

BRIEFING NOTE

18 January 2021

Searches and constitutional documents from a BVI law and Cayman Islands law perspective

Conducting due diligence on, and issuing legal opinions with respect to, British Virgin Islands (“BVI”) and Cayman Islands entities forms an important part of any offshore banking & finance or corporate lawyer’s practice. Reviewing search results and constitutional documents is integral to this.

In this article, we address some frequently asked questions with respect to searches and constitutional documents as they relate to BVI business companies (“**BVI Companies**” and each a “**BVI Company**”) and Cayman Islands exempted companies (“**Cayman Companies**” and each a “**Cayman Company**”). These are the most common types of legal entities in the BVI and the Cayman Islands respectively used in offshore banking & finance transactions.

1. What searches is it possible to carry out in the BVI and the Cayman Islands with respect to BVI Companies and Cayman Companies?

The searches that can be carried out in the BVI are fairly extensive and comprise the following:

- i. **A search of the records maintained by the BVI Registrar of Corporate Affairs (the “BVI Registrar”) that are on file and available for public inspection on the Virtual Integrated Registry Regulatory General Information Network (“VIRRGIN”).** These records include the following information and documents:
 - a. Company name and number, and foreign character name (if any);
 - b. Previous name history (if any);
 - c. Company type (i.e. that it is a business company);
 - d. Date of incorporation;
 - e. Status (i.e. whether it is active or dissolved);
 - f. Registered office;
 - g. Name, address and other contact details of its registered agent;

- h. Confirmation as to whether the register of directors is public or private (see paragraph 2(iii) below for further details);
 - i. Basic information with respect to shares (e.g. whether bearer shares are permitted);
 - j. Transaction history (with functionality to obtain certain filings);
 - k. Certificate history (with functionality to obtain certain certificates);
 - l. Certificate of incorporation (including any certificate of change of name);
 - m. Memorandum of association and articles of association (“**M&A**”);
 - n. Register of directors (solely to the extent that a BVI Company has elected to make it public – see paragraph 2(iii) below for further details);
 - o. Register of members (solely to the extent that a BVI Company has elected to file it – see paragraph 2(iv) for further details); and
 - p. Register of registered charges. This comprises any particulars of charge, variations of charge and notices of satisfaction or releases of charge, along with the corresponding certificates of registration, variation, satisfaction and release, under sections 163-165 of the BVI Business Companies Act, 2004 (the “**BVI Companies Act**”). Broadly speaking, the purpose of filing particulars of charge with the BVI Registrar is to protect the priority of the underlying security interests and to put third parties on constructive notice of them.
- ii. **A search of the electronic records of proceedings in the Eastern Caribbean Supreme Court, Court of Appeal (Virgin Islands) and the High Court (Civil and Commercial Divisions) available for public inspection contained in the judicial enforcement management system maintained at the registry of the High Court of Justice of the Virgin Islands.** This will show whether there are any actions or petitions against a BVI Company in the Eastern Caribbean Supreme Court, Court of Appeal (Virgin Islands) and the High Court (Civil and Commercial Divisions) at the time of the search.

The searches that can be carried out in the Cayman Islands are considerably more limited and comprise the following:

- i. **A search of the Cayman Online Registry Information System.** This search will reveal the following information:
 - a. Company name and number;
 - b. Company type (i.e. that it is an exempted company);
 - c. Date of incorporation;
 - d. List of current directors of the company;



- e. Status (i.e. whether it is active or dissolved); and
 - f. Registered office.
- ii. **A search of the Register of Writs and Other Originating Process of the Grand Court maintained electronically by the Clerk of the Grand Court of the Cayman Islands.** This will show whether there are any actions or petitions against a Cayman Company in the Grand Court of the Cayman Islands at the time of the search.

2. What constitutional documents, statutory registers and certificates are customarily reviewed by offshore counsel as part of a due diligence exercise, or for the purposes of issuing a legal opinion? Which of those documents are publicly available?

Offshore counsel will usually request the following documents with respect to a BVI Company and a Cayman Islands Company:

- i. **Certificate of incorporation (including any certificate of change of name with respect to a BVI Company and any certificate of incorporation on change of name with respect to a Cayman Company).** The certificate of incorporation of a BVI Company and a Cayman Company is conclusive evidence that all of the requirements of the BVI Companies Act and the Cayman Islands Companies Act (As Revised) (the “**Cayman Companies Act**”) (as applicable) in respect of incorporation have been complied with.

The certificate of incorporation (including any certificate of change of name) of a BVI Company can be obtained through a VIRRGIN search.

The certificate of incorporation (including any certificate of incorporation on change of name) of a Cayman Company is a matter of private record and can only be obtained with the consent of the Cayman Company authorizing its registered office service provider to disclose it.

- ii. **Memorandum of Association and Articles of Association.** The M&A of a BVI Company and the M&A of a Cayman Company together form that company’s constitution.

The BVI Companies Act and the Cayman Companies Act each set out certain requirements with respect to the M&A. Offshore counsel will review the M&A of a BVI Company and a Cayman Company to ascertain compliance with the BVI Companies Act or the Cayman Companies Act (as applicable) and, among other things, whether there are any: (a) limitations on the relevant company’s business, objects or powers, (b) consent requirements or reserved matters with respect to transactions that the BVI Company or Cayman Company (as applicable) is proposing to enter into, and (c) relevant execution requirements or other formalities (including with respect to any company seal) that need to be complied with.

The M&A of a BVI Company can be obtained through a VIRRGIN search.

The M&A of a Cayman Company is a matter of private record and can only be obtained with the consent of the Cayman Company authorizing its registered office service provider to disclose it.

- iii. **Register of directors and register of directors and officers.** A BVI Company must maintain a register of directors that contains the information prescribed by the BVI Companies Act. A Cayman Company must maintain a register of directors and officers that contains the information prescribed by the Cayman Companies Act. Each of the register of directors and the register of directors and officers is *prima facie* evidence of any matters directed or authorized by the BVI Companies Act or the Cayman Companies Act (as applicable) to be contained therein.

The register of directors of a BVI Company is generally a matter of private record. Although a BVI Company must file a copy of its register of directors with the BVI Registrar, this is not a matter of public record unless the BVI Company elects otherwise. It would be highly unusual in our experience for a BVI Company to make this election.

The name of each current director of a Cayman Company is publicly accessible upon paying a fee to the Registrar of Companies of the Cayman Islands (the “**Cayman Registrar**”). The historical details of the directors and officers of a Cayman Company (including the directors’ addresses and details of former directors and officers) and the register of directors and officers of a Cayman Company are a matter of private record and can only be obtained with the consent of the Cayman Company authorizing its registered office service provider to disclose it.

- iv. **Register of members.** A BVI Company and a Cayman Company must each maintain a register of members that contains the information prescribed by the BVI Companies Act or the Cayman Companies Act (as applicable). The entry of the name of a person in the register of members as a shareholder constitutes *prima facie* evidence that legal title in the share vests in that person. Therefore, share certificates (to the extent that any have been issued) are of secondary importance, though they are typically reviewed by offshore counsel for consistency with the register of members.

The register of members of a BVI Company is generally a matter of private record. However, a BVI Company may elect to file its register of members with the BVI Registrar at which point it becomes a matter of public record. If a BVI Company does this, it is worth noting that the BVI Company is bound by the contents of the register of members that is filed until it files a notice to cease registration of changes.



The register of members of a Cayman Company is a matter of private record and can only be obtained with the consent of the Cayman Company authorizing its registered office service provider to disclose it.

- v. **Register of charges and register of mortgages and charges.** To the extent that a BVI Company has created any charges, it must maintain a register of charges that contains the information prescribed by the BVI Companies Act. A Cayman Company must maintain a register of mortgages and charges that contains the information prescribed by the Cayman Companies Act irrespective of whether it has created any charges.

The register of charges of a BVI Company (if any) and the register of mortgages and charges of a Cayman Company are matters of private record and can only be obtained with the consent of the BVI Company or the Cayman Company (as applicable) authorizing its registered agent or registered office service provider (as applicable) to disclose it.

- vi. **Certificate of good standing.** The concept of “good standing” is slightly different in the BVI and the Cayman Islands. In the BVI, “good standing” means that the relevant BVI Company is on the Register of Companies, has paid all fees, annual fees and penalties due and payable and has filed with the BVI Registrar a copy of its register of directors which is complete. A Cayman Company is deemed to be in good standing if all fees and penalties under the Cayman Companies Act have been paid and the Cayman Registrar has no knowledge that the Cayman Company is in default under the Cayman Companies Act. Most offshore law firms will usually accept certificates of good standing that are no older than 30 days for the purposes of issuing a legal opinion and/or preparing a due diligence report.

Any BVI law firm or other professional services provider that has access to VIRRGIN is able to order a certificate of good standing from the BVI Registrar with respect to a BVI Company.

The position is different in the Cayman Islands, where only the registered office service provider of the relevant Cayman Company can order a certificate of good standing from the Cayman Registrar.

- vii. **Certificate of incumbency.** It is important to note that this is a reference to a certificate issued by the registered agent of a BVI Company and the registered office service provider of a Cayman Company, as opposed to a certificate issued by either the BVI Registrar or the Cayman Registrar. Whilst it is customary to review a certificate of incumbency with respect to a BVI Company and a Cayman Company as part of a due diligence exercise, most offshore law firms typically do not require a certificate of incumbency with respect to a Cayman Company for the purposes of issuing a legal opinion. A certificate of incumbency usually remains a key document for the purposes of issuing a BVI law



legal opinion, however. Most offshore law firms will usually accept certificates of incumbency that are no older than 30 days for the purposes of issuing a legal opinion and/or preparing a due diligence report.

Most certificates of incumbency typically confirm that the applicable BVI Company or Cayman Company is in good standing, as well as its name and company number, registered office address, the identities of the directors and shareholders and share capital (if applicable). It is usually also possible to request a confirmation that the registered agent or registered office service provider (as applicable) is not aware of any proceedings which are pending or have been threatened against the BVI Company or the Cayman Company, and that no receiver has been appointed to its knowledge.

3. What are the consequences if some of the constitutional documents are not provided by the commercial parties?

This will ultimately depend on which documents are outstanding, whether they are a matter of public record, and the client's risk appetite. For example, if the register of mortgages and charges of a Cayman Company which is the target of an acquisition has not been provided, that might not be acceptable to a potential buyer which is seeking to rely on a due diligence report to ascertain whether that Cayman Company has created any charges. On the other hand, if a Cayman Company is acting as a guarantor in an unsecured financing, the lender may not have any objections if offshore counsel is not provided with the register of mortgages and charges as this will not typically be relevant to the opinions to be issued to that lender.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice, please contact:

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