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Legislative developments and trends

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This year so far has seen radical reform in the corporate and commercial laws and indeed the regulatory framework of the British Virgin Islands. The demand for tighter regulation and more modern registration requirements and processes has driven broad changes with deep implications. Investors, and their legal advisors, should take particular note of amendments in two areas of legislation: company law and financial services.

Company law

The transitional period for re-registration under the BVI Business Companies Act, effective since January 1 2005, ended at the start of 2007. BVI companies existing before this date had the option to continue as an international business company under the existing legislation until January 1 2007, re-register as a company governed by the new act, or transfer to a different jurisdiction. The new act applies to all companies registered in the BVI, and the distinction between international and local companies has been removed.

This legislation overhauls BVI company law. The maintenance of authorized share capital is no longer mandatory. The scope of directors' duties and the relevant standards of care expected of directors are clarified. Furthermore, the provisions for the payment of dividends and distributions have been tightened and a new regime for registering charges has been introduced, making it compulsory for companies to maintain a register of charges. Failure to do so is a criminal offence.

The act contains comprehensive provisions relating to segregated portfolio companies (SPCs) which were previously available for exclusive use by insurance vehicles in the BVI. Their use is extended to private, professional

and public funds registered under the BVI Mutual Funds Act 1996.

Company law reform has been coupled with the launch of the new Virtual Integrated Registry and Regulation General Information Network (Virrgin), an internet-based information system. Virrgin offers industry practitioners an electronic means to file, process and receive feedback relating to documents filed with the Registry of Corporate Affairs. So far, the jurisdiction has processed about 8,000 incorporations and more than 7,000 post-incorporation transactions using this facility.

Financial services

While there has been considerable attention given to Companies Act reform, other significant legislative changes have also taken effect this year. On January 15 2007, three pieces of legislation came into force: the Financial Services Commission (Amendment) Act 2006 (FSCA), the Banks and Trust Companies (Amendment) Act 2006 (BTCA) and the Company Management (Amendment) Act 2006 (CMA).

Robert Mathavious, the head of the Financial Services Commission (FSC), recently said: "We will not provide a haven for the ethically challenged." Anyone who takes this as regulatory rhetoric will be quickly disabused of that notion upon reading the FSCA. The legislation enhances the FSC's powers considerably.

The FSCA amends the Financial Services Commission Act 2001, the principal legislation setting out the powers of the FSC, and provides the regulatory framework for financial services business operating in or from the BVI. It clarifies the scope of financial services business and what constitutes unauthorized business in this area. It also redefines the role of the FSC with a specific reference to enforcing anti-money laundering regulations.

It introduces a new framework for cooperating with international regulatory bodies, but retains safeguards against so-called fish-

ing expeditions, particularly assistance in tax matters.

The BTCA and the CMA follow the same pattern as the FSCA in seeking to clarify the precise scope of business that they seek to govern – banking and trust business in the case of the former and company management business in the case of the latter. An interesting feature of the BTCA is that it stratifies trust licences into three classes: Class I relates to trust business and company management business, Class II relates to trust business only and Class III relates to company management business only. Companies providing a registered office or registered agent services to a limited partnership registered under the Partnership Act 1996 come under the scope of the CMA.

These two amendment acts introduce a threshold of 5% for equity interest requiring prior consent from the FSC, where such an interest in a licensed entity is to be acquired or disposed of. Interests below this level are not significant for the purposes of these statutes.

The new financial reporting requirements set out in section 17 of the CMA merit careful consideration, especially the quarterly filing requirements for unaudited financial statements. Two more key pieces of legislation, an Insurance Bill and a Financial and Money Services Bill, are expected to be on the statute book in the near future.

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Financial and corporate**Recommended firms****Tier 1**

Conyers Dill & Pearman
Harneys

Tier 2

Maples and Calder
Ogier
Walkers

Tier 3

Appleby
Forbes Hare

Tier 4

Farara Kerins
O'Neal Webster

Tier 5

Dancia Penn & Co
Hewlett Beck & Arad
McW Todman & Co

The full implementation of the BVI Business Companies Act has given a boost to the investment fund industry. The country has jumped into second place in front of Bermuda as an offshore domicile for funds. Old capital and surplus restrictions that hindered companies making distributions and share redemptions are steadily being removed and the Act has also introduced new types of companies, broadening the product base of the BVI.

Other trends at the time of writing include a high number of refinancings right across the asset classes and the increasing use of special portfolio companies to ringfence liabilities – previously this practice had taken place exclusively in insurance but it has now been extended to mutual funds. Historically the Cayman Islands have functioned as the private-equity hub in the Caribbean, but there is now greater scope for the industry in the BVI.

The structured finance market is underdeveloped in the BVI and some firms are now starting to show interest in developing it further. The relevant legal framework is identical to that of the Caymans, where Maples & Calder in particular has been very successful in establishing a structured finance practice. In the future we are likely to see a rise in the level and quality of structured finance in the BVI.

Harneys has traditionally been the established power, but the balance of power has been changing over the last few years with new players arriving and expanding. One observer of the market remarked that a magic circle of offshore law firms is emerging: Maples and Walkers based in the Caymans, Conyers and Appleby from Bermuda, and

Ogier and Mourant from Jersey. All these firms have international reputations and links and the traditional dominance of Harneys is under threat. Meanwhile, in the BVI, the gap between the firms in the top three tiers and the local firms in the bottom two tiers is reported to have widened.

Conyers Dill & Pearman

Five lateral hires have seen the number of lawyers at Conyers double in the last year and the firm's BVI outfit has been strengthened – there is market-wide acknowledgement that its tier-one status is deserved.

This reputation has won the firm big-ticket work from high-profile international clients in the areas of funds and cross-border mergers. The practice has also been working with onshore counsel to devise innovative ways to control the outflows of capital, including using side pockets, gates, lock-up periods, suspension of redemptions and in-kind distributions.

Perhaps the most significant signing was Greg Boyd who has already made a name for himself in the short time he has been on the island. He is described by one rival as “a very bright lawyer who is good to work with, productive and gets the job done.”

The two lawyers most frequently identified at the firm are Guy Eldridge and Robert Briant, who competitors say “gives sensible, practical advice and his clients like him”. Mark Forté has used his reputation as a litigator to good effect in the firm's insolvency practice.

Leading lawyers

Robert Briant
Guy Eldridge
Mark Forté

Harneys

Harneys, described by a competitor as “the original BVI law firm”, is the largest firm in the jurisdiction by some way and until recently its hegemony was unchallenged. Its pre-eminence continues to attract the most significant transactions to pass through the jurisdiction. The firm's lawyers frequently advise on complex cross-border transactions including joint ventures, private-equity transactions, listings and public M&A. The firm is regularly instructed by many of the world's leading law firms on behalf of household names in industry and commerce.

There have been some suggestions that Harneys does appear at times to be complacent, but there is no doubt that there are some outstanding lawyers at the firm. In particular, Peter Tarn was singled out for praise by many

commentators. One competitor said that this is because “he is smart and because of his business acumen... he is very experienced and he gets the most done with the least fuss”. Colin Riegels also goes down well with his clients because “he is responsive and pays close attention to detail”.

Leading lawyer Tim Slater left Harneys in December 2006 to work in-house while Ray Wearmouth returned from Hong Kong to head the corporate and banking teams in the BVI. Meanwhile Michael Gagie replaced Wearmouth as the head of Harneys' Hong Kong office shortly after advising on the largest transaction of the year, TNK-BP's \$5 billion guaranteed debt issuance in March 2007.

The firm has a great deal of capital markets experience and the over the last year its securities work has not been limited to the Alternative Investment Market (Aim) – Leonard Birmingham and Wendy Walker acted in the flotation on the Oslo Stock Exchange of Seabird Exploration in 2006 and Frigstad Discoverer Invest in 2007.

Since joining the firm from DLA Piper's London office in mid-2005, Simon Dinning has been very active, notably advising ReneSola on its issuance of Rmb929 million (\$120 million) US dollar-settled convertible bonds in late March 2007. Deutsche Bank's Hong Kong branch was the placing agent for the offering. At the time of writing this was only the second renminbi yuan-linked convertible bond available to international investors. It came hot on the heels of ReneSola's Aim flotation in August 2006 which Dinning had acted on with Michael Gagie. The pair also teamed up with Christopher Simpson and Tamara Cameron to act for Chagala Group and Gem Diamonds on their respective listings on Aim in February 2007.

On the M&A front the firm acted on the \$1.7 billion purchase of the Marriot chain of hotels from RBS, as well as for a British property investment group on its acquisition of 28 hotels from the Thistle hotel chain. Back in August 2006 Leonard Birmingham also acted for RBS Private Equity on the £500 million Allied London Properties management buy-out, which involved Deutsche Bank.

Leading lawyers

Kieron O'Rourke
Colin Riegels
Peter Tarn
Ray Wearmouth

Maples and Calder

Despite changes at the top, the 14-strong resident BVI team continues to consolidate its

market position. By June it had been joined by four new associates with management hoping to take on another two by the end of 2007. David Brooks has returned to the Cayman Islands and funds specialist Robert McIntyre is now the managing partner. A competitor conceded that he was “a good choice. He is experienced and knows the BVI well”. Another rival concurred: “Robert McIntyre is a good business man: he understands business and understands the market.”

Clinton Hempel heads the corporate practice which focuses on M&A, joint ventures, and banking and finance. Much of the firm’s work comes out of the US where confidence is growing in the use of BVI companies for private equity, joint ventures and corporate finance. At the same time an increasing amount of work originates in Latin America and Brazil in particular, an area where rising star José Santos Torres focuses heavily.

The team is also working on a growing number of public listings by BVI companies. It has recently worked on transactions involving several of the BVI companies listed on Aim and is now advising Albidon, Gem Diamonds and Amur Minerals. At the time of writing it was also working on a listing to the main exchange of the CSE.

In May 2007, Maples provided BVI counsel to Summerset Overseas in connection with the £595 million sale of shares in the Whyte and Mackay Group. In another standout deal closed in the same month, the corporate team worked as BVI counsel to Berggruen Residential on the first-ever public offering by a BVI company on the Israeli Stock Exchange.

Leading lawyers

Clinton Hempel
Robert McIntyre

Ogier

After rejecting approaches by Maples and Calder and Appleby, W Smith’s managing partner, Duncan Smith, steered the firm into its merger with Ogier in February 2007, crafting an offshore colossus spanning nine jurisdictions. This has given the BVI outfit a greater degree of traction and increased its visibility on the radar to London. The new business this is generating means that the firm is looking to augment its BVI team over the next year.

Leading lawyer Simon Schilder heads a competent corporate team which is riding an M&A boom. In the firm’s standout deal of the year, which closed in March 2007, Ogier advised the Royal Bank of Scotland on the £951 million acquisition of Condor Overseas Holdings, a joint-venture vehicle owned by Whitbread Group and Marriott UK Acquisition Company. The vehicle holds a

portfolio of 46 Marriott-branded four-star hotels in the UK.

Led by Bronwyn King, the investment funds team has also had a very busy year, advising on a mix of segregated portfolio companies, standalone funds and master feeder funds.

Ogier has been involved in a number of large financings over the last year. In January 2007 the firm acted for JPMorgan in the restructuring of a BVI fund to which the investment bank provided leverage into a segregated portfolio company. The \$800 million was refinanced through a variable-funding note to the fund. In March 2007 Ogier advised The Royal Bank of Scotland on its \$950 million post-sale financing of Fawkes Investments. In the same month Ogier advised the same bank as lender to the Liberty Living Group in respect of a £200 million refinancing, and BNP Paribas’s Swiss arm in respect of a \$400 million secured credit facility guaranteed by two BVI companies and inter-company loan and subordination arrangements between the two BVI companies.

The firm is serious about developing structured finance on the island and recruited Rachael Johnson from Clifford Chance in September 2006. Since she arrived Ogier has advised Cemex and the issuers on four fixed-to-floating perpetual callable debentures (the largest of which was \$950 million) to be issued by special-purpose vehicles incorporated with limited liability in the BVI.

Leading lawyers

Simon Schilder

Walkers

Described by a competitor as “the magic lawyer” at Walkers, Heidi de Vries leads the firm’s rapidly growing and increasingly powerful corporate and international finance offering in the BVI. With 15 lawyers Walkers is now the second-largest offshore law firm in the jurisdiction. In August 2006 the BVI team moved into new purpose-built offices to accommodate its swelling numbers – it has doubled in size in the last two years, and the firm expects to employ another five lawyers over the coming months.

“Walkers has hired a lot of people in the last 12 months and is gearing up nicely,” concedes a rival. “It could be our main competitor in 12 to 18 months time.” In particular Jack Boldarin’s arrival from the Caymans in November 2006 has helped to strengthen Walkers’ hand, although Chris Lloyd’s expertise will be missed when he retires later in 2007. One client explained that the reason that he and others opt for Boldarin’s services is because “Jack is very responsive and understanding of our needs for cross-border transactions”.

Walkers responded to the growth in the investment funds industry by splitting the mainstream corporate group and the funds team into two separate departments in January 2007. Boldarin is heading the corporate group while de Vries is taking care of funds.

The private client department is headed by the Chris McKenzie, known by the market as the leading trust lawyer in the BVI. McKenzie chaired the committee whose proposals led to the enactment of the BVI’s Vista legislation – which enables the formation of special investment trusts – and the other highly acclaimed recent BVI trust law reforms, and is acknowledged by rivals to be “streaks ahead” of everyone else in terms of trust law.

The corporate group has been extremely busy of late. Walkers advised Apax Partners in connection with the merger of Tommy Hilfiger Corporation with a BVI special-purpose vehicle and the global reorganization of the Tommy Hilfiger Group. In another noteworthy deal the corporate team acted for a prominent private bank in connection with the international cross-border merger of a Portuguese financial institution and a BVI company, in the first successfully completed transaction of its kind under the country’s relatively new Business Companies Act.

In other highlight corporate work the firm advised Real Estate Opportunities on both the corporate and financing aspects of its £400 million acquisition of Battersea Power and acted for Nuance Communications in its \$58 million acquisition of Focus Infomatics. Walkers also gave counsel to Saban Capital Group and German Media Partners on the €3.1 billion sale of its shares in Germany’s largest commercial television group, ProSiebenSat1 Media. At the time of writing Boldarin’s team was busy advising on the \$2.5 billion takeover bid for Uramin.

The firm has also been very active in international finance work. In 2006 it advised on the BVI financing and corporate aspects of an \$80 million pre-export finance facility arranged by ABN Amro for the Russian Copper Company. The loan’s collateral was provided by export contract payments. Then in July 2007 it gave guidance to ABN Amro and Commerzbank on BVI aspects of their \$150 million syndicated dual-tranche loan to ZAO JFC Group, the largest fresh-fruit supplier in Russia. Going to press, the practice was advising on a leading international hotel chain’s financing arrangements for the development of leisure facilities in the Caribbean and its joint venture arrangements relating to the development.

Leading lawyers

Heidi de Vries
Chris McKenzie

Appleby

Appleby has had a slightly uncertain year with regards to personnel. Jacqueline Daley-Aspinall stayed at the firm only briefly before returning to Harneys, and John Greenwood left the island and the firm for Withers in London. The firm has drafted in Alex Erskine from Bermuda to take over the management of the office. "Appleby is struggling at the moment," remarked another commentator, and it remains to be seen whether Erskine can turn it around. Therefore Appleby sits just outside the second tier for the time being.

Despite the firm's recently low profile, few dispute the firm's capabilities. In October 2006 Naresh Chand arrived from the Caymans to head the trust group, an area in which the practice is planning to aggressively expand. The office's most visible corporate lawyer is the experienced Sally Cox, who is "very personal and easy to deal with" according to fellow lawyers. In one highlight transaction she worked with firm's Hong Kong team on the issuance of \$400 million of guaranteed convertible bonds by Hongkong Land, a BVI-incorporated issuer. Other transactions the firm was involved in over the last year include a financing, a refinancing, a leasing and a public offering.

Forbes Hare

Forbes Hare is a boutique corporate firm comprising two partners and four associates which has built up referral relationships with number of international law firms. The firm has recently been busy in capital markets and structured finance, investment and project finance structures, and M&A and debt financing. The corporate practice is augmented by a strong litigation and insolvency practice and is well connected through former BVI financial secretary and name partner Glenroy Forbes. In the market it is felt that it is still a little premature to rank Forbes among the other tier two firms, but if its referrals continue apace it could soon be giving the market leaders a run for their money.

Corporate highlights of the last year included acting on behalf of the purchaser of a billion-dollar Russian metals producer and advising Island Capital in relation to its \$350 million investment in the Beef Island development, the largest real-estate development in the BVI. The firm also acted for the Ashmore Group in relation to a \$250 million Russian real-estate financing, as well in conjunction with Baker & McKenzie in relation to a \$60 million aircraft financing with GE Capital Corporation. In addition, the firm advised Fulbright and Jaworski in relation to the sale of a Middle Eastern media business.