

The British Virgin Islands

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Introduction

The British Virgin Islands ("BVI") remains one of the largest offshore domiciles in the world. There are some 800,000 companies registered with the BVI's Registry of Corporate Affairs. Depending on the source, anywhere from 40 – 50% of those companies are used in Asia. It is therefore no surprise that the BVI has the distinction of being the second largest foreign investor in Hong Kong (the first being China). This is, of course due to the fact that so many BVI entities are used as vehicles for investing into Hong Kong (even though the funds do not originate in the BVI, because BVI vehicles are used, the investment is recorded as originating from the BVI). Hong Kong funds are often then invested into mainland China. This pattern also works in the reverse, so that BVI entities are also often used as vehicles for investments originating in China and into other countries whether in other parts of Asia, Africa, Europe, or the United States.

The popularity of BVI entities is not a matter of chance: rather it is because BVI companies, trusts, funds and other products share a number of benefits. For instance, the BVI has modern and flexible legislation that meets current international standards and yet retains a level of flexibility that permits BVI companies, trusts and funds to be used in a number of ways that are beneficial to the end user.

Funds

There are three types of funds that can be organised under BVI law. These are private funds, professional funds and public funds. For the high net worth individual the private fund will be of most interest. A private fund under BVI law is a BVI fund that is limited to 50 investors and that is not offered to the public. By contrast, a professional fund is limited to professional investors who must initially, invest a minimum of US\$100,000 in the fund.

The private fund will be of interest to the high net worth individual (HNWI) that wishes to engage in estate planning, but does not wish to use a trust. A trust is a common law concept and while familiar to persons in UK Commonwealth or former UK Commonwealth countries, may be unfamiliar to persons in other jurisdictions that do not recognise the trust concept. In a typical trust the actual property is held by a trustee for the benefit of other persons called beneficiaries. Persons unfamiliar with trusts are sometimes uncomfortable with a third person - a trustee - having control of their funds. In addition regulatory or government authorities who are not familiar with trusts may prefer to deal with a fund, with which they might be better acquainted.

A private fund can be set up using a partnership, a company or even a trust, but a company is the favoured vehicle and would be the recommended entity for HNWIs. Private funds must be recognised by the BVI regulator, the BVI Financial Services Commission. The process takes 2 – 10 business days and involves submitting an application to the FSC accompanied by the offering memorandum for the fund; the fund's constitutional documents; register of directors (at least 2 are required) and other corporate documents. The fund is also required to have an investment manager, administrator, custodian and auditor but can obtain an exemption for all of these except the administrator.

Once the fund is approved by the FSC the assets of an HNWI can be placed in the private fund without any loss of control by that individual. As a director, he/she can manage the assets of the fund without any restrictions other than such restrictions that may be imposed in the offering documents. Shares can be issued to any other family members if so desired, with no minimum investment requirement. Shares can be redeemed and therefore assets liquidated on demand at regular intervals. Shares can also be separated into different classes with different rights as to redemption and voting as may be required.

Companies

As mentioned above, one of the most known corporate vehicles in the world is the BVI business company and about half of such incorporated companies are used in Asia, in particular Hong Kong, Singapore and increasingly in mainland China.

A BVI company may be incorporated at a low cost and generally within 24 – 48 hours, once the BVI registered agent is satisfied with the due diligence information supplied and has filed the company's constitutional documents at the BVI Registry of Corporate Affairs. It should be noted that a BVI company can have a Chinese character name.

The BVI company is well known as a tool for business, private arrangements and succession planning. Once the company is set up the directors and shareholders can manage the company and its assets without any restrictions per se and ensure continuity. The corporate structure based on the principle of separate legal personality and limited liability, minimises investment risk for the owners. There are many other benefits which follow from the use of a BVI company including the following:

- (i) The BVI has no income tax, corporation tax, capital gains tax, inheritance tax, gift tax, wealth tax or of any other form of tax (that would usually apply to a company conducting business outside of the BVI). Accordingly, a BVI company can act as a tax neutral vehicle for varying investors.
- (ii) The BVI Business Companies Act, 2004 (the "Act") provides tremendous flexibility as it relates to the constitutional documents of a BVI company. The main benefit of this flexibility is that the constitutional documents can be drafted so as to mirror a specific transaction such as a joint venture, succession planning type structure or a listing scenario.
- (iii) The BVI legal system is based on English law and follows English law precedent but the BVI has its own corporate statutes and its own Commercial Court as a Division of the Eastern Caribbean Supreme Court with the court of final appeal being the Privy Council in London. This structure ensures certainty in the law and efficiency which is crucial for commercial operations.
- (iv) The Act specifically provides that a BVI company has the ability to include a provision in its constitutional documents that a director of the BVI company can, in a joint venture scenario, act in the best interests of one or more shareholders of the company regardless of whether such actions are in the best interest of the BVI joint venture company itself. This is seen as a great practical benefit to joint venture transactions, whether for Chinese inbound or outbound investments.
- (v) Profits from BVI companies can be released with significant ease. In order to make a distribution to shareholders, a BVI company only needs to satisfy a solvency test. The solvency test is satisfied if:
(i) the company's assets exceed its liabilities; and (ii) the company is able to pay its debts as they fall due. There are no distributable profits tests or similar requirements which is the case in some other jurisdictions.
- (vi) BVI companies are used as listing vehicles on the world's most renowned exchanges including the New York Stock Exchange, Nasdaq, the London Stock Exchange (Main Board and AIM), the Toronto Stock Exchange, the Singapore Stock Exchange and mostly recently on the Hong Kong Stock Exchange which provides a great exit mechanism for Asian investors.
- (vii) Minority shareholders of a BVI company may seek court redress in cases of fraud, violation of constitutional documents or unfair prejudice situations.
- (viii) Information on directors and shareholders is not required to be publicly filed which gives confidentiality, and as a succession tool, BVI companies can operate for an unlimited duration and can be used in conjunction with trusts for succession planning purposes.

Trusts

In addition to being the world's leading international corporate domicile, the BVI is now regarded as one of its leading international trust jurisdictions.

A trust is typically created when a person (known as the settlor) transfers property to one or more other persons (the trustees) for the benefit of others (the beneficiaries). Trusts are used for a variety of purposes. These purposes include a confidential way of holding assets, succession planning, probate avoidance, tax mitigation, the provision for a spouse after death, the protection of the inheritance of young children and other vulnerable relatives who may not be able to look after their own affairs, assisting with the succession to family businesses, and philanthropy.

VISTA trusts

2003 trust law reforms, in particular the BVI's VISTA trust legislation, have given the BVI a significant competitive advantage over the offerings of other jurisdictions. The VISTA trust legislation is unique in that it enables a shareholder to establish a trust of his or her company that disengages the trustee from management responsibility and permits the company and its business to be retained as long as the directors think fit.

VISTA trusts are typically set up in the following circumstances:

- When the settlor wishes to retain control, since matters will, when appropriate, generally be structured so that settlor-control is retained at the director (company) level.
- When the settlor intends shares and/or the underlying assets of a company to be retained.
- When trustee involvement in an underlying company's affairs is undesirable or inappropriate.
- Where purpose trusts are needed to hold shares in private trust companies (which themselves act as trustees of other trusts).
- Where the underlying assets of the trust are to comprise investments which involve a degree of risk which would be regarded as inappropriate for the trustees of a non-VISTA trust.
- At least one trustee of a VISTA trust must either be a company which has a trust licence from the BVI's regulatory authority (the Financial Services Commission) or a BVI private trust company (PTC).

Private Trust Companies

The BVI's 2007 Regulations enable unlicensed BVI PTCs to be established if the company is not remunerated for the provision of its trustee services, does not solicit business from members of the public and satisfies the other conditions outlined below.

PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:

- The principal advantage of a PTC is that it generally enables settlors or settlors' family members or their appointees to exercise a significant degree of control over trustees' decisions by being directors of PTCs.
- The corporate structure is readily understood by non-professionals, especially those from non-trust jurisdictions.
- Importantly, confidentiality is preserved.
- A PTC enables the trustee's charges to be kept in check.
- PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise speculative investments.

The BVI is increasingly selected as one of the leading jurisdictions to use incorporate PTCs for the following reasons:

- No licence is needed.
- It is not necessary to have a local director or authorised representative.
- There are no capitalisation requirements.
- The company need not establish a physical presence in the BVI.
- The costs of setting up and running the company are extremely competitive.
- Only the PTC's memorandum and articles of association will be filed publicly and (except in cases of abuse) there is no need to supply the regulatory authorities with copies of the trust documentation or to disclose the identity of the settlor or beneficiaries.
- A PTC can now be the sole trustee or a co-trustee of a VISTA trust.

The BVI is renowned for its state of the art legislation relating to funds, companies, trusts and trustee services which has been developed in close partnership with the private sector to ensure that it keeps pace with clients' needs. It is perceived as innovative, flexible and extremely user-friendly. This, along with the popularity of BVI business companies, trusts and funds make it a jurisdiction of choice for HNWIs from Hong Kong, China, Singapore and other parts of Asia interested in a secure, flexible way to protect and grow their wealth.

Author Biographies



Kerry Anderson

Kerry is the Managing Partner and heads the Investment Funds and Regulatory Team at O’Neal Webster. Kerry advises international clients on a range of cross-border corporate and commercial issues. He also focuses on advising clients on the structuring of BVI funds including hedge funds and private equity vehicles. Kerry’s clients include US and EU-based fund managers; closed-ended funds; open-ended funds licensed or approved as professional, private and public funds; approved managers; and segregated portfolio company funds. Kerry Anderson is listed as a ‘*Recommended Lawyer*’ in Legal500, 2015 and as a ‘*Leading Lawyer*’ in Chambers Global, 2015.



Christopher Simpson

Christopher Simpson is a partner in the Commercial Department of O’Neal Webster. His practice focuses primarily on corporate and commercial, banking and finance, and investment funds. He also advises on investment business and regulatory matters. Over the course of his career, Christopher has been involved in several IPOs, including on AIM, NASDAQ and the LSE. He has also been involved in ground breaking deals including one of the first ever court approved corporate arrangement schemes in the BVI and one of the largest single asset real estate financings in China. He was awarded BVI Banking Lawyer of the Year in 2013 by Lawyer Monthly and is recommended by Legal 500. His articles have appeared in various publications including BVI Finance, Global Capital Markets, China Business Law Journal, Financier Worldwide Magazine, Mondaq, Lexology and Legal 500. Christopher is a past Treasurer of the BVI Bar Association and is a Notary Public.



Christopher McKenzie

Chris McKenzie is a partner in the London office of the leading BVI firm of O’Neal Webster. He was the founding chair of STEP in the BVI and served as one of the two council members for STEP’s Caribbean and Latin America Region from 1999 to 2010 (and then as chair of the Region for a further 3 years). Chris is generally regarded as the BVI’s leading trusts and estates expert. He chaired the committee that formulated the proposals which led to all the BVI’s trust and estate reforms including both the VISTA trust legislation and the jurisdiction’s equally highly-regarded PTC regulations. Chris has also chaired the BVI Bar Association’s probate committee over 10 years and is former vice president of the Association. He is the author of all the BVI’s leading texts on trusts and estates and has been appointed by the BVI government to sit on a number of financial services advisory committees.