

## A Guide to Financing and the British Virgin Islands

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The British Virgin Islands (“BVI”) is home to over 416,000 active companies. This article considers the benefits of using a BVI company in financing transactions.

### BVI’s Broad Appeal

BVI has many attractive features, including political stability, tax neutrality and the absence of exchange control and currency restrictions. From a legal perspective it is creditor friendly, has a well-developed, English based legal system, a bespoke commercial court and flexible highly commercial legislation. On top of this, the BVI adheres to international standards of compliance. These are all factors which have led to the BVI being a jurisdiction of choice for corporate vehicles entering into financing transactions.

### Capacity and Powers of a BVI Business Company

Subject to the *BVI Business Companies Act* (the “Act”), any other enactment and its memorandum and articles, company has irrespective of corporate benefit –

- a) Full capacity to undertake or carry on any business or activity, do any act or enter into any transaction and
- b) For the purposes of paragraph (a) full rights, powers and privileges.

Without limiting the above, the powers of a BVI company include the power to do the following –

- a) Unless it is a company limited by guarantee or an unlimited company that in either case is not authorised to issue shares –
  - a. Issue and cancel shares and hold treasury shares;
  - b. Grant options over unissued shares in the company and treasury shares;
  - c. Issue securities that are convertible into shares and
  - d. Give financial assistance to any person in connection with the acquisition of its own shares;
- b) Issue debt obligations of every kind and grant options, warranties and rights to acquire debt obligations;
- c) Guarantee a liability or obligation of any person and secure any obligations by mortgage pledge or other charge, of any of its assets for that purpose and
- d) Protect the assets of the company for the benefit of the company, its creditors and its members and, at the discretion of the directors, for any person having a direct or indirect interest in the company.

For the purposes of d) the directors may cause the company to transfer any of its assets in trust to one or more trustee(s) and with respect to the transfer, the directors may provide that the company, its creditors, its members or any person having a direct or indirect interest in the company. However, the rights or interests of any existing or subsequent creditor are not affected by such a transfer, and those rights or interests may be pleaded against any transferee in any such transfer.

Under the Act no act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

## Some Advantages of BVI

- A BVI company is a legal entity in its own right, separate from its members and has legal capacity to sue and be sued in its own name under the laws of the BVI.
- There is no income or other tax of the BVI imposed by withholding or otherwise on any payment to be made to or by the company pursuant to the transaction documents.
- It is not necessary to ensure the legality, validity or enforceability of the transaction documents that they be registered in any register kept by or filed with any governmental authority in the BVI unless the documents create a charge.
- The transaction documents will not be subject to stamp duty in the BVI and no registration, documentary recording, transfer or similar tax, fee or charge is payable in the BVI in connection with the execution, delivery, filing, registration or performance of the transaction documents.
- A BVI company is free to acquire, hold and sell foreign currency and securities without restriction. There is no exchange control legislation under BVI law and accordingly there are no exchange control regulations imposed under BVI law which would prevent a company from paying dividends to shareholders, and all such dividends may be freely transferred out of the BVI, clear of any income or other tax of the BVI imposed by withholding or otherwise without the necessity of obtaining any consent of any government or authority of the BVI.
- A financial institution will not be deemed to be resident, domiciled or carrying on business in the BVI by reason only of the execution, performance and/ enforcement of the transaction documents by the financial institution.
- A financial institution has standing to bring an action or proceedings before the appropriate courts in the BVI for the enforcement of the transaction documents. There are generally no licensing requirements for a financial institution based outside the BVI providing finance to a BVI company. Similarly, the financial institution is not required to be licensed, qualified or otherwise entitled to carry on business in BVI to enforce its rights under the transaction documents including the exercise of its remedies under them.
- The choice of foreign laws, typically New York law and English law, would be recognised and given effect to in any action brought before a court of competent jurisdiction save for certain exceptions for example public policy and where the relevant foreign law is penal in nature.
- A final and conclusive is enforceable under the reciprocal enforcement of judgments legislation or where such legislation does not apply a new claim can be brought in BVI based on a final judgment in a foreign court under which a sum of money is payable.
- A BVI company is not entitled to any immunity under the laws of BVI, whether categorised as sovereign immunity or otherwise, from any legal proceedings to enforce transaction documents.
- There is no applicable usury or interest limitation law in the BVI which may restrict the recovery of payments or the performance by a BVI company of its obligations under the transaction documents.

## Security

The transaction documents are governed by the law of the jurisdiction of the lender, typically New York law or English law. As such, the key elements to the facility agreement and security package are driven by that jurisdiction.

The most common types of security granted are mortgages, charges and assignments. As the majority of BVI companies are holding companies, their assets are often only shares in subsidiaries, bank accounts and other receivables. As such, BVI security will almost always consist of an equitable mortgage over shares ("Share Mortgage").

### Share Mortgage

As part of the Share Mortgage, the lender will also receive and retain certain ancillary "deliverables", all designed to facilitate and allow the lender to take control of the company on an enforcement. These may consist of some or all of the following - (i) the original share certificate (if any) with respect to the charged shares, (ii) an executed, undated blank share transfer form, (iii) executed but undated resignation letters from the BVI company directors and accompanying letters of authority to date the same on an enforcement, (iv) an irrevocable proxy in favor of the lender permitting it to vote the shares in the company on an enforcement and (v) an undertaking from the company and, potentially from its registered agent, inter alia, to co-operate with and take instructions directly from the lender on an enforcement. The company's articles of association may also be amended to include certain share charge-related provisions. As a further protection for the lender in this context, it is standard practice for a notation that the shares have been charged to be placed on the register of members of the company and filed with the registrar of corporate affairs for registration, thereby putting third parties on notice that the shares of the company have been so charged.

### Security over Assets of a BVI company

There is no concept of perfection of a charge in the BVI. As such, the security is valid as a matter of BVI law when the charge is entered into. A BVI company is required to keep a register of all relevant charges created by the company. Where a company creates a relevant charge an application to register the charge may be made to the Registrar of Corporate Affairs in the British Virgin Islands (the "Registrar") pursuant to Section 163 of the Act. A charge registered under Section 163 of the Act has priority over any subsequently registered and unregistered charges. Third parties are deemed to have notice of any publicly registered charge.

Anybody can ask for a search to be carried out at the offices of the Registrar to ascertain whether any charges are registered over the assets of the subject company and whether a notation has been placed on the register of members of the company.

## Conclusion

BVI companies continue to feature prominently in all types of financing structures and joint ventures. Conyers Dill & Pearman's BVI office regularly acts on behalf of lenders and obligors on acquisition finance, structured finance and asset finance transactions in a variety of sectors and geographical areas including European Property, oil in the Middle East, energy in North America, telecoms in South America, worldwide resorts and hotels and shipping in the North Pacific to name but a few.

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