “...**shall be** sent to the company for registration.”¹⁰⁴

The only condition that the directors can accept a transfer of share without an instrument of transfer is, under S54(9) of BCA that the directors are “...*satisfied that an instrument of transfer has been signed but the instrument has been **lost or destroyed**.*” They must **resolve** to accept such evidence ..as they consider appropriate. The BCA¹⁰⁵ clearly provides that the name of the transferee should be entered in the register of members notwithstanding the absence of the instrument of transfer.

- (1) The significance is the emphasis placed on the importance of the instrument of transfer. The instrument of transfer is mandatory, whereas in IBC Act, instrument of transfer is, in that sense, optional.
- (2) The entering into the Register as a recognition of membership in the company.

Authority of Directors to Accept or Reject Registration of Instrument of Transfer

Another important point to note is the authority of the director to accept or reject the transfer of shares, thus permitting a person to become a member of the company.

If there is no provision in the Memorandum or Articles, both the IBC Act and BCA do not require that there should be a board resolution for accepting the Instrument

¹⁰¹ S30(1) IBC Act

¹⁰² The BCA has a whole section (Division 3) dedicated to this topic

¹⁰³ S54(1) BCA

¹⁰⁴ S54(3) BCA

¹⁰⁵ S54(9)(b) BCA

of Transfer. In addition, both require the directors / company to “...enter in its share register the name of the transferee ...” if requested¹⁰⁶(IBC Act), “...enter the name of the transferee...in the register of members...”(BCA)¹⁰⁷ – **immediately**.

However, if the directors want to refuse or delay to enter the name of the transferee into the Register, under the BCA, they can do so by a board resolution with reasons¹⁰⁸. Those reasons must be permitted under the BCA or the Memorandum or Articles¹⁰⁹. One of the ‘permitted’ reasons is when the holder of the shares fails to pay an amount due in respect of those shares.¹¹⁰

The IBC Act does not have corresponding provisions. It seems that under the IBC Act, the directors do not have the right to delay or refuse to enter the name of the transferee into the Register. Of course, provisions in the Articles can be easily drafted to cover this defect.

Share Certificate

The only difference is the signing of the certificates. If the company’s Articles provide that the company can issue share certificates,

- (1) In case of a IBC, the certificate **must** be signed by 2 directors, OR 1 director plus 1 officers OR 2 officers OR under common seal with or without signature of director/officer¹¹¹
- (2) In case of a BCA Company, the certificate **shall** be signed by at least 1 director OR under common seal with or without signature of director/officer¹¹²

One interesting note on the status of the share certificate is that, under the IBC Act, the share certificate “...is a *prima facie* evidence of the title of the member to the share...”¹¹³ There is no such provision in BCA, instead, it states that “...*The entry in the register of members of a person is the holder of a share is prima facie*

¹⁰⁶ S30(4) IBC Act

¹⁰⁷ S54(4) BCA

¹⁰⁸ S54(4) BCA

¹⁰⁹ S54(5) BCA

¹¹⁰ S54(7) BCA

¹¹¹ S27(2) IBC Act

¹¹² S44(2) BCA

¹¹³ S27(3)

*evidence of the title of the member to the shares..*¹¹⁴

When challenged in court, under the IBC Act, holder of the registered share certificate will have priority over the member whose name is entered into the share register. It is then up to the Company to prove that the “Share certificate” is falsified, issued wrongly, or outdated.

However, under BCA, since the register of members is the Prima Facie evidence, it is the case of the holder of the Share Certificate to apply to the court under S43 to rectify the register of member.

This change does not mean much to clients from common law jurisdictions, but for clients from Taiwan and Mainland China, they may be puzzled. Based on the experience from their country's Company Law, they normally place much reliance on the share certificate than on the Register.

Factional Shares

Both IBC Act and BCA allow the issue of fractional shares, but there is one important difference. Under the BCA, the fractional shares “*has the corresponding fractional rights, obligations and liabilities of a whole share of the same class*”.¹¹⁵, However, IBC Act¹¹⁶ allows companies to issue such shares “subject to any limitations in its Memorandum and Articles ... and to the extent otherwise provided in the Memorandum or Articles “, that is, companies can issue fractional shares without corresponding rights.

This is not a major issue, as this can be circumvented under the BCA by issuing fractional shares from another class of shares with different rights and obligation. The implication is that the BCA moves such authority from the hands of the director back to the shareholders.

¹¹⁴ S41(3) BCA

¹¹⁵ S39(2) BCA

¹¹⁶ S21 IBC Act

Power of the Company to Acquire Its Own Shares and Treasury Shares

It is provided in the BCA that the company can acquire its own¹¹⁷ shares (purchase or redeem), **may** hold them for re-issuance without canceling them¹¹⁸ if (1) authorized by the Memorandum, (2) authorized by a Director resolution. (3) the total number of treasury shares held should not be more than 50% (in number, not value) of the total number of the class.

Of course, as usual, all rights of the treasury shares are suspended¹¹⁹. However, the purchase or redemption of a company's own share is also a **distribution**, except for a few cases which are statutory exempted – see the next section for details.

The procedure of acquisition of treasury shares is quite liberal. The structure of this part of the law is that, the relevant rule specified under the Memorandum or Articles will be followed, and if there is no rule found under the Memorandum and Articles, then one should follow the procedures under Section 60 to 62, BCA. I am not going to elaborate the same here.

The implication of not canceling (but disabling) the treasury shares is that the director can re-issue them for any consideration at any time they wish¹²⁰. This again, follows the general concept of BCA type of companies – flexibility. One general point of caution--**directors may have unlimited authority to deal with the shares if not restrained**. There is one over-riding provision in the BCA, unless the Memorandum or Articles provides the necessary authority given to the directors, those shares cannot be acquired or redeemed without the consent of the members who is affected.

Therefore, a specific enabling provision should be included in the Memorandum or Articles to allow the directors to exercise its power to redeem or repurchase the shares.

¹¹⁷ S59(1) BCA, subject to S57

¹¹⁸ S59(4) provides that the shares must be cancelled on acquisition unless held in accordance with S64 (1) BCA.

¹¹⁹ S64(2) BCA

¹²⁰ S65 BCA allows re-issuance of the treasury shares in the same way as issue of new shares.

10 Distribution

Differences between the treatment of distribution under IBC Act and BCA

I summarize the differences in the following table.

| | BCA | IBC Act |
|----------------------|--|--|
| Sections | S56 (Definitions: Solvency tests and distribution) S57 (General provisions about distribution) S58 (Provisions for recovery of distribution made when a company does not satisfy solvency test) S59 (Provision allowing Company to acquire its own shares) S60 to S62 (Procedures for redemption of shares) S63 (Condition where acquisition not deemed to be a distribution) S64 (General provision about Treasury Shares) S65 (Reissue of Treasury Shares) S66 (Mortgages and charges of shares) | S23 (Dividend of Shares – bonus shares) S36 (General Provisions about dividends) |
| Coverage | Distribution of any assets of the company to members, including cash dividends, share dividends, acquisition of own shares and redemption of shares, treasury shares, mortgage and charges of shares | Dividends only |
| Test | Directors can determine the time, amount “they think fit” if they are satisfied “on reasonable ground the company will immediately after the distribution satisfy the solvency test ” ¹²¹ . Their decision must be stated in a statement, passed as resolution, that “in the opinion of the directors, the company will, immediately after the distribution, satisfy the solvency test.” ¹²² | Dividend could only be declared and paid out of surplus ¹²³ . Surplus is defined as book value of total assets over the sum of its book liabilities plus capital ¹²⁴ and that the company will be able to satisfy its liabilities as they become due and the realizable value of the assets of the company will not be less than the sum of its total liabilities, other than deferred taxes, shown in the books and its capital. |
| Authorization | Director can authorize a distribution, subject to Memorandum or Articles and provisions in the BCA. | Directors can authorize a distribution. In the absence of fraud, the decision of the directors as to the realizable value of the assets of the company is conclusive ¹²⁵ |

¹²¹ S57(1) BCA

¹²² S57(2) BCA

¹²³ S36(2) IBC Act

¹²⁴ S2(1) IBC Act and the calculation of distributable reserve is re-stated under S36(3)(b) “the realisable value of the assets of the company will not be less than the sum of its total liabilities **other than deferred taxes**, as shown in the book of the accounts, and its capital.

¹²⁵ S36(3) IBC Act

Definition of Surplus and capital under IBCA:

*"surplus" in relation to a company, means the excess, if any, at the time of the determination, of the **total assets of the company over the sum of its total liabilities, as shown in the books of account, plus its capital***¹²⁶;

and

"capital" of a company means the sum of the aggregate par value of all outstanding shares with par value of the company and shares with par value held by the company as treasury shares plus

- (a) the aggregate of the amounts designated as capital of all outstanding shares without par value of the company and shares without par value held by the company as treasury shares, and*
- (b) the amounts as are from time to time transferred from surplus to capital by a resolution of directors;*¹²⁷

Note that the definition of capital of IBC Act does not include the "premium" or "reserves" and therefore, **all reserves of a IBC are distributable** unless being an amount "transfer from surplus to capital by a resolution of directors. "

Readers should also note that under the IBC Act, contingent liabilities will not be considered and it is easier for the directors to declare dividend, as long as the value in the **book** is in the positive. The "TEST" used under the IBC Act is the "book value". It is thus easier to declare dividend and make distribution under the IBC Act.

Distribution under the BCA

Practitioners should note carefully that "Distribution" covers all kinds of distribution of assets to members, and the test and procedures should be applied, with a few exceptions.

The main governing provision is S57. When the resolution is passed, the directors must satisfy that the company will pass the solvency test¹²⁸. A resolution of declaration of a distribution (including all kinds of distribution, e.g. dividend,

¹²⁶ S2(1) IBC Act

¹²⁷ S2(1) IBC Act

¹²⁸ S57(1) BC Act

redemption of shares, unless exempted under section 63 BCA), must also contain the statement that in the opinion of the directors, the company will, immediately after the distribution, satisfy the solvency test.¹²⁹

Practitioners should also note that directors have a continuing responsibilities of monitoring whether the company still satisfy the solvency test from the time of authorization to the time the distribution is made. Otherwise the authorization and distribution **is deemed not to have been authorized**.¹³⁰

Consequence Of Distribution Not Passing The Solvency Test

If the distribution is voided by reason of that the company could not satisfy the solvency test between the time of declaration and the time distribution is made, the distribution is void and the distribution is recoverable from the members. **Note that there is one interesting exception**¹³¹:

- (1) The member is acting in good faith, receiving the distribution without knowledge of the company's failure to satisfy the solvency test. AND
- (2) The member has altered his position in reliance on the validity of the distribution – say, for example, the member is a corporation has, on receiving the distributions, distributed the same to its members. AND
- (3) It would be unfair to require repayment in full or at all

My observation is, even if a director has distributed the assets in bad faith in favour of a member (e.g. his son), and that the son has “spent” the money not knowing the distribution is void, he can keep the distribution. What amounts to an “unfair to require repayment” is not yet clear.

The company's remedy in this case, is to rely on S58(2) to sue the director, as the provision provides that the director is personally liable to repay the company amount that cannot be recovered from the members. The exact words of the law are that, a director who

(c) ceased, after authorization but before the making of the distribution, to be satisfied

¹²⁹ S57 (2) BCA

¹³⁰ S57(3) BCA

¹³¹ S58 BCA

on reasonable grounds for believing that the company would satisfy the solvency test immediately after the distribution is made; and
(d) failed to take reasonable steps to prevent the distribution being made;
*is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from members.*¹³²

I find it disturbing: what if the director concerned does not take reasonable step to ensure the solvency test can be passed? By the time of distribution, he is still satisfied with the solvency test and never “cease” to be satisfied. What amounts to “reasonable step “ is also a matter open for discussion.

Appreciation of Assets

IBC Act includes a provision for the appreciation of assets¹³³ that the directors by resolution may include in the calculation of surplus unrealized appreciation of assets and that the decision of the directors as to the value of the assets is conclusive. That is to say, the directors can distribute unrealized gain, e.g. appreciation in property value. There is no equivalent provision in BCA

Solvency test of the BCA

Solvency test is defined under S56 by a simple rule:

- (i) the value of the company's assets exceeds its liabilities, and*
- (ii) the company is able to pay its debts as they fall due;*

There is no definition of what assets are and what liabilities are and it seems that the normal accounting definition is used.

Treasury Shares

By definition, acquisition of its own shares is a form of distribution and should be governed under S57 to S58. However, BCA has a major exception to the rule (that is, the directors can approve such distribution without considering the Solvency Test). Under Section 63 of BCA, it states that

¹³² S58(2)

¹³³ S37 IBC Act

“... The purchase, redemption or other acquisition by a company of one or more of its own shares is deemed not to be a distribution where

- (a) the company redeems the share or shares under and in accordance with section 62;*
- (b) the company purchases, redeems or otherwise acquires the share or shares pursuant to a right of a shareholder to have his shares redeemed or to have his shares exchanged for money or other property of the company; or*
- (c) the company purchases, redeems or otherwise acquires the share or shares by virtue of the provisions of section 179.*

That is, (1) the share is redeemable at the option of the shareholder or redeemable at a specific date (S62), (2) the shares is acquired from dissenters (S179).

In most cases, the shareholder and the director is the same person. .

Conclusion

BCA posts a heavier responsibility on the directors as compared with IBC Act. This is one of the various pitfalls which leads to my argument that BCA Company is only suitable for simple structures (single shareholder-director holding simple assets) and not suitable for complicated structures.

11 Members and members proceedings

Members

As with the IBC, a BCA Company should have at least one member¹³⁴. If the company does not have any member, any person doing business using the name of or on behalf of the company is personally liable for the payment of all debts of the company contacted during the time¹³⁵.

Resolutions

BCA recognizes, as the IBC Act, resolutions passed in a meeting and written resolutions¹³⁶. There is a major difference. Unless the Articles requires otherwise, the IBC Act requires absolute majority, or such higher majority as may be

¹³⁴ S79(1) BCA

¹³⁵ S108 BCA and S74 IBC Act

¹³⁶ S81(1) BCA

specified in Articles¹³⁷ for passing a written resolution, while in BCA, only a simple majority is enough¹³⁸ except a resolution for removal of a director¹³⁹.

Who Can Call A Meeting?

The following persons can call a meeting of members:-

- (1) Directors (as a board of directors),
- (2) Such person authorized by Memorandum or Articles¹⁴⁰
- (3) 30% of the voting shareholders (or of that class) in writing may require the directors to summon a meeting, this percentage can be reduced in the Memorandum or Articles but not increased¹⁴¹. In IBC Act, this percentage is 50%.

There is no difference in BCA and IBC Act in how the meeting is conducted: within or without the Virgin Islands, any time, any place. Means of meeting may be physical meeting, by telephone and other electronic means, AND as long as all members participating in the meeting are able to hear each other.

Note that this is therefore not possible to exclude the right of any class of shareholders to call a meeting. There is an interesting provision about “notice” which is not found in IBC Act but in BCA, that¹⁴²

“The convener or conveners of a meeting of members may fix the date notice is given of a meeting, or such other date as may be specified in the notice, as the record date for determining those members that are entitled to vote at the meeting.”

A member or a director of a BCA may apply to the court for an order to call a meeting of members, which is to be conducted in the manner as the court may order.¹⁴³

An important development of the BCA regime is that the law provides that the

¹³⁷ S2(6)(b)(i) IBC Act

¹³⁸ S81

¹³⁹ S114(2)(b)

¹⁴⁰ S82(1) BCA

¹⁴¹ S82(2) BCA

¹⁴² S83(4) BCA

¹⁴³ S86 BCA

Regulation may specify provisions for a members meeting¹⁴⁴, which is in fact, similar to the effect of Table A in UK, Hong Kong or Singapore Company Laws.

Directors and Directors proceedings

IBC Act and BCA contain similar provisions as to directors. However, there are several differences.

Appointment of Directors

BCA provides that directors should be appointed within 30 days¹⁴⁵, however, IBC Act does not have such provision. The newly appointed directors must sign the consent to act under the new BCA¹⁴⁶, but there is no such provision in the IBC Act

Restriction of Power of Directors

BCA clarifies and restricts the power of the Directors. The following power cannot be delegated to a committee of directors. That is to say, they must be decided by a full board of directors.¹⁴⁷ These powers can be further restricted by the Memorandum and Articles but could not be relaxed.

- (1) to amend the memorandum or articles;
- (2) to designate committees of directors;
- (3) to delegate powers to a committee of directors;
- (4) to appoint directors;
- (5) to appoint an agent;
- (6) to approve a plan or merger, consolidation or arrangement; or
- (7) to make a declaration of solvency or approve a liquidation plan

and the BCA further empowers the Register to amend and add to this restriction list by the Regulations. Under the IBC Act¹⁴⁸, the directors power is restricted on (4) and (5). It is interesting to note that under the new BCA, directors can have

¹⁴⁴ S87 BCA

¹⁴⁵ S113 BCA

¹⁴⁶ S112 BCA

¹⁴⁷ S116(2) BCA

¹⁴⁸ S47(2) IBC Act

power to remove a director, subject to the express authorization of Memorandum and Articles.

Disqualification of Directors

BCA introduces the whole section of the list of disqualified persons, but there is no such provision found in IBC Act. This perhaps clarifies many gray areas in the previous IBC Act. Persons disqualified include¹⁴⁹, under S111(1)

- (a) an individual who is under 18 years of age;
- (b) a person who is a disqualified person within the meaning of section 260(4) of the Insolvency Act;
- (c) a person who is a restricted person within the meaning of section 409 of the Insolvency Act;
- (d) an undischarged bankrupt; and
- (e) a person who, in respect of a particular company, is disqualified by the memorandum or articles from being a director of the company. “

Condition “(e)” is indeed a very useful tool. Company now has the statutory ground for disqualifying some persons, which is much desirable in case of family asset holding companies, or prevention of aggressive taking over bid by a third party.

Removal of a director and filling of Vacancy

Under the BCA, directors **may** be removed by a resolution of the Members¹⁵⁰ or, if permitted by the Memorandum and Articles, by a resolution of directors.

If such resolution is a member’s resolution, **simple majority** is needed in case of a formal meeting, but **absolute majority** is needed if by way of a written resolution. In addition, the resolution can only be passed in a meeting which is called for that particular purpose, and the notice has to state clearly the purpose; that is to say, no surprise attack.

If such resolution is a director’s resolution, the Articles should govern the manner

¹⁴⁹ S111(1)BC Act

¹⁵⁰ S114 (1) BCA

of such resolution to be passed.

I have a word of caution for those who use shelf companies. I think those agencies selling shelf companies have a tendency to include provisions to allow directors to remove directors. It is of no concern, if the company is used in holding personal assets. In case it is to be used in a group structure, this should be considered carefully, as this will become a flaw in the internal control of the company, for example, two directors acting fraudulently in concert may remove the third director without the knowledge of the shareholders.

The authority of directors to fill a vacancy on the Board is statutory authorized under the New BCA, unless the Memorandum and Articles expressly does not permit them to do so¹⁵¹. Under the IBC Act, the default is a resolution of members OR a majority of remaining directors¹⁵².

Notice of Directors Meeting

Subject to the any requirements of Memorandum or Articles, under the BCA, it requires reasonable notice to be given¹⁵³ but under IBC Act, it requires at least 3 days notice¹⁵⁴.

Directors Standard of Behaviors

The new BCA provides certain new requirements and concepts in dealing with the standard of behavior and disclosure of interest.

Both BCA and IBC Act contain similar provisions regarding directors' behavior. BCA stresses on the director to "act honestly and in good faith...and in what the director believes to be in the best interest of the company¹⁵⁵" and IBC Act stresses on "act honestly and in good faith with a view to the best interest on of the company..."¹⁵⁶

¹⁵¹ S113(4) BCA

¹⁵² S43(4) IBC Act

¹⁵³ S127(7) BCA

¹⁵⁴ S49(1) IBC Act

¹⁵⁵ S120(1) BCA

¹⁵⁶ S54(1) IBC Act

In addition, the BCA contains a provision that require the director to¹⁵⁷ :

“...exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company. “

AND that

“A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,

- (a) the nature of the company;*
- (b) the nature of the decision; and*
- (c) the position of the director and the nature of the responsibilities undertaken by him or her. “*

What it supposes to mean should be referred to the court.

However, BCA provides a leeway for directors of a company that is a member of a group of company or a joint venture

- (1) In case of the wholly owned subsidiary, if the Memorandum and Articles expressly permits, he can act in a manner which he believes is **in the best interests of the holding company even though it may not be in the best interest of the company.**¹⁵⁸
- (2) In case of a company which is **not** a wholly owned subsidiary, that is, the company has minority interest shareholders, the conditions are (a) expressively permitted by the Memorandum and Articles and (b) **prior agreement of the minority shareholders.**¹⁵⁹
- (3) In case of a company that is carrying out a joint venture between the shareholders, if the Memorandum and Articles permits, he can act in a manner that he believes is in the best interests of the holding company even though it may not be in the best interest of the company. BCA does not define “joint venture”, which I believe refer to

¹⁵⁷ S121 and S122 BCA

¹⁵⁸ S120(2) BCA

¹⁵⁹ S120(3) BCA

situation where the shares and voting rights are equally divided among the shareholders.

Directors' Interest in Contact and Disclosure of Interest

The regime of BCA regarding the treatment of disclosure of interest is totally new. Previously, under the IBC Act, the contact or agreement is valid if ¹⁶⁰

- (a) *the material facts of the interest of each director ...in the agreement or transaction and his interest in or relationship to any other party to the agreement or transaction are disclosed in good faith or are known by the **other directors**...; and*
- (b) *the agreement or transaction is **approved or ratified** by a resolution of directors ...*

OR,

- (a) *the material facts of the interest of each director...in the agreement or transaction and his interest in or relationship to any other party to the agreement or transaction are disclosed in good faith or are known by the **members** entitled to vote at a meeting or members; and*
- (b) *the agreement or transaction is **approved or ratified** by a resolution of members.*

Under the new BCA¹⁶¹, it becomes an absolute duty of the director to disclose, if

- (1) *"...after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, **disclose the interest to the board** of the company.*
- (2) *The **Regulations** shall prescribe the circumstances in which a director is interested in a transaction*
- (3) *...*
- (4) *...a disclosure to the board to the effect that a director 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, is a sufficient disclosure of interest in relation to that transaction.*
- (5) *For the purposes of subsection (1), a disclosure is not made to the board unless it is made or brought to the attention of every director on the board.*

It is an extremely stringent provision regarding disclosure indeed. The distinguishing features are

- (1) The disclosure must be made to the **board** and there is no provision for

¹⁶⁰ S56(2)(a) IBC Act

¹⁶¹ S124 BCA

- disclosure to the members, which differs from the provisions in IBC Act.
- (2) The circumstance in which a director is considered interested in a transaction could be governed by the Regulation, which may be amended by the Registrar from time to time.
 - (3) There is no provision for the members or board to ratify the situation, as we will see later, the transaction will not be invalidated because of the non-disclosure¹⁶². That is to say, all disclosures must be made to the board **prior** to the transaction.
 - (4) The disclosure should be made to every director on the board.
 - (5) However, the transaction may be voidable by the company if not disclosed properly¹⁶³.

The BCA provides a statutory definition of what constitute “sufficient disclosure “, under S124(4); which is

“a disclosure to the board to the effect that a director 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, is a sufficient disclosure of interest in relation to that transaction. “

Comparing with the IBC Act, which requires disclosure for

“...material facts of the interest.. in the agreement or transactions... and his interest or relationship to any other party to the agreement or transaction ...”¹⁶⁴

It seems that matters to be disclosed are less. That is to say, the principle is, as long as the director discloses his interest prior to the transaction before the Board, he has abided by the law.

Under BCA, it imposes heavy penalty for non-disclosure– the director commits an offence and is liable on summary conviction to a fine of USD10,000. There is no penalty cause under the IBC Act.

¹⁶² S124(5) BCA

¹⁶³ S125(1) BCA

¹⁶⁴ S56(2)(a) IBC Act

Validity Of The Contract If Directors' Interest Is Not Disclosed.

The mere non-disclosure of interest by the director does not invalidate the contract ¹⁶⁵. However, it is voidable by the Company ¹⁶⁶. There are two exceptions:-

- (1) the material facts of the interest of the director in the transactions are known to the **members and the transactions is approved or ratified by a member's resolution.**
- (2) The company receives fair value for the transaction.

Note that unlike IBC Act, disclosure to directors to validate the transaction is removed. BCA puts the authority back to the hands of the members. One question arises as to the meaning of "fair value". The law only provides a not-totally –satisfactory definition:

"...a determination as to whether a company receives fair value for a transaction shall be made on the basis of the information known to the company and the interested director at the time that the transaction was entered into. "¹⁶⁷

¹⁶⁵ S124(5) BCA

¹⁶⁶ S125(1) BCA

¹⁶⁷ S125(3) BCA

13 Registered Office and Registered Agent

There is not much change in this area, except that the company has to inform the Registered Agent within 15 days, the location of the original of some registers or documents if the original is not kept in the registered office. (See page 22 **New Requirements for Keeping Records and Filing**)

Registered Office

Under the BCA, although all statutory documents are now only required to be filed with the Registered Agent and not kept in the Registered Office (as provided under IBC Act). BCA spends a few paragraphs in defining a Registered Office¹⁶⁸, which is not found in IBC Act. One thing is different. If the address of the Registered Office is the same as the address of the Registered Agent, it should be stated in the Memorandum and the Notice changing the Registered Office of the company¹⁶⁹.

Registered Agent

Under the new BCA, only the registered agent of the company can file documents with the Registrar on behalf of the company.¹⁷⁰

A favorable development is the new provision in the BCA that registered agent can be changed notwithstanding anything written in the Memorandum or Articles, Section 92

“92. (1) A resolution to change the location of a company’s registered office or to change a company’s registered agent may be passed
(a) notwithstanding any provision to the contrary in the memorandum or articles, by the members of the company; or
(b) if authorized by the memorandum or articles, by the directors of the company.
(2) A change of registered office or registered agent is effected by filing a notice in the approved form. “

¹⁶⁸ S90 BCA

¹⁶⁹ S90(3)(b) BCA

¹⁷⁰ S232 BCA

However, the notice of change of Registered Agent must be endorsed by the new Registered Agent with his agreement to act as Registered Agent¹⁷¹. There are only two types of persons who can file the notice of change in Registered Agent, the existing Registered Agent or the solicitor in the Virgin Islands acting on behalf of the company¹⁷².

This countermands the effect of the legislation. What the law does not say is what if the existing agent fails to file the notice or refuses to file the notice? Since it is the statutory right of the company to change the Registered Agent, the only method is to engage a solicitor to file the same when there is really serious disagreement between the existing Registered Agent and the company.

At least, there is a way out.

The change of Registered Agent or Registered Office is not an amendment of Memorandum and Articles¹⁷³

Similar to the previous IBC Act, my concern is whether the Registered Agent has too much authority to hinder the administration of the company. Nevertheless, one good point about the BCA is that since all documents can only be filed by the Registered Agent, all publicly disclosed documents or documents in the hands of Registered Agent are genuine. This is unlike, say, in case of Hong Kong companies, people with susceptible motives may file documents without the authority of the company, calculated to confuse the public, sometimes hindering the normal operation of the company.

¹⁷¹ S92(3) BCA

¹⁷² S92(3) and S92(4) BCA

¹⁷³ S92(8) BCA

14 Mortgages and Charges

Changes under the New BCA

There are a few changes under the new BCA

- (1) Maintenance of a Register of Charges is now compulsory¹⁷⁴.
- (2) The Register should be kept at the registered office or the office of the Registered Agent¹⁷⁵
- (3) Unlike the IBC Act, which provides for optional registration of the Register of Charges of the company, the Registrar now maintains a **public Register of Charges** in respect of each company¹⁷⁶
- (4) A new Application in the **Approved Form** can be made to the Registrar by the company or the Chargee¹⁷⁷
- (5) A certificate of registration of the charge will be issued by the Registrar to the company and to the Chargee.¹⁷⁸
- (6) BCA also provides rules on variation of the registered charges and release of charges.¹⁷⁹
- (7) Note that there is no provision for Charges created before 1 Jan 2005 to be registered.

Priority of Charges

As for the priority of charges, the following rules apply

- (1) Charges created after 1 Jan 2005 and are registered have priority over charges registered subsequently.
- (2) Charges create after 1 Jan 2005 and are registered have priority over unregistered charges created after 1 Jan 2005;¹⁸⁰
- (3) Unregistered charges created after 1 Jan 2005 will rank **among them** in the order that they would have ranked had section (S166) not come into effect.¹⁸¹

¹⁷⁴ S162(1) BCA

¹⁷⁵ S162(2) BCA

¹⁷⁶ S163 BCA

¹⁷⁷ S163(1) BCA

¹⁷⁸ S163(4) BCA

¹⁷⁹ S164 and S165 BCA

¹⁸⁰ S166(1) BCA

¹⁸¹ S166(2) BCA

- (4) There is no effect on the priority ranking for charges created before 1 Jan 2005. That is to say, if the charge rank in priority over a charge created after 1 Jan 2005, it will continue to take priority over ¹⁸²
- (5) There are two statutory exceptions to the above rules.
 - (a) Agreement between the company and the Chargee to vary the priority
 - (b) Floating charges rank after a subsequently registered fixed charge UNLESS the floating charge contains a “negative pledge clause”¹⁸³. Negative pledge clause means a prohibition or restriction on the power of the company to create any further charges ranking in priority to or equal with the floating charge.

Conclusion

It is therefore very important, when creating a new charge for a BCA company to have it registered. However, searching on the public record of the Register of Charges in the hands of the Registrar does not necessarily disclose the full picture, we have to insist on inspecting the register of charges maintained by the company. Under S162 of the BCA, the company shall keep “a register of all relevant charges created by the company” which means that from 1 Jan 2005, this record must contains all charges created and currently active of the company.

Although the BCA does not have any effect on IBC incorporated under IBC Act, however, IBC must comply with the BCA on 1 Jan 2007. I think it will be a good practice to update the register of charges from now on, especially for those IBC used for holding mortgaged properties in Hong Kong.

My opinion is that this will have a positive effect on the use of BCA companies to acquire properties, as the weakness of IBC previously is its uncertainty due to confidentiality, and that the registration of register of members and directors are optional. Now the uncertainty has been partially removed.

¹⁸² S167 BCA

¹⁸³ S168(a) and (b) BCA

15 Continuation

There is a big difference in conditions under which a foreign company can continue as a BCA company.

Under the IBC Act, a foreign company can continue as an IBC even if its originating jurisdiction does not allow it to do so, S84 (2) of IBC Act

*“(2) A company incorporated under the laws of a jurisdiction outside the British Virgin Islands is entitled to continue as a company incorporated under this Act **notwithstanding any provision to the contrary** in the laws of the jurisdiction under which it is incorporated. “*

But the New BCA law only allows those foreign companies from a jurisdiction that allows continuation. S180(1) of BCA:.

“...a foreign company may continue as a company incorporated under this Act in accordance with this Part if the laws of the jurisdiction in which it is registered authorize it to continue in another jurisdiction, including the Virgin Islands”

In my opinion, BCA has removed one of the best provisions of the IBC Act.

There is not much difference in the procedures or documents need to be filed for continuing into BVI or out of BVI.

16 Dissolution

Liquidation

I am not going to cover in this note about liquidation. It is enough for me to say that the BCA contains provision as to voluntary liquidation only, under the condition that the company is solvent. Insolvent liquidation is governed by another piece of legislation, the Insolvency act 2003.

Striking off

There are five reasons that a BCA company will be strike off by the registrar, that is ¹⁸⁴

- (1) fails to appoint a Registered Agent
- (2) fails to file any return, notice or document required to be filed
- (3) the company ceases to carry on business
- (4) the company is carrying on business without a license, for which a license is required.
- (5) The company fails to pay annual fee or any late payment penalty by the due date.

Under the IBC Act the only reasons are (1), (5) and an additional reason – fails to observe S5 of the IBC Act.

All other provisions and procedures are similar to the IBC Act. However, I would like to elaborate on reasons (2) and (3), which are new to practitioners.

The new BCA Company can in fact carry on business on BVI unless it is restricted by its own Memorandum and Articles. Having said that, I find it is hard to believe that the Registrar can know that the company is not carrying on business. However, reason (2) is much more disturbing. In the previous IBC Act, there are only a few filing requirements. It is always the duties of the directors of the company to inform the administrator to file the required documents or notice, as in the case of the Company Secretary of a Hong Kong Company. However under

¹⁸⁴ S213 BCA and IBCA S99 and S40A (5) and (6)

the new BCA, there are much more filing requirements¹⁸⁵. The users of IBC have traditionally adopted a 'lassie faire" attitude on the business of IBC. It can be quite frustrating for them to closely monitor the day-to-day compliance of a BCA company. So, is there any reason to use BCA a company any more? Is it the cost of maintenance? However, the costs is now on average about US\$700 to US\$1500 to incorporate one for an end user, which is not materially less than that of a Hong Kong company.

¹⁸⁵ Say, for example, give notice to the Registered Agent of the location of the Registers within 15 days of change.

17 Miscellaneous Provisions

Regulations

Regulations are defined under S240 :

- (1) The Governor in Council may, on the advice of the Commission, make Regulations generally for giving effect to this Act and specifically in respect of anything required or permitted to be prescribed by this Act
- (2) The Regulations may provide for the circumstances in which , and the procedures by which, a company may re-registered from one type of company ... to another type of company...

Therefore, the Commission has the power to make Regulations under BCA to regulate all types of Companies. Until now, there is no such Regulation exist. I think when the BCA is in full operations in 2007, all Regulations will be in place.

Approved Forms

The Commission may design forms, known as “approved Form” to be used when it is required or specified in the BCA. The forms will be published in the Gazette.

Exemption from Tax

A relatively important section under the BCA is the provision about exemption of all form of taxes.

Under S242, Companies registered under the BCA will be exempted from all forms of taxes, including dividend paid by the company, capital gain realized in respect of shares, debts obligations, stamp duties on transfer of properties...

There is only one minor exception - stamp duties on transfer to or by a company of any landed properties situated in the BVI or transactions in respect of the shares, debt obligations or other securities of a land owning company.

Companies registered under the IBC Act are exempted from tax, but companies registered under the local Companies Act are not. The BCA aims to abolish the different treatments between the two (removing ring fencing), thus, there should

be some provisions to deal with the tax issue.

Offence Provision

A really scaring provision indeed, which has no equivalent provision under the IBC Act

Section 243 states that “Where an offence under this Act is committed by a body corporate, a director or officer who authorized, permitted or acquiesced in the commission of the offences also **commits an offence and is liable on summary conviction to the penalty specified for the commission of the offence.**”

Directors can no longer hide behind the corporate veil – such a very user un-friendly provision. Even when the director resigns from his office, he still remains liable under the provisions of BCA that impose liabilities on him, in respect of any acts or omissions or decisions made whilst he was a director.¹⁸⁶

In IBC Act, most of the penalty provision is worded so that only a director who knowingly permits the contravention is liable to a like penalty., e.g. Under S 66(4), which stipulates that

“A company that willfully contravenes this sections liable to a penalty of \$25 for each day or part thereof during which the contravention continues, and a director, who knowingly permits the contravention is liable to a like penalty.”

Carrying on Business in the BVI

An IBC under the IBC Act is not permitted to carry on business with persons in the BVI 187 and the restriction is required under S12(1)(l) to be stated in the Memorandum. There is no such restriction in the BCA.. Instead, under S9(4),

“Section 9(4)

The memorandum of every company shall contain a statement in the approved form specifying the limitations on the business that the company may carry on.”

Does this mean that all BVI Companies having this limitation cause can only carry

¹⁸⁶ S116 BCA

¹⁸⁷ S5(1)(a) – IBC Act

out limited business? What is the consequence of a company that is “ultra virus”?
How about its directors? A third party?

Contracts of a Company

The two pieces of legislations contain the same provisions as regards contracts.
(See S103 to S108, BCA and S68 to S69 and S71 to S74) except that BCA does
not have the corresponding provision regarding “contracts for payment or transfer”
under s70 of IBC Act.

18 Investigation of Companies

Part XIII – Investigation of Companies.

S222 to S227 give power to “a member” and the Registrar to apply to the court for appointment of an inspector to conduct an investigation under three grounds, namely, if the company appears to the court that

- (a) the business of the company or any of its **affiliates** is or has been carried on with intent to defraud any person,
- (b) the company or any of its affiliates is formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purposes, or
- (c) persons concerned with the incorporation, business or affairs of the company and any of its **affiliates** have connection wherewith acted fraudulently or dishonestly.

Under section S224(2), the court may authorize the inspector to enter and search, conduct oral examination, hearing etc. or require any person to produce documents.

Although the BVI court may not have the necessary juridical cooperation in other countries, this section, in effect, has given a useful tools for law-enforcers of other countries to discover documents in the hands of the registered agents, who reside in BVI

I find it interesting that the law refers to “affiliates”. There is no definition of “affiliates” found in the BCA.

19 Provisions Not Found in the New BCA

Section 32 – Seizure

One of the attractive features in the IBC Act not found in the new BCA is S32 of the IBC Act, which provides that the ownership of a shares in a IBC Act company could be re-instituted by application to the court (of BVI) even it is seized, confiscated, nationalized, or expropriated by a governmental authority whether it is legally constituted or not¹⁸⁸.

This is quite disappointing. The fact that this section is removed may be due to the fact that this has never been involved, or that this is over-sensitive, politically incorrect. Although most of the agents, when selling BCI IBC may not even know the existence of this provision, this provision nevertheless addresses the problem of some Asia jurisdictions, especially Taiwan.

Section 70 – Contracts for Payment or Transfer

This section deals with the situation when one of the contacting parties has died and the law provides that the death of that person, notwithstanding any provision to the contrary in the law of any other jurisdictions, will not defeat or impair the contract.

This is one of the reasons for an IBC to be used to protect assets. This provision effectively avoids any “in-between” situation whereby the contact is defeated due to the death of one of the parties.

¹⁸⁸ S32 IBC Act – see Appendix A

Appendix A : Section 32 of IBCA

32. (1) Where a governmental authority, whether it is legally constituted or not, in any jurisdiction outside the British Virgin Islands

(a) by or in connection with a nationalization, expropriation, confiscation, coercion, force or duress, or similar action; or

(b) by or in connection with the imposition of any confiscatory tax, assessment or other governmental charge, takes or seizes any shares or other interest in a company incorporated under this Act, the company itself or a person holding shares or any other interest in the company, including an interest as a creditor, may apply to the court for an order that the company disregard the taking or seizure and continue to treat the person who would have held shares or any other interest in the company but for the taking or seizure of the shares or other interest as continuing to hold the shares or other interest.

(2) Without affecting subsection (1), where a person whose shares or other interests have been taken or seized as referred to in subsection (1) is other than a natural person, the person making the application under subsection (1), or the company itself, may apply to the court for an additional order for the company to treat the persons believed by the company to have held the direct or indirect beneficial interest in the shares or other interest in the company as the holder of those shares or other interest.

(3) The court may, upon application made to it under subsection (1) or (2),

(a) grant such relief as it considers equitable and proper; and

(b) order that any shares or other interest in the company vest in such trustees as the court may appoint upon such trusts and for such purposes as the court determines.

Appendix B: Authority Which Can Only Be Exercised By Members

Authority, which can only be exercised by members (shareholders)

S12(1) gives the authority of amending the Memorandum to the Members of the Company, although under S12(4), the Memorandum contains a provision to authorize the Directors to amend the Memorandum. However, the following is statutory prohibited to be amended by the Directors¹⁸⁹ :

- (1) *to restrict the rights or powers of the members to amend the Memorandum or Articles,*
- (2) *To change the percentage of members required to pass a resolution to amend the Memorandum or Articles, or*
- (3) *In circumstances where the Memorandum or Articles cannot be amended by the members.”*

The IBC Act allows the directors to amend any part of the Memorandum or Articles if authorized by the Memorandum or Articles¹⁹⁰.

¹⁸⁹ S12(5) BCA

¹⁹⁰ S16(1) IBCA

Appendix C: Certain Penalty / Fee Provisions

| | BCA | IBC Act | Director's Liability under the IBC Act |
|---|---|---|--|
| Scale fee / Penalty for filing the amended Memorandum or Articles | Schedule 1 – Fee: USD25 to 100 depending on days being late. | Penalty : S16(4) – WC: USD50 each day | Yes – DK |
| Not providing copies of Memorandum and Articles to members | S16(2) summary conviction USD1,000 | N/A | N/A |
| Company not stating its full name on communication or legal documents | S26(2) summary conviction USD1,000 | N/A | N/A |
| Non-disclosure of discloseable interest | S124(6) summary conviction USD10,000 | N/A | N/A |
| Failure to keep company records | According to S96 Penalty S96(4) Summary Conviction USD10,000 | According to S66 Penalty S66(4) WC :USD25 per day | Yes-DK |
| Failure to keep a register of charges | S162(3) summary conviction USD5,000 | N/A | N/A |

WC – Willfully Contravenes

DK - Knowingly permits the contravention.