

Harneys

Financing structures in the British Virgin Islands

Offshore jurisdictions are a bit like pop boy bands in a way – they all tend to look very much the same to the uninitiated. They predominantly apply some variation of English common law, they provide a high degree of corporate flexibility, no local adverse tax consequences, and they usually begin with a B. But within the field, there are a few more regional variations that become apparent. Bahamas tends to do more ship registrations; Bermuda has the bulk of the offshore insurance market; and Cayman does a huge proportion of the formation of hedge funds. The odd fish in the barrel is the British Virgin Islands (BVI). By some measures the BVI is the largest offshore jurisdiction in the world – in the 2000 KPMG report to the UK government on offshore territories, it was estimated that an astonishing 42 per cent of the world's offshore vehicles were formed in the BVI. But the BVI isn't really known for anything, so why it's enormous popularity?

Part of the answer is simply cost. The BVI is a first-tier offshore



By Colin Riegels,
partner, Harneys

local professionals with appropriate expertise. But unlike other first-tier jurisdictions, the costs in the BVI tend to be much lower (more in line with second-tier jurisdictions), causing a considerable gravitation towards the BVI in the middle of the market and accounting for much of the high volumes of incorporations. Prices vary between providers, but a boilerplate BVI vehicle can be acquired for around US\$2,100. An equivalent vehicle might cost US\$3,700 in Cayman or US\$4,350 in Guernsey (source: <http://www.ocra.com/pricing/feeschedule.asp>). In Bermuda, government incorporation fees alone can be up to US\$10,000.

But it isn't just cost. BVI companies are routinely used in pan-

offshore jurisdictions in a structure. Having gone to the expense of using, for example, a Jersey topco, using BVI companies at other points in the structure will multiply legal and possibly accounting costs in a way that can dwarf the original formation costs.

The other answer to the BVI's surprising popularity is, in large measure, financing. Whether the offshore company is being incorporated to buy a flat in Mayfair, operate as a hedge fund, trade derivatives, facilitate a buyout, act as a joint venture, or fulfill any of the other hundreds of functions that offshore vehicles are used for, it is a fairly safe bet that bank funding is going to play a key part in its commercial function. And it is also a safe bet the banks will need to be comfortable with the protection of their rights in the offshore jurisdiction. While all offshore jurisdictions recognise this to some extent, and most jurisdictions provide the usual comforts that secured lenders expect under the common law, lacking any other defined market speciality, the BVI has continuously refined its legal structure so as to provide the maximum level of comfort to providers of third party. Some of the steps that set the BVI apart are:

1. **The Insolvency Act 2003.** Most offshore financial centres employ extremely modern and up-to-date company law, but some still languish with insolvency law based upon the UK's Bankruptcy Act 1861 (c.134, 24 & 25 Vict.)

The BVI is a first-tier offshore financial centre, and shares all the attributes of such jurisdictions: English language, common law, reliable courts, stable currency and local professionals with appropriate expertise.

financial centre, and shares all the attributes of such jurisdictions: English language, common law, reliable courts, stable currency and

jurisdictional structures at all levels of the market, including the top. If cost was the sole driver, it would make little sense to utilise multiple

However, in 2003 the BVI adopted a modern and comprehensive insolvency and bankruptcy code that codifies the protections, secured and unsecured, lenders expect. The legislation is almost unique in that it explicitly recognises the cross-border nature of most offshore structures, and gives the BVI courts wide powers to assist foreign office holders. Or 'step back' where appropriate and allow the insolvency process in another jurisdiction more closely connected with the group's business and assets to take its course, avoiding a multiplicity of proceedings.

2. **Netting.** The BVI has adopted the ISDA model-netting law by statute – giving pre-preferential netting rights (prior to and subsequent to any insolvency) and allowing a level of comfort in relation to

If cost was the sole driver, it would make little sense to utilise multiple offshore jurisdictions in a structure.

derivatives transactions that does not exist for countries relying on common law rules relating to equitable set-off.

3. **Financial assistance.** Like most offshore jurisdictions there is no statutory prohibition on financial assistance for the purchase of shares of a BVI company, but BVI company law expressly legalises such financial assistance, thereby removing the concern that such transactions may be void (and a criminal offence) at common law (as was suggested in *R v Lorang* (1931) Cr App R 167) that causes concern in other jurisdictions.
4. **Orphan structures.** The BVI's VISTA trust regime allows orphan

structures to be set up within the jurisdiction without the trustee's liability concerns relating to the rule in *Bartlett v Barclays Bank* [1980] Ch 15. BVI VISTA trusts have so far escaped the academic criticism that the slightly conceptually different STAR trusts in Cayman have attracted.

Although offshore jurisdictions will generally always offer a substantial level of comfort in relation to financing structures, the BVI's continual evolution of its laws in this regard ensures it will probably be regarded as the safest home for the financing vehicle offshore for some time to come. ■



Harneys is the oldest and largest legal practice in the British Virgin Islands, and is consistently ranked as the leading law firm in the jurisdiction by the major international legal directories.

Our depth of expertise in the British Virgin Islands market is a result of our intense jurisdictional focus, our close involvement with the legislative development process, and the quality and experience of our lawyers.

Our offices in London and Hong Kong provide our European and Far East-based clients with time-zone sensitive legal advice on all aspects of British Virgin Islands law, and our closely affiliated trust company, Harneys Corporate Services, provides for easy incorporation of British Virgin Islands companies, along with a full range of post-incorporation corporate services.

"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".

IFLR1000, 2007