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An overview of BVI financial law

Colin Riegels
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The British Virgin Islands (BVI) is a very small British overseas territory in the Caribbean, with a population of around 25,000 natural souls. However, it is also the domicile for over 800,000 offshore vehicles. Most of those vehicles are companies, but a small number are limited partnerships or trusts. A report by KPMG in 2000 suggested that approximately 41% of the world's offshore vehicles were formed in the BVI.

Those offshore vehicles fill a variety of different commercial roles: investment funds, joint ventures, asset holding vehicles, structured finance vehicles and so forth. These vehicles are used globally but (with the possible exception of investment funds) with increasing emphasis on the Brazilian, Russian, Indian and Chinese (Bric) economies.

In April 2007 the Financial Times published an article indicating that the BVI was the second largest source (behind Hong Kong and ahead of Russia) of international foreign direct investment, with \$123 billion invested through BVI companies in the preceding year.

Structuring

The majority of offshore vehicles in the British Virgin Islands are incorporated under the BVI Business Companies Act 2004. After a long period of consolidation, this is now the sole company statute in the BVI. It is reflective of the most common features of Anglo-Saxon based company law, but with modifications to provide maximum flexibility in relation to corporate structuring.

The statute contains a number of features designed to widen the appeal of BVI companies. For example, the statute contains no provisions relating to capital or, by extension, to surplus or share premium. The right to

declare dividends is determined solely by solvency post-distribution. The Act imposes a simple but straightforward mechanism for registration of security interests and determining priority.

Potentially problematic areas like financial assistance, *ultra vires* and corporate benefit are given robust treatment. Flexible corporate restructuring tools, including US-style 'true merger' provisions, have been included. The Act is amended and updated approximately twice a year on average.

Partnerships in the BVI are either formed or regulated under the Partnership Act 1994. Trusts are regulated in part by the Trustee Act 1961 and partly by the Virgin Islands Special Trusts Act 2003 (Vista), although much of the law relating to trusts is still found in the English common law (which applies to BVI by statute).

BVI trust law similarly contains a number of characteristic offshore innovations – for example the enforceability of purpose trusts and the proscribing of rules against perpetual vesting. Vista trusts are special trusts which abrogate the rule in *Bartlett v Barclays Bank*, which requires trustees to actively manage companies whose shares form part of the trust assets.

Regulatory

Licensing and regulation of investment funds is principally dealt with under the Mutual Funds Act 1996 but this is expected to be replaced in 2009 by the Securities and Investment Business Act (SIBA), which is in the consultation stage. SIBA is partly a product of the BVI's recent admission to the IOSC, and will introduce into the BVI for the first time securities legislation and financial markets regulation.

The BVI's mantra has always been 'light but effective' regulation, but in common with most countries, regulatory creep tends to result in increasing rather decreasing regulatory burdens.

The BVI has very few licensed banks due to an extremely strict licensing regime under the Banks and Trust Companies Act 1990. Conversely, there are a plethora of licensed trust companies in the BVI, also regulated under the same statute.

Insurance regulation in the BVI remains in something of a state of flux. The Insurance Act 1994 still regulates the profession; however the Insurance Act 2008 has been enacted, but not yet brought into force, pending the drafting of relevant subsidiary legislation.

Insolvency

The longest statute in the BVI is the Insolvency Act 2003. The statute is expressly drafted to give primacy to the interests of creditors (particularly secured creditors) in dealing with the consequences of insolvency, and enforcement of security rights. Provisions relating to voidable transactions prior to liquidation are made subject to 'safe harbours' to protect legitimate attempts to refinance failing companies.

The statute imposes for the first time in BVI law the concepts of liability of directors for insolvent trading prior to liquidation. It also gives statutory force to the *Isda's* model netting laws. The Insolvency Act also reflects the fact that most BVI vehicles will have assets and liabilities outside of the jurisdiction, and so contains broad provisions for cross-border co-operation in insolvency proceedings.

Other key legislation

Like many offshore jurisdictions, the BVI has a raft of legislation giving the authorities a wide range of powers to deal with financial crime, and to co-operate with investigators in foreign countries. Key legislation includes the Financial Services Commission Act 2001; Proceeds of Crime Act 1997 (most recently amended in 2008); the Financial Services (International Co-operation) Act 2000; the Anti-Money Laundering Regulations 2008 and the Financial Investigation Agency Act 2003.

The BVI has a Category One shipping registry, although vessel registrations are not a mainstay of the jurisdiction. Maritime matters principally fall under the Merchant Shipping Act 2004.

Financial and corporate

Recommended firms

Tier 1

Harneys
Walkers

Tier 2

Conyers Dill & Pearman
Maples and Calder
Ogier

Tier 3

Appleby

Tier 4

Dancia Penn & Co
Farara Kerins
Forbes Hare
Hewlett Beck & Arad
McW Todman & Co
O'Neal Webster

The difficulties facing regional offshore competitors like the Cayman Islands have taken a similar toll on law firms in the British Virgin Islands (BVI). Fund formation practices have been forced to redirect their efforts towards restructuring and, in some cases, liquidating established funds. "Funds are keeping the lights on for everybody and a bit of financial work beyond that," says one BVI partner.

If there was any doubt beforehand, the past year has confirmed that firms cannot afford to be overly reliant on any one region for their client bases. In the hopes of offsetting dwindling transactions from London and New York, BVI's broader corporate practices have spent the year refocusing themselves on the increasing deal flows originating from BRIC countries and Latin America.

"Emerging markets are faring better than the US and UK in terms of streams of work," says one BVI partner. "During the autumn, when obviously the news agencies were focused on the bailouts in the US and London, under the radar Russian companies benefited from a bailout by the Russian government. We saw a bubble of activity there." Transactions from another Bric member, Brazil, have sustained activity as that country's fledgling private-equity market throws more and more work to offshore centres.

Fallout from Bernard Madoff's Ponzi scheme has roiled investment funds worldwide, adding another segment of work for lawyers in BVI. Since the investigation began into the disappearance of nearly \$65 billion invested in Madoff funds, feeder funds have been actively pursuing investments involved with the scheme and kept firms busy with preliminary litigation proceedings. Some fund complexes have been forced to unwind completely.

Fraud accusations abroad have also prompted more involvement from BVI regulators in fund activity. BVI lawyers are still awaiting the passage of the proposed Securities and Investment Business Act, which is slated for enactment in the next year. The new set of regulations would force hedge funds to produce transparency safeguards such as annual audited accounts and to operate under two independent directors. Although it is far from dramatic in its proposals, lawyers here see change to the BVI funds industry as inevitable. "I don't think it can be business as usual anymore," says a BVI partner. "When the market comes back, we're going to have to do business in a different way."

Harneys

The departure of Ray Wearmouth from Harneys' corporate department was the most significant lateral movement last year in the BVI. But despite this loss of senior talent, competitors point to the quality of the remaining partners at Harneys. "Ross Munro is a junior partner but he has a good reputation. Every time I've worked with him I've thought he was very sensible," says a rival partner. "He's a great lawyer, a pragmatic guy," adds another.

Promoted to partnership in 2008, Munro now leads the firm's investment funds group. Colin Riegels' leadership of Harneys' corporate group receives similar praise. "I've worked with and known Colin for a number of years now and rate him very highly," says a peer. As the largest firm in BVI, Harneys' presence on the ground is seen as an important differentiation between the firm and its competitors.

The Russian state bank VEB (Vnesheconombank) retained Harneys as advisor for the creation of a \$2 billion credit facility for Deutsche Bank. The new facility subsequently allowed Deutsche Bank to refinance an existing facility with Eco Telecom and finance that company's purchase of a stake in rival VimpelCom. Another Russian deal saw the firm represent Citigroup Venture Capital International in the sale of National Logistic Company. Acquired by rival Itella,

the transaction value was estimated at €220 million (\$305 million).

One Harneys client observes: "We would describe the quality of the work as efficient, accurate and quite commercial in its approach which is, as you can imagine, welcomed by us and our clients. Turnaround time is also impressive."

Leading lawyers

Ross Munro
Colin Riegels
Peter Tarn

Walkers

Walkers maintains a leading presence in the BVI and Cayman Islands through focused, quality representations by senior talent. Jack Boldarin's leadership of the corporate group and Richard May's funds work are the basis for Walkers' success since entering the BVI market in 2002.

"We love the Walkers firm. They've done such a great job for us. When we went into the BVI in 2006, they immediately started assisting us with our projects in the Caribbean," says a client. "I can't speak highly enough about how responsive they are. The guidance we receive is right on point, exactly what we need."

Representing Fresh Del Monte Produce, a Walkers team led by Boldarin negotiated the acquisitions of three banana and pineapple facilities in Costa Rica for a final closing price of \$403 million. Recommended by peers for his growing transactional knowledge relating to the market, senior associate Simon Hudd also acted for Walkers on the deal.

In funds work, Walkers is serving as lead counsel to the investment group Capital H. Richard May and Phillip Sacks are working to create two feeder fund structures and an additional private-equity fund for the Swiss client.

Another ongoing relationship is that between Walkers and financial services provider Macquarie. Recently, Macquarie Capital Products retained May to integrate the company's investment management arm into the capital products group, subsequently structuring a feeder fund for the new inter-company entity.

Leading lawyers

Jack Boldarin
Richard May

Conyers Dill & Pearman

The expansion of Conyers Dill & Pearman's client base hasn't gone unnoticed by competitors, though some rivals believe this growth

has left the firm in need of more senior practitioners like Robert Briant.

Briant is roundly recommended by peers for his experience in the market and consistent ability to close transactions. "Conyers is a firm with some good personnel. I personally think Robert Briant is a very good lawyer and I recommend work to him when I'm conflicted out," says a peer of the firm.

Retained by the Brascan Corporation, Briant created the investment fund Brascan Brazil Real Estate Partners. The \$2 billion fund will have a focus on the commercial real-estate sector in Brazil and highlights Conyers' growing brand in the region, thanks to an office in São Paulo. Other offices include Dubai, Hong Kong, London and Moscow. "The nice thing that Conyers has done is increase their global coverage," says one competitor.

Leading lawyers

Robert Briant

Maples and Calder

Following its success in the Cayman Islands, Maples and Calder established its BVI office in 2004 with a similar focus on corporate matters and investment funds. While the firm's BVI practice has yet to attain the breadth of practitioners and expertise available in Grand Cayman, peers do see a carry-over represented by managing partner Robert McIntyre's quality of work. "Robert McIntyre is held in high regard on the funds side of the practice," says one competitor.

Clinton Hempel has been raising his profile at the firm as well. Advising Kappa Energy Holdings, Hempel helped close the sale of the Colombian oil and gas producer to Pacific Rubiales Energy for \$168 million. He also represented Macrovision Solutions to obtain the \$650 million in acquisition financing needed by the digital entertainment provider to acquire Gemstar-TV Guide International.

Leading lawyers

Clinton Hempel
Robert McIntyre

Ogier

The corporate talent available at Ogier's BVI office received a significant boost when the firm lured Ray Wearmouth away from rival Harneys this year. "Ogier did quite well in recruiting Ray Wearmouth away from Harneys. He's certainly a very experienced corporate and banking lawyer," says one market observer.

Ogier's BVI team also includes Simon Schilder and Rachael McDonald. A veteran of

the firm, Schilder is described as "a very good lawyer, very well respected," by a peer, who goes on to say: "He's definitely one of the key players." Senior associate McDonald is seen as a rising practitioner in the corporate practice. "She's certainly one to watch for the future," says a competitor.

In January 2009, Schilder advised Passport Capital regarding the creation of two agriculture-focused funds. The creation of the Passport agriculture fund and Passport agriculture master fund was undertaken simultaneous to Ogier's restructuring of two existing funds for the investment management company.

Corporate restructuring work also saw Schilder serving as the primary BVI counsel to the Etalon Group. Ogier advised the Russian construction company throughout its corporate restructuring concerns in late 2008.

Leading lawyers

Simon Schilder
Ray Wearmouth

Other ranked firms

According to competitors, **Appleby** has yet to reach its full potential in the BVI, where the success the firm has found in Caribbean jurisdictions like Bermuda and the Cayman Islands is still a work in progress. But peers note that the firm's diversified client base of international financial institutions and industrials will allow it to pull through the financial downturn largely unscathed.

In co-operation with Allen & Overy's New York office, Appleby's James McConvill advised HSBC in the financing for the retail expansion of an unnamed US retailer in 2009. Made available through HSBC's Panama branch, the \$1 billion financing allowed the retailer to expand into Latin America by way of deposit and forward sale agreements in BVI.