

British Virgin Islands

An overview of BVI financial law

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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.