

Snapshot: bearer share companies in the British Virgin Islands

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Long gone are the days of offshore incorporation where corporate ownership could be concealed through the simple device of a bearer share company, whereby ownership was determined solely by physical possession of a company's share certificate. Regulatory reforms to improve corporate transparency and crackdown on white collar crime prompted most offshore jurisdictions to reform their bearer share regimes. The BVI is no exception. Although the reforms took place many years ago, complex issues arising from those reforms are still emerging, often involving valuable underlying assets.

The BVI Business Companies (Amendment of Schedules) Order 2007 (the **BCA Order 2007**) introduced a series of transitional arrangements which eliminated the privacy traditionally afforded by a bearer share company and had the practical effect of abolishing bearer share companies under BVI law in all but name. These arrangements are explained below.

Transitional arrangements for bearer share companies

Paragraph 34A of Schedule 2 to the Business Companies Act, 2004 (**BCA**) statutorily amended the memorandum and articles of association of all BVI companies to prohibit the issue of bearer shares after 31 December 2009 (the **Transition Date**). This had the effect of abolishing the concept of a bearer share company in the BVI. Accordingly, owners of bearer share companies were required to take either of the two actions below by the Transition Date in accordance with Paragraph 35:

1. convert any bearer shares into registered shares in accordance with the terms of the company's memorandum and articles; or
2. deposit all existing bearer shares with an authorised custodian, accompanied by a notice in the approved form under Section 71(1) of the BCA stating the full name of the beneficial owner of the bearer share and the name(s) of any other person(s) with an interest in the bearer share – eg a chargee.

An "authorised custodian" is a person approved by the BVI Financial Services Commission (**BVI FSC**) under sections 50A or 50B of the BCA. This status is held by a handful of fiduciary services providers in the BVI.

A bearer share company which failed to take either of the two steps above prior to the Transition Date becomes subject to the following constraints under BVI law:

1. Bearer shares which were not converted or deposited on or before the Transition Date are disabled by Sections 68 and 70 of the BCA. Thus a bearer share cannot be transferred or voted, nor can the bearer receive any dividends or distributions after the Transition Date.
2. It risks having a liquidation order made against it under Paragraph 37 of Schedule 2 to the BCA and the Insolvency Act upon the application of the BVI FSC.

What can be done to "rescue" a non-compliant bearer share company after the Transition Date?

Ogier has seen several instances where owners of bearer share companies were either unaware of the requirements imposed by the BCA Order 2007, or simply failed to implement the steps required by Paragraph 35 of the BCA. For bearer share companies in that position, it is not too late to regularise the company's affairs and avoid the risk of the company being liquidated upon enforcement action being taken by the BVI FSC.

The Eastern Caribbean Court of Appeal has confirmed that the following actions are available to regularise a bearer share company which has failed to have its bearer shares converted or deposited with an authorised custodian:^[1]

1. A bearer share company's board of directors retain the ability to exercise their powers to redeem bearer shares and convert them into registered shares after the Transition Date under Section 38(2) of the BCA. ^[2] This is a straightforward process where a functional board of directors remains in place, and no time limit constrains the exercise of that power.
2. If there is no functional board of directors, the BVI Courts have jurisdiction to appoint an equitable receiver over the company's board, who may then exercise the board's powers under the company's articles and the BCA to redeem and convert the bearer shares. ^[3] It will usually be just and convenient for the BVI Courts to make such an order because BVI law confers a constitutional right on persons to be compensated for the compulsory acquisition of their property, including shares. ^[4]

However, the BVI Courts do not have jurisdiction to order rectification of a company's share register to show the owner of a disabled bearer share as a registered shareholder. ^[5] The redemption and conversion procedure in Section 38(2) of the BCA appears to be the only mechanism for regularising a shareholder's status.

Complications caused by dissolution

The position will be further complicated if a non-compliant bearer share company allows itself to be dissolved. In a recent judgment, the Eastern Caribbean Supreme Court refused to restore a dissolved bearer share company in the circumstances where the sole corporate director had also been dissolved and the shareholder had failed to convert or deposit his bearer share prior to the Transition Date. ^[6] As the sole director had ceased to exist, the bearer share had been disabled, and the company had no creditors, Justice Jack held that nobody had standing to bring a restoration application for the company.

It remains to be seen whether the BVI Courts will take a different attitude than that taken in *Chinook Wind Alliance* if an application to restore a dissolved non-compliant bearer share company is brought by a competent director or creditor.

[1] *The Bank of Nova Scotia Trust Company (Bahamas) Ltd v Registrar of Corporate Affairs* (BVIHCVAP 9/2016, 10 October 2018, Mendes JA).

[2] *Sempacher Foundation v Lark Services Inc.* (BVIHC (COM) 27/2018, 17 January 2020, Farara J) at §§38-49.

[3] *West Indies Associated States Supreme Court (Virgin Islands) Act*, s.24(1).

[4] Virgin Islands Constitution Order 2007, ss.25 and 115.

[5] Net International Property Ltd v Adv. Eitan Erez (As Trustee in Bankruptcy for Rachel Sofer Sayag) (BVIHCMAP 10/2020, 22 February 2021, Webster JA) at §79.

[6] In re Chinook Wind Alliance Ltd (BVIHC (COM) 126/2020, 14 October 2020, Jack J).

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