

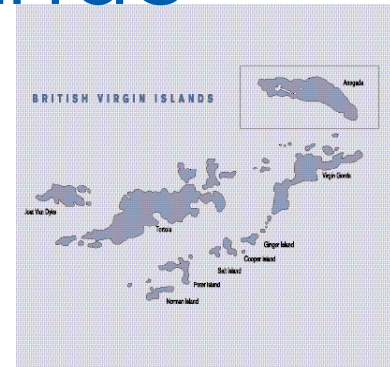
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Corporate finance legislation in the British Virgin Islands

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As a British Overseas Territory, the British Virgin Islands (BVI) offers security and stability that many associate with the British flag. The territory is responsible for its own internal self-government and is governed by democratically elected officials. The BVI has an independent legal and judicial system based on English common law with a right of final appeal to the Privy Council in London.

The BVI's policies and legislation have been developed in close partnership with the private sector, ensuring they meet the needs of the international financial community. Through this partnership the BVI government has established sophisticated and efficient supervision and regulation to safeguard the integrity of the jurisdiction, while creating an operating environment that is highly attractive to private enterprise.

International Business Companies (IBCs)

In 1984, the BVI government passed the International Business Companies Act 1984 (the Act), creating a user-friendly corporate legislative regime. As a consequence of that enactment the BVI has become the world's premier international corporate domicile, and this legislation remains the most important in terms of corporate finance activity. It is anticipated that a new Companies Act will be enacted soon that will contain provisions to foster growth of corporate finance activity in the BVI. However, for present purposes, this discussion is limited to the Act.

The large number of existing companies and the continued new registrations exhibit a global commercial acceptance of the BVI IBC as an international corporate vehicle. This aspect of a BVI IBC is possibly the most beneficial, as it translates into greater acceptance and familiarity among banks, brokers, lawyers, accountants and other professionals.

In addition to the flexibility and acceptability of the IBC, other general advantages include exemptions from all BVI taxes and stamp duty, confidentiality, limited statutory filings and ease of administration and operation.

Companies incorporated under the Act bear the hallmarks of ease of incorporation, ease of administration and flexibility combined with competitive pricing in a tax free, politically stable, common law environment. More specific advantages are:

- same day name approval and incorporation with release of incorporation documents from the Registry of Corporate Affairs, usually within 48 hours;
- incorporation is completed without the need for execution of corporate documents by initial directors and shareholders;
- straightforward and simple procedures for appointing and removing directors, issuing and transferring shares, increasing or reducing authorized share capital, amending the



memorandum and articles of association, and liquidating and dissolving companies;

- shareholders' and directors' resolutions may be passed in writing, dispensing with notice requirements;
- no requirement to hold annual general meetings, nor any meetings in the BVI;
- no requirement to prepare audited accounts or to file annual returns;
- no requirement to appoint BVI resident directors or a secretary;
- simple procedure for migrating companies; and
- statutory merger and consolidation procedures.

A share register must be maintained as part of the company's internal records, but this need not be filed with the Registrar of Corporate Affairs and consequently does not form part of the public record. A company may elect to submit a copy of its share register to the Registrar of Corporate Affairs if it wishes.

Maintaining a register of directors as part of the company's internal records is now mandatory. However, as with the share register there is no obligation to file a register of directors with the Registrar of Corporate Affairs and it does not form part of the public record. A company may elect to submit a copy of its register of directors with the Registrar of Corporate Affairs.

The creation and maintenance of a register of mortgages, charges and other encumbrances is optional, as is the filing of a copy of such register with the Registrar of Corporate Affairs.

It is a statutory requirement for an IBC to have a registered office and registered agent within the BVI.

Corporate finance issues

The Act provides considerable flexibility to an IBC in terms of raising finance, issuing equity and acquiring or merging with other businesses – all of which have made the IBC an ideal choice for corporate finance vehicles. BVI law is based on English common law, and the central issues of corporate power, directors fiduciary duties, corporate personality, limited liability and corporate benefit are in all substantive respects the same as the position under English common law. At the same time, however, BVI commercial legislation benefits from being much less cumbersome in many of the areas that have caused considerable difficulty and uncertainty under the corresponding English statutes. For example, while under English law it is unlawful for a company to directly or indirectly provide financial assistance for the acquisition by a third party of its own shares, generally referred to as financial assistance, there is no similar statutory prohibition in the BVI. Nonetheless, every director, in carrying out the business of the company, must act honestly and in good faith with a view to the best interests of the company and must exercise the care, diligence and skill that a reasonably prudent person will exercise in comparable circumstances.

An IBC has wide powers under the Act. Specifically an IBC has the power, irrespective of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company, which include the power to issue common, preferred limited or redeemable shares; issue shares that entitle participation only in certain assets; issue convertible securities; purchase, redeem or otherwise acquire and hold its own shares;

and guarantee a liability or obligation of any person and to secure any of its obligations by mortgage, pledge or other charge of any of its assets for that purpose.

Equity

With respect to issuing shares, IBCs may issue par value shares, no par value shares and may have an authorized capital expressed in different currencies. IBCs retain the flexibility to increase and reduce authorized capital, acquire their own shares and/or increase or reduce issued capital.

IBC's retain the right to issue shares to bearer rather than to a named individual or company. The rationale behind such scheme was that the name of the member is not required to be entered on the share register and therefore allowing greater anonymity than registered shares. Further, bearer shares are more freely transferable, being transferred simply by delivery of the bearer share certificate. The use of bearer shares, whether here or in other jurisdictions, has generally fallen out of favour in recent times, primarily because of the difficulty associated with identifying the beneficial owner.

As such the BVI government is in the process of enacting legislation which will ultimately require restrictions on the mobility of bearer shares. The proposed amendments require that bearer shares are to be held in the custody of an approved custodian within licensed financial institutions under special custodian arrangements. Following further consultation with all parties concerned in the BVI, the immobilization provisions will not become effective for seven years. For the first four years, the situation will remain unchanged for existing IBCs. After that, for a further three years, those IBCs that retain the power to issue bearer shares would pay a small increase in their licence fee.

When the Act comes into force, it will require all bearer shares to be held in the custody of either an authorized or recognized custodian, with the result that the transferability of bearer shares will be immobilized. A bill to amend the separate Financial Services Act making provision for authorized and recognized custodians will be introduced in the BVI legislature shortly. The Bill will make service providers licensed under any BVI financial services legislation eligible for consideration as an authorized custodian. In addition, a body corporate incorporated or formed outside the BVI that is not a resident in, and does not have a place of business in the BVI will also be eligible as an authorized custodian in certain situations.

Debt

The IBC has also proved very popular in terms of a debt financing vehicle. Growing familiarity in all major jurisdictions as to the use of the IBC in terms of borrowing or issuing debt, as well as guaranteeing the obligations of others, has become common practice. IBCs can lend, borrow or issue debt securities without being required to be licensed under local law. There is no specific regulation of debt issues by the BVI Financial Services Commission. IBCs retain great flexibility in terms of structuring deals, and issues such as financial assistance and corporate benefit are less problematic than in onshore common law jurisdictions. The creation of security

under foreign law governed documents is effective and the registration of security documents and priorities granted thereby are straightforward. The use of orphan structures are also achievable in the BVI, and hence we are experiencing a significant growth in structured finance transactions.

Also, the government is preparing SPV-specific legislation, which will no doubt reinforce the credibility of the BVI as an attractive alternative to the other premier offshore centres for structured finance transactions.

Mergers and acquisitions

The Act contains the provisions governing the merger of IBCs (both with each other and also with companies from different jurisdictions). The Act also deals with the consolidation of IBCs, the sale of assets by IBCs, corporate arrangements involving IBCs and their members, as well as provisions for the protection of dissenting members upon the occurrence of a merger, amalgamation or reorganizational sale. It is also possible for a foreign company to be continued in the BVI as an IBC, and an IBC may migrate to another jurisdiction, subject to the laws of that jurisdiction.

Conclusion

It is clear that the continued popularity of the IBC, and the growing acceptability of its use in corporate finance transactions, will continue to make the IBC a popular choice for investors around the world. The BVI government continues to support the use of innovative and pioneering structures and seeks to refine its product accordingly in light of the changing economic realities of the world.

Corporate and commercial

Recommended firms

Conyers Dill & Pearman

Harney Westwood & Riegels

Walkers

O'Neal Webster O'Neal Myers Fletcher & Gordon

Smith-Hughes Raworth & McKenzie

Walker Smiths

Appleby Spurling Hunter

Dancia Penn & Co

Farara Kerins

Hewlett Beck & Arad

Lex Caribbean

McW Todman & Co

Conyers Dill & Pearman

Conyers Dill & Pearman is headquartered in Bermuda, but also has offices in London, Singapore, Guernsey and across the Caribbean. Its office in the British Virgin Islands (BVI) is manned by two partners and four associates, and offers advice on all areas of BVI corporate law, including mergers and acquisitions, public offerings of securities of BVI companies, securitization, banking and finance.

The firm moves up to the top tier of the rankings this year, on the basis of consistent recognition by the market, which believes Conyers Dill & Pearman is a “class operation”. Although the BVI office is less heavily staffed than its Bermuda office, its reputation has grown over the last two years, and is now providing serious competition to Harney Westwood & Riegels. Robert Briant, in particular, is frequently singled out for praise by his peers, who describe him as having “a good head on his shoulders”.

Leading lawyer

Robert Briant

Harney Westwood & Riegels

The oldest firm in the BVI, Harney Westwood & Riegels now has seven partners and 29 associates working across its three offices in the BVI, Anguilla and London. The firm provides advice in all areas of financial law, including bond issues, securitizations, derivatives, initial public offerings, mergers and takeovers and corporate restructurings.

Its client base is international, covering all the main jurisdictions, and includes financial institutions, established

public and private companies, and founders and investors in start-up companies.

The firm is well respected in the BVI, and is viewed by its peers as being at the top of the market due to its history and size, though other firms have now closed the gap. Peter Tarn, head of the banking and finance, and corporate and commercial departments, is highly recommended by his peers and clients alike.

Key contact partners

Leonard Birmingham
Phillip Kite
Peter Tarn

Leading lawyer

Peter Tarn

Walkers

One of the largest firms in the Cayman Islands, Walkers established a presence in the BVI in 2002, taking over a local firm. It provides advice on all aspects of BVI law, but places particular emphasis on corporate and international finance law.

A great deal was expected of Walkers on its arrival in the BVI market due to its considerable Cayman Islands practice, and in particular it was hoped that the firm's arrival would raise the profile of the territory. Feelings are mixed in the market as to whether the firm has delivered on these expectations. Some feel that Walkers has not been in the BVI market long enough to compete at the top level. Others, however, feel that although its presence is not long-established, Walkers still deserves its position in the top tier of the rankings. Partner Simon Pascoe, in particular, is strongly recommended by his peers.

Leading lawyer

Simon Pascoe

O'Neal Webster O'Neal Myers Fletcher & Gordon

Formed in 1993 by the merger of BVI firm O'Neal Webster O'Neal with Jamaican firm Myers Fletcher & Gordon, the firm provides a range of commercial advice to a variety of domestic and international clients. It has a particular focus on BVI companies, partnerships and trusts, though it also offers banking advice in both domestic lending and international banking transactions.

Although senior partner Paul Webster, QC, is singled out by the market for praise, O'Neal Webster moves down to the second tier this year. The comment from the market is that, although it is a "sound firm" with "capable lawyers", it is more known in the BVI for contentious work than for its corporate/commercial practice, and does not have the profile of the top-tier firms.

Leading lawyer

Paul Webster QC

Smith-Hughes Raworth & McKenzie

Five-partner firm Smith-Hughes Raworth & McKenzie advises a range of clients including law firms, banks, accountants and trust companies. The firm's focus is on international commercial transactions, including cross-border joint ventures, mergers and acquisitions, and disposals, as well as providing advice on investment structures and offshore trusts to commercial clients and individuals.

Domestically, Smith-Hughes advises on a variety of finance activity involving BVI companies, including banking transactions, project and structured financing and restructurings. The firm also provides legal opinions on all aspects of BVI company law, from both its BVI and its London office.

Opinion in the market is that Smith-Hughes deserves its move up the rankings this year. It has lawyers who are "very good at what they do", warranting a second-tier ranking, with Clinton Hempel in particular being recommended.

Leading lawyer

Clinton Hempel

Walker Smiths

Walker Smiths is an international practice, focusing on finance and capital markets. Its worldwide client base includes corporations, law firms and financial institutions, and the firm also provides advice within the BVI to several international trust companies.

The firm moves up to the second tier this year on the recommendation of the market. Although its practice is limited, "what they do, they do well". The perception is that the practice has grown considerably over the last couple of years, with one lawyer commenting that the firm is "getting an increasing following". Duncan Smith in particular is held in high regard.

Leading lawyer

Duncan Smith

Other firms

Appleby Spurling Hunter was created in 2004 by the merger of Bermuda firm Appleby Spurling & Kempe with Cayman Islands firm Hunter & Hunter. It established an office in the BVI in February 2004 to provide BVI commercial and financial law advice directly to its clients rather than using an affiliated law firm. Although it is early days for the office, which is staffed by only one lawyer, opinion in the market is that the firm should be introduced to the rankings because of its status across the Caribbean, and that it will ultimately be a first division contender.

Dancia Penn & Co makes its first appearance in the rankings this year. The firm was founded in 1984 by Dancia Penn, attorney-general of the BVI from 1992 to

1999, and offers advice on all types of corporate and commercial work, including the formation and structuring of companies, financing, insolvency and public and private offerings.

Recently renamed due to the appointment of former partner Janice George-Creque to the High Court bench, **Farara Kerins** is a medium-sized firm offering legal advice to both local and international businesses. Gerard Farara QC is recommended by his peers, who credit him with a great deal of the firm's success.

Hewlett Beck & Arad offers advice on offshore corporate law, in particular the formation and structure of companies and partnerships, and mergers and acquisitions. It also advises on commercial banking transactions, as well as BVI regulatory issues, and the establishment of trusts and funds.

Lex Caribbean is a pan-Caribbean law firm, with offices in Barbados, Trinidad and Tobago, and Jamaica, as well as the BVI, and is part of the Ernst & Young network. It provides specialist advice on corporate recovery and insolvency matters, as well as offering private client, trust, banking and regulatory advice.

McW Todman & Co is added to the rankings on the recommendation of the market. Established in 1969, it is a small firm with only three lawyers, but provides advice on a full range of commercial and banking law to an international client base, predominantly in Europe and North America.