

BVI Government to introduce new business licensing and investment regime

Introduction

The Government has for some time been engaged in a consultation and review exercise concerning business licensing and matters relating to the encouragement and regulation of investment in the British Virgin Islands (**BVI**). Draft legislation reflecting the Government's proposals has now been published in the Gazette in the form of the Business Licensing Act (**BLA**) and the Virgin Islands Investment Act (**VIIA**).

The BLA and VIIA will repeal and replace the Business, Professions and Trade Licences Act (**BPTLA**) and introduce a new regime to regulate business activities and investment in the BVI. While they are currently in draft form and are therefore subject to amendment, the BLA and VIIA signal the introduction of significant change in this area that will be of interest to current business owners and potential investors.

The requirement for a licence

The BLA maintains the existing requirement that a person shall not engage in business in the BVI without the requisite licence. Business as contemplated by the BLA includes every form of trade and profession, any other activity that is carried on for gain or reward, or in the course of which goods or services are acquired or supplied.

In a departure from the current licensing regime, the BLA provides that the licensing requirement will apply notwithstanding the provisions of any other Act. This is different from the current position where certain business activities that are regulated under separate legislation (for example the Securities and Investment Business Act 2010), are specifically exempted from the need to obtain a licence under the BPTLA. If the provision survives the consultation process, businesses that are currently exempt from the licensing requirement under the BPTLA may need to apply for a licence under the BLA in addition to satisfying any other licensing requirement.

Under the BLA there is a general exemption exclusively for belongers from the requirement to obtain a licence in respect of the sale of any locally produced unprocessed agricultural products or any marine products or roadside vending of homemade pastries, drinks and confectionaries. The BPTLA provided for a similar exemption that was not restricted to belongers.

The application process

Persons familiar with the process of applying for a licence under the BPTLA will note several changes under the BLA.

First, a modest non-refundable application fee must now accompany the application. Second, the application must be submitted to the Board of the Virgin Islands Trade Commission (the **Commission**) established under the Virgin Islands Trade Commission Act 2020, for consideration. The functions of the Commission are explained in

more detail below. Third, and perhaps most significantly, a licence application submitted by a foreign investor (which in general terms is an investor that is not a believer) must be accompanied by a *certificate of approval of investment*. The process of applying for and securing a certificate of approval of investment is covered in more detail below.

In deciding whether to grant a licence the Commission shall also take into account the following matters:

- the previous conduct of the business and that of the persons who have an interest in that business, whether as owner, director, shareholder or otherwise;
- whether the business or proposed business of the applicant is one that has been traditionally reserved for believers or whether it is one in which believers have had a substantial representation;
- the efforts made to obtain believer participation in the business;
- the necessity, if any, for the institution of quotas for the types and categories of businesses to be licensed and operated; and
- the socio-economic impact of the proposed business activity to the economy of the BVI.

Certificate of approval of investment

The process of applying for and securing a certificate of approval of investment is governed by the VIIA. In broad terms, the VIIA prescribes that any foreign investor proposing to invest in the BVI must first apply to the Commission for approval of the proposed investment in the prescribed form and manner. In considering the application for approval of the proposed investment, the Commission shall consider the net benefit for the BVI and shall take into account a range of specified matters, including the following:

- the contribution of the investment to the national development, economic growth, public policy and national security objectives of the BVI;
- the contribution of the investment to the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices;
- the contribution of the investment to the implementation of programmes and policies aimed at redressing social and economic imbalances in the BVI, including gender-based imbalances;
- the contribution of the investment towards increasing employment creation in the BVI;
- the extent to which the investment will procure goods and services from the small to medium enterprises sector and believer suppliers in general; and
- any other factors the Commission may prescribe.

Licence renewals

The BLA introduces several changes to the licence renewal process, compared with the current process under the BPTLA.

The BLA prescribes that the same matters taken into account by the Commission when determining whether to grant a licence (as outlined above) should be taken into account when determining whether to renew a licence. In addition, certain prescribed documentation must accompany the renewal application. These include evidence that all taxes, social security contributions and national health insurance contributions have been paid, and copies of any applicable licences, permits or authorisations to operate the business. In the case of a company, the application should be accompanied by a certificate of good standing issued by the Registry of Corporate Affairs and current registers of directors and members.

Fees

The BLA provides for a general increase in annual licence fees. This is not unexpected given that licence fees under the BPTLA remained static for many years. As is the case under the BPTLA, licence fees under the BLA will vary depending on the nature of the business or profession in question. Licence fees will also be higher in respect of businesses or professions undertaken by foreign investors compared with those undertaken by belonger investors.

The proposed annual licence fees range from US\$1,500 to US\$15,000 per year in respect of businesses undertaken by foreign investors and US\$150 to US\$1,500 per year in respect of businesses undertaken by belongers.

The Commission

The Commission is charged with receiving, reviewing and determining applications for the grant and renewal of licences under the BLA. The Commission has a wide role under the VIIA and will perform a range of functions, including the following:

- receiving and considering investment proposals received in accordance with the VIIA and approving or disapproving such applications and issuing certificates of approval of investment;
- promoting foreign and domestic investment;
- undertaking promotional activities to attract foreign investment;
- registering and maintaining a register of belonger and foreign investors and their investments;
- providing support services to investors and assisting with ongoing relations with the Government; and
- assessing economic sectors and investment proposals and projects for investment potential.

Reservation of economic sectors and business activities

The VIIA provides that Cabinet on the advice of the minister responsible for investment promotion, may through the publication of regulations, reserve certain categories of:

- economic sectors; and
- business activities,

as exclusive to the following categories of investor:

- the Government;
- belongers and entities whose majority shareholdings are owned by belongers;
- joint venture partnerships between belonger investors and foreign investors; and
- investors that meet certain specified conditions pertaining to the net benefit that the investment would afford the BVI.

Regulations have not yet been published and it therefore remains to be seen how such a system of reservation will work in practice.

The VIIA provides that if an investor had lawfully invested in an economic sector or business activity prior to it being designated as reserved under the VIIA, the investor shall be entitled to maintain his or her investment after the effective date of the reservation.

Registration of investments

The VIIA contains a general obligation for investors to register their investments with the Commission where those investments exceed a designated monetary threshold to be specified in future regulations. The requirement to register investments applies to both belonger and foreign investors.

Investments that are already in existence when the VIIA comes into effect must be registered within a twelve-month period. The obligation to register also applies to investments that grow to exceed the threshold for registration once they do so even where they start off being below the threshold.

Expropriation

The VIIA provides that the government may expropriate an asset, a property right or any other right of an investor, if such expropriation:

- is taken in the public interest;
- is taken in accordance with applicable requirements and procedures; and
- is accompanied by the payment of *just compensation*.

The VIIA sets out a number of factors to be taken into account when assessing the level of just compensation and that it shall be based on an equitable balance between the public interest and the interest of those affected having regard to all relevant circumstances.

The circumstances in which expropriation will be deemed an appropriate remedy are not addressed in any detail in the draft legislation.

Change of control

The VIIA provides that an investor with an investment in a sector that is above the designated monetary threshold may not:

- change the ownership or control of the investment; or
- transfer any licence, permit, authorisation or concession owned by the investor, to a foreign investor through any form of merger, acquisition, direct sale or transfer,

without the approval of the Commission. Future regulations will specify the designated monetary thresholds that will apply to different sectors.

On receipt of an application the Commission may approve the application with or without conditions, or decline the application, but it is not clear under the draft legislation what criteria will be applied by the Commission in making this determination.

The VIIA contains an exception to the general requirement for the Commission's approval in relation to any transfer of ownership or control of an investment where a lender takes possession of a financed investment in the event of a default by the borrower or in the event of bankruptcy or insolvency. However, the requirement for the Commission's approval will still apply in the event of any future transfer of ownership by the lender and also if the lender seeks to operate the investment, other than for essential maintenance and temporary operation.

Performance agreements

Under the VIIA the Commission may, on behalf of the Government, enter into a legally binding performance agreement with any foreign investor seeking approval under the VIIA to agree on matters relating to the contributions of the investment to the development objectives of the BVI. While not expressly stated in the VIIA, it is presumably under such performance agreements that the terms of any incentives and contributions towards the Fund (see below) shall be documented.

National Economic Investment Fund

The VIIA provides for the establishment of a fund to be known as the National Economic Investment Fund (the **Fund**) into which shall be paid monies contributed by investors pursuant to the VIIA and such other qualifying investments payable pursuant to other legislation. The monies of the Fund shall be used only for the following purposes:

- infrastructure development;
- environmental protection and improvement;
- development programmes; and
- social programmes, including education, sports and health.

The legislation does not set out what criteria will be used to determine when a payment into the Fund will be required, or what level of payment will be expected.

Incentives

The VIIA provides that the Commission may introduce incentives and other support mechanisms as may be required for investments after consultation with the relevant minister responsible for any specific economic sector and with the consent of the minister responsible for finance where revenue is involved.

The incentives which may be introduced include the following:

- residency;
- customs duty exemptions/reductions; and
- tax reductions, including in relation to property tax and payroll tax.

Investment incentives shall be available for investment projects with such minimum prescribed investment as may be determined by the Cabinet. The VIIA sets out the list of areas of economic activity that shall be eligible for investment incentives, which are as follows:

- tourism, research and development;
- professional and financial services;
- business process outsourcing;
- fisheries research and development;
- environmental research and development;
- alternative energy research and development;
- manufacturing and production;
- agriculture research and development; and
- international air and sea transport.

The introduction of the VIIA will repeal the following legislation:

- The Pioneer Services and Enterprises Act;
- The Hotel Aid Act; and
- The Encouragement of Industries Act.

The VIIA provides that any incentives granted under these Acts shall continue to apply until their expiry.

Conclusion

The publication of the BLA and VIIA heralds the introduction of significant change to the regulation of business licensing and investment in the BVI. We will remain engaged with the legislative process and will provide our own observations on the draft legislation to the Government. We will also publish further guidance once the legislation is introduced. In the meantime, we are available to answer any questions from existing or potential investors in the BVI to help them to ascertain what the impact of this legislation might be on their business interests.

For more information or if you require any guidance in connection with investing in the BVI or in relation to any licence application or renewal, please email us at ghp@ghpbvi.com or reach out to one of our lawyers using the contact details below.

Contact Us

SHEILA C GEORGE

Managing Partner | George Henry Partners LP

☎ + 1 284 393 7001 | + 1 284 340 3322

✉ sheila.george@ghpbvi.com

JOHANN E HENRY

Partner | George Henry Partners LP

☎ + 1 284 393 7002 | + 1 284 340 3422

✉ johann.henry@ghpbvi.com

PAUL E MELLOR

Partner | George Henry Partners LP

☎ + 1 284 393 7003 | + 1 284 340 4822

✉ paul.mellor@ghpbvi.com

JERMAINE O CASE

Senior Associate | George Henry Partners LP

☎ + 1 284 393 7004 | + 1 284 346 4422

✉ jermaine.case@ghpbvi.com

Copyright © George Henry Partners LP

The content of this guide is intended for general information purposes only and is current as at the date of publication indicated. This guide does not constitute legal advice and should not be relied upon as such. You should always seek specific legal advice that takes into account your individual circumstances.