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Investment funds in the British Virgin Islands

Ross Munro
Harneys
Tortola

As of December 2005, BVI funds regulated under the Mutual Funds Act 1996 can be set up as segregated portfolio companies (SPCs) under the BVI Business Companies Act 2004.

An SPC investment fund can be structured with a number of distinct and separate sub-funds without the risk that creditors of one sub-fund could have recourse against the assets of another sub-fund. It is anticipated that the SPC regime will be extended to additional categories of BVI business companies.

An SPC is a single corporate entity with statutory segregation of assets and liabilities between each of the segregated portfolios established within the company and the assets and liabilities that are not held within or on behalf of any segregated portfolio (the general assets). A segregated portfolio does not constitute a legal entity separate from the SPC.

Financial Services Commission approval

With the approval of the BVI Financial Services Commission (the FSC), an existing fund can be registered or a new fund incorporated as an SPC. When considering the application the FSC must be satisfied that the applicant has, or has available to it, the knowledge and expertise necessary for the proper management of segregated portfolios.

The application for approval to incorporate a new SPC is straightforward, and in many respects similar to an application for recognition or registration of a fund under the Mutual Funds Act.

An application for approval to register an existing fund has the following additional requirements but typically can still be completed in a few weeks:

- The directors must adopt a resolution to seek registration, because notice must be given to all shareholders (whether or not entitled to vote). Unless the memorandum and articles provide otherwise, the consent of shareholders is not required.
- There is no requirement to obtain the consent of any of the creditors of an existing fund. However, the fund's contractual commitments should be reviewed to ensure that registration as a SPC does not amount to a breach.
- A declaration must be submitted from one or more directors that the fund is solvent and that the fund (and each of its pro-

posed segregated portfolios) will, after assets have been allocated to segregated portfolios, be solvent.

- A statement of the assets and liabilities of the fund as at a date not more than six months before the date of application must be submitted, together with details of any transactions, events or other matters not reflected in the statement that have had or are likely to have a material effect on the assets and liabilities of the fund. The directors must also explain to the satisfaction of the FSC how the liabilities of the fund will be satisfied.

Creation of segregated portfolios

An SPC can create one or more segregated portfolios from time to time. In certain circumstances FSC approval is required, but in many cases the SPC will simply be required to notify the FSC within 14 days of creating the segregated portfolio and file a copy of the offering document, along with the prescribed fee.

Ongoing obligations

An SPC is subject to the following additional ongoing obligations:

- An SPC's financial statements must be audited and filed with the FSC within six months of the end of its financial year. The statements must contain an explanation of the nature of the SPC and certain other prescribed information.
- The offering document of each segregated portfolio must be filed with the FSC, and all changes notified within 14 days.
- In certain limited circumstances, a segregated portfolio transfer order from a BVI court is required for the transfer of assets attributable to a particular segregated portfolio that is not made in the ordinary course of the SPC's business.

Contracts with SPCs

When a SPC enters into a contract on behalf of a segregated portfolio, it is required to identify and specify the segregated portfolio that will receive the benefit and be subject to the burden of the contract. Unlike a number of other jurisdictions, failure to do so will not result in the directors incurring personal liability for the liabilities incurred under that contract. There will always be a risk that, during any court proceedings brought in a different jurisdiction, the courts of that jurisdiction will not recognize the segregation of assets and liabilities in granting or enforcing a judgement against the SPC. It is recommended that contracts entered into by the SPC are governed by BVI law and are made subject to the jurisdiction of the BVI courts. If that is not possible, limited recourse provisions can be included as an express term of the contract.

Fees

Application fees and ongoing annual fees are higher for SPCs than other companies incorporated under the BVI Business Companies Act 2004. However, there is still a substantial saving over the alternative of establishing individual companies for each sub-fund, as well as an opportunity to save on other operational expenses.

Corporate and commercial

Recommended firms

Tier 1

Conyers Dill & Pearman
Harneys

Tier 2

Appleby Hunter Bailhache
Forbes Hare
Maples and Calder
Walkers
W Smiths

Tier 3

Farara Kerins
O'Neal Webster

Tier 4

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

Conyers Dill & Pearman

The market perceives Conyers Dill & Pearman to be “excellent” and it is little surprise that its clients are predominately multinational corporations and well known international companies. The BVI office is staffed by two partners and three associates and managing partner, Rob Briant, is frequently recommended by peers as “an excellent corporate lawyer who is very good technically”.

However, rivals refer to the loss of the “prestigious” Harry Thompson, who has returned to Canada, as a “blow to the firm”. Nevertheless, Conyers has recruited two associates, with Audrey Robertson arriving from Hammonds and Ned Jackson from Mello Jones & Martin. The firm also recruited barrister Richard Evans to its “very sound” insolvency and restructuring practice, headed by leading lawyer Mark Forté. And the continued presence of Briant, along with the firm’s solid reputation in the BVI market, means that any perceived negative effects of Thompson’s departure are unlikely to translate into serious problems for the firm going forward.

Leading lawyers

Robert Briant
Mark Forté

Key contact partner

John Collis

Harneys

Market opinion suggests that Harneys, “a big old BVI firm” is “the number one firm in the British Virgin Islands with a long march on everyone else”. While its absolute dominance of the

market to the exclusion of all others might be overstating things slightly, Harneys is unquestionably a top-tier operation.

With a rock-solid team of six partners and 30 associates, the firm has increased its expansion drive this year as Russell Willings (ex-Allen & Overy) and Mumta Ita (ex-Clifford Chance) joined the firm’s “reputable” banking and finance department headed by the “very experienced and professional” Peter Tarn. Associate Simon Dinning also joined the firm from DLA Piper.

Harneys’ outstanding deal list for the past year, and its reputation among its peers, justifies its top-tier ranking. In August 2005 Peter Tarn and Simon Dinning advised Titanium Resources in relation to its reorganization in the BVI and other overseas subsidiaries, and on the placing of new shares in the company and the admission of the company’s shares to the AIM exchange in London. The deal was valued at \$10 million. Among the year’s many other high points, the firm advised HSBC on its £16 million term and revolving facility for the acquisition of PC-Pos and PC-Pos South Africa. Meanwhile, the “exceptionally bright and switched on” Colin Riegels, and Jamal Smith, were consulted in a stock purchase and sale between Verizon International Holdings, Nynex Asia IDC and Rogan Partners for the \$220 million purchase of the outstanding capital stock of Nynex Indocel Holding.

Riegels was also involved in a deal representing Alfa Telecom, one of Russia’s leading private equity telecommunications investors, in relation to a series of transactions totalling \$3.3 billion with Turkey’s Cukurova Group, resulting in Alfa’s acquisition of a 49% interest in Cukurova Telecom Holdings.

Another key transaction saw the firm act for holding company Quadrant-Amroq Bottling when Pepsi Americas acquired 49% of the company’s outstanding common stock. The deal was valued at \$51 million and the transaction involved the restructuring of a number of BVI entities in the Pepsi Americas group. Finally, the firm helped the overseas private investment corporation Export-Import Bank of the US, Export Development Canada and the Inter-American Development Bank in connection with a \$600 million new airport project in Quito, Ecuador.

Leading lawyers

Michael Gagie
Colin Riegels
Tim Slater
Peter Tarn

Key contact partners

Leonard Birmingham
Colin Riegels
Peter Tarn

Appleby Hunter Bailhache

Appleby Hunter Bailhache continued to add to its personnel this year with the arrival of Jacqueline Daley from Harneys and Michael Baker from Freshfields Bruckhaus Derringer. This brings the number of partners and consultants in the corporate and commercial department to four and the number of associates to six. Of the team, rivals point to consultant John Greenwood as being an “outstanding” and “well-known” lawyer.

The firm offers advice in most areas of financial law, including general corporate and commercial work, funds and capital markets. Recently, Appleby has advised Insight Foundation Property and WPL Investments on the sale and purchase of three BVI companies, and the refinancing of £37 million-worth of inter-company loans.

In equity capital markets work, the firm advised one of the largest private financial lending institutions in a strategic investment from numerous BVI subsidiaries in a complex structure and heavy negotiation on the terms of investment. The firm also



Forbes Hare

BVI corporate and commercial lawyers



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guided an Asian bank through a pre-initial public offering (IPO) by a large private PRC group engaged in bank finance guarantee, non-bank finance guarantee, entrusted lending and advisory business valued at \$10 million.

On the debt side, meanwhile, the firm acted for Wise Insight Finance, the BVI-incorporated issuer, on the issue of a \$320 million guaranteed convertible bond which was guaranteed by Key Properties, a Bermuda company listed on the Hong Kong Stock Exchange. This was an innovative deal because it was a high-value issue of listed convertible bonds, one of the largest in Hong Kong in recent years and clear evidence of Asian economic recovery.

Leading lawyer

John Greenwood

Key contact partner

John Greenwood

Forbes Hare

Forbes Hare makes its debut in the 2007 edition due to an impressive amount of recommendation by peers and a notable list of clients. The firm, a boutique commercial law firm set up last year by leading practitioners from various BVI and Cayman firms, has been involved in key roles on some of the jurisdiction's most notable capital markets deals, including advising (alongside Baker & Mackenzie) a well-known hotel group as borrower on the BVI legal aspects of a \$425 million financing, secured by five luxury hotel properties located in the continental United States, Hawaii, and Mexico. The firm also acted for Interlink and Interisle on the \$350 million Beef Island development.

Forbes Hare's other clients include ABN Amro, Lloyds TSB and KPMG, while several international law firms, such as Herbert Smith, are a good source of referral work. The firm is also very well connected through former financial secretary and name partner Glenroy Forbes, and retains strong relationships with a number of top-flight international firms such as Herbert Smith and Clifford Chance.

Key contact partner

Glenroy Forbes

Maples and Calder

Market opinion suggests that Maples and Calder has shown serious commitment to the BVI, and this manifests itself in the fact that the firm has grown substantially as a practice. Over the past 12 months the number of resident BVI lawyers has risen from nine to 14, enhancing the office's core areas of corporate, funds and litigation. Managing partner David Brooks arrived from Maples' Cayman office, John Rochester from Linklaters, Lyndsey Davis from Lawrence Graham and Joanne Dining from SJ Berwin; a further recruit was also in the pipeline at the time of writing.

From among the team, Clinton Hempel, described by a rival lawyer as a "well liked guy", heads up the corporate and commercial department and "respected" leading lawyer Robert McIntyre handles the bulk of the firm's funds work – representing around 15% of funds in the BVI last year. Charles Jennings, former managing partner of the BVI office, moved to the UK in April 2006, where he is now managing partner of Maples' London office. The BVI office specializes in advising on hedge funds, private equity and structured finance, and the firm has taken these specializations into the EU and the Middle East recently by opening offices in Dublin and Dubai.

A recent standout deal for Maples was its role acting as BVI counsel on a \$1 billion joint venture between Whitbread and

Marriott International. The joint venture, which owns 46 Marriott hotels, was formed last year following Whitbread's announcement to exit from the operation and ownership of its franchised four-star hotel business. Hempel and senior associates Rochester and Jose Santos advised Whitbread on the sale of its interests in the joint venture to Royal Bank of Scotland. The practice also won a role as BVI counsel on the £28 million Alternative Investment Market (Aim) listing of Amur Minerals – one of the first Aim listings under the BVI Business Companies Act 2004, the jurisdiction's new corporate framework. Elsewhere, Hempel and Rochester advised SABMiller on its purchase of the remaining stake in its Central American subsidiary Bevco for \$464 million.

Maples and Calder has also worked on many of the major pieces of litigation in the BVI over the past 12 months. For example, at the time of writing the firm was acting for the claimant in the IPOC case and the claimant in the Sibir Energy case.

Leading lawyers

David Brooks
Clinton Hempel
Robert McIntyre

Key contact partner

David Brooks

Walkers

The corporate side of Walkers' in the BVI is led by the "excellent" Heidi de Vries (ex-Clayton Utz). De Vries, described by one rival lawyer as "very well regarded in terms of funds" leads a team of lawyers who concentrate on M&A, corporate finance, structured finance, banking and international lending and investment funds.

Jack Husbands heads the expanding litigation, corporate recovery and insolvency practice at Walkers, while the "very capable" Christopher Mackenzie continues to develop a strong private client and international trust services practice.

Leading lawyers

Heidi de Vries
Chris Lloyd

Key contact partner

Heidi de Vries

W Smiths

W Smiths is a practice with an international focus offering advice on areas such as international finance, capital markets, funds and litigation. Regarded by market observers as being both "aggressive and persuasive" the firm has undergone a recent expansion into Hong Kong and partner Duncan Smith and associate, Nicholas Plowman (ex-Slaughter and May), have moved there to set up the office.

On the deal front last year, W Smiths advised the Royal Bank of Scotland on the acquisition of Condor Overseas Holdings, a joint venture between Whitbread and Marriott International owning 46 Marriott-branded hotels in the UK for £951 million. The firm also represented Crescent Entertainment in connection with a 50% stake in Village Road Show Pictures valued at \$120 million, and First Choice Holdings on its \$80 million acquisition of the Moorings Group. The practice also won a role advising SABMiller on the BVI aspects of its \$7.8 billion acquisition of Bavaria S.A. Elsewhere, the firm advised a BVI domiciled entity on a \$100 million bond issue linked to real estate investments in Europe and South America.

Leading lawyer

Simon Schilder

Key contact partners

Simon Schilder
Duncan Smith