



AMERICAN
BANKRUPTCY
INSTITUTE

2022 Caribbean Insolvency Symposium

Recognition and Joint Appointments

Andrew Thorp, Moderator

Harneys | Tortola, BVI

Charlotte Caulfield

Kalo Advisors | Tortola, BVI

Shane Donovan

Mourant | Tortola, BVI

Nathan Mills

R&H Restructuring | Tortola, BVI

Anna Silver

FFP | Tortola, BVI

Recognition and Assistance of Foreign Insolvency Officeholders in the British Virgin Islands

Overview

The insolvency law of the British Virgin Islands (the **BVI**) is contained in the Insolvency Act, 2003 (the **Act**) and associated rules and regulations.

Liquidation

The provisions dealing with the liquidation (bankruptcy) of BVI companies are found in Part VI of the Act.

Under section 159, a BVI licensed insolvency practitioner may be appointed as a liquidator:

- (a) of a BVI incorporated company on an application under section 162; or
- (a) of a foreign company on an application under section 163.

The members (or shareholders) of a company may also, by a 'qualifying resolution', appoint a BVI licensed insolvency practitioner as liquidator of the company. A resolution is a qualifying resolution if it is passed at a properly constituted meeting of the company by a majority of 75%, or if a higher majority is required by the memorandum or articles, by that higher majority, of the votes of those members who are present at the meeting and entitled to vote on the resolution.

Under section 483, an individual resident outside the BVI may be appointed to act as an insolvency practitioner jointly with a BVI licensed insolvency practitioner if:

- (b) where he is appointed by the Court, the Court, or in any other case the person or persons appointing him, is or are satisfied that:
 - (i) he has sufficient qualifications and experience to act in the insolvency proceeding in respect of which the appointment is made;
 - (ii) he has given his written consent to act in the prescribed form;
 - (iii) he is not disqualified from holding a licence under section 477 (bankrupts and the like);
 - (iv) he is not disqualified from acting in the case of a company or a foreign company, under subsection 482(2) or in the case of an individual, under subsection 482(3) (auditors, directors, individuals connected to the company);
 - (v) there is in force such security for the proper performance of his functions as may be specified in the Regulations¹; and
- (c) prior written notice of his appointment has been given to the BVI Financial Services Commission (the **Commission**).

¹ Presently a policy of professional indemnity insurance with a reputable insurance company or companies against any loss arising out of any single claim and in the aggregate, annually, in the amount of at least \$500,000 for negligence or breach of duty, although the Commission has a discretion to impose a greater level of security.

Under section 162 of the Act, the circumstances in which the Court may appoint a liquidator to a BVI company include if the company is insolvent. Relevantly, under section 8, a company is 'insolvent' if:

- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under 157;
- (b) execution or other process issued on a judgment, decree or order of a BVI Court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
- (c) it can be shown either:
 - (i) the value of the company's liabilities exceeds its assets (balance sheet insolvency); or
 - (ii) the company is unable to pay its debts as they fall due (cash flow insolvency).

Those who are given standing to make an application under section 162 include the company itself, a creditor and (subject to permission of the Court which shall not be granted unless the Court is satisfied that there is a prima facie case that the company is insolvent) a member.

Those same persons also have standing under section 163 to apply for the appointment of a liquidator of a foreign company if the Court is satisfied that the company has a connection with the BVI and, amongst other things, the company is insolvent or it has been dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered. A foreign company has a connection with the BVI only if:

- (a) it has or appears to have assets in the BVI (usually shares in BVI subsidiaries); or
- (b) there is a reasonable prospect that the appointment of a liquidator of the company under Part VI will benefit the creditors of the company.

Under section 175, with effect from the commencement of the liquidation of a company:

- (a) the liquidator has custody and control of the assets of the company;
- (b) the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under Part VI or authorised by the liquidator;
- (c) unless the Court otherwise orders, no person may:
 - (i) commence or proceed with any action or proceeding against the company or in relation to its assets; or
 - (ii) exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company;
- (d) unless the Court otherwise orders, no share in the company may be transferred;
- (e) no alteration may be made in the status of or to the rights or liabilities of a member, whether by an amendment of the memorandum or articles or otherwise;
- (f) no member may exercise any power under the memorandum or articles, or otherwise, except for the purposes of the Act; and
- (g) no amendment may be made to the memorandum or articles of the company.

None of the above affects the right of a secured creditor to take possession of and realise or otherwise deal with assets of the company over which that creditor has a security interest.

On 18 May 2017, the BVI Court adopted the Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the **Guidelines**). Other jurisdictions to have adopted the Guidelines include:

- (a) The United States Bankruptcy Court for the District of Delaware;
- (b) The United States District Court for the Southern District of New York;
- (c) The United States Bankruptcy Court for the Southern District of Florida; and
- (d) The United States Bankruptcy Court for the Southern District of Texas.

The overarching objective of the Guidelines is to improve the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt matters opened in more than one jurisdiction (**Parallel Proceedings**) by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted.

The guidelines consist of an introduction, 14 guidelines, and an Annex that sets out procedural issues relating to joint hearings between courts.

The introduction outlines the basic aims and objectives of the Guidelines and encourages parties in Parallel Proceedings to consider the Guidelines at the earliest practicable opportunity with a view to enhancing coordination and cooperation among courts under whose supervision the debtor's estate is being administered. The sharing of information and the avoidance or minimisation of costs and inconvenience are encouraged. Where there is agreement among the parties they can make an application to the Court to establish protocols or orders for dealing with the debtor's estate.

The numbered guidelines set out detailed requirements and procedures for entering into and implementing the protocols or orders. The process is voluntary but once the parties enter into a protocol which is approved by the Court they will be required to conduct themselves in the continuing litigation in accordance with the terms of the protocol.

The Guidelines also deal with communication between Courts for the purpose of making orderly arrangements for hearings. Where there are joint hearings the Courts can communicate directly on procedural, administrative and preliminary matters relating to the joint hearing. Communication between Courts can take place by telephone, video conference call or other electronic means. Parties are entitled to be present or be represented during such joint communications and the communications shall be recorded. A written transcript may be prepared and treated as the official transcript of the communication. Copies of the transcript may be filed in Court as part of the record of the joint proceedings. Subject to local laws and procedures a Court may permit a foreign party or his representative to be heard in the joint proceedings.

The Guidelines make provision for the recognition and acceptance of orders made by foreign courts, and of the laws, regulations and practices of general application relating to proceedings in other jurisdictions, unless there is a proper objection on valid grounds.

The annex sets out in greater detail the procedures in the numbered Guidelines relating to joint hearings in those cases in which it is decided to hold a joint hearing.

Provisional Liquidation

The appointment of provisional liquidators is a form of interim relief that may be granted by the Court in the context of an application for the appointment of liquidators.

Under section 170 of the Act, where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, the Court may appoint a provisional liquidator of a company if:

- (a) the company, in respect of which the application to appoint a liquidator has been made, consents;
or
- (b) the Court is satisfied that the appointment of a provisional liquidator is necessary for the purpose of maintaining the value of assets owned or managed by the company.

An application for the appointment of provisional liquidators may be made by the applicant for the appointment of a liquidator, the company, a creditor or (again, with the permission of the Court) a member.

Generally speaking, an application for the appointment of provisional liquidators involves a two-stage test. The first and threshold stage is to consider whether the applicant has demonstrated that it is *likely* to obtain an order appointing liquidators on the hearing of the application (i.e. it is likely that the company is insolvent). Any views the Court may express about that will of course be provisional, because the substantive application itself is not being tried at the time of the application to appoint a provisional liquidator (or to set aside such an appointment). If such likelihood is not demonstrated, it would not, at least ordinarily, be right to appoint a provisional liquidator.

If on the other hand it is demonstrated, and the threshold thus crossed, then the second stage is to consider whether in the circumstances of the particular case, it is – as a matter of judicial discretion – right that a provisional liquidator should be appointed pending the hearing of the substantive application for the appointment of liquidators.

By section 171, a provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was appointed. The Court may limit the powers of a provisional liquidator in such manner and at such times as it considers fit.

'Soft Touch' Provisional Liquidation

In *Re Constellation Overseas Ltd* (Claim Nos. BVIHC (COM) 2018/0206, 0207, 0208, 0210 & 0212, 5 February 2019), the Court held that it has jurisdiction to appoint 'soft touch' provisional liquidators under section 170.

The essence of a soft touch provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. The purpose is to give the company the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation. It may be appropriate where there is no alleged wrongdoing of the directors. Such an application is generally a protective measure; the primary reason for making such an application is to ward off predatory creditors who may wish to take satellite ex parte actions against the companies registered in the BVI in an attempt to steal a march on creditors generally.

The applicants in *Re Constellation Overseas Ltd* were six BVI companies that formed part of a group of companies. The companies were subject of a court-supervised Judicial Reorganisation in Brazil under which the officers of the debtor companies continued to administer the affairs of the companies under the supervision of the Brazilian Court. They had also commenced ancillary proceedings in the United States for protection under Chapter 15 of the US Bankruptcy Code on the basis that New York law governed the vast majority of the companies' debt. The application was supported by creditors holdings over US\$1 billion of the companies' debt of \$US1.5 billion, including the companies' largest unsecured creditor.

The following additional principles emerge from the Court's judgment in *Re Constellation Overseas Ltd*:

- (a) A company's own application for the appointment of provisional liquidators has always been treated more favourably than that of a creditor. If the company itself makes, consents to, or is shown not to oppose the application, the appointment is almost a matter of course;
- (b) However, it is necessary to show at least some prospect of promoting a restructuring.

Recognition of Foreign Insolvency Proceedings Generally

Although Part XVIII of the Act contains the UNCITRAL Model Law on Cross Border Insolvency, that part has never been brought into force. Accordingly, it is not possible to obtain an order for general recognition of the appointment of foreign officeholders with the effect that foreign officeholders then have all the powers of BVI appointed liquidators.

Orders in Aid of Foreign Proceedings

However, under Part XIX of the Act, a foreign representative may apply to the Court for an order in aid of foreign proceedings in respect of which he is authorised.

A foreign representative means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding. Foreign proceedings means a collective judicial or administrative proceeding in a *relevant foreign country*, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

The current list of relevant foreign countries designated by the Commission includes 9 jurisdictions, namely Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States of America².

Part XIX is designed to operate on an application-by-application basis. It gives a foreign representative from a relevant foreign country express rights to apply to the BVI Court for orders in aid, but without conferring status on the foreign representative through the recognition of the foreign proceedings in which he has been appointed.

On an application under section 467, the Court may:

- (a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;
- (b) restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property, save that the Court will not make an order affecting the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest;
- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding;
- (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
- (f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in BVI insolvency proceeding in respect of a debtor;

² The list has not been updated since August 2005, and the Commission has recently commenced a review of the list.

- (g) stay or terminate or make any other order it considers appropriate in relation to BVI insolvency proceeding; or
- (h) make such other or grant such other relief as it considers appropriate.

Importantly, any order made under section 467 must not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest. In making an order, the Court may apply the law of the BVI or the law applicable in respect of the foreign proceeding.

Under section 468, in determining an application under section 467, the Court must be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with:

- (a) the just treatment of all persons claiming in the foreign proceeding;
- (b) the protection of persons in the BVI who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property;
- (d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency; and
- (e) comity.

In *Re C (a bankrupt)* (Claim No. BVIHC (COM) 2013/0080, 31 July 2013), trustees in bankruptcy appointed by a Hong Kong court applied to the courts of the BVI for an order that they be granted all of the powers which they would have had if they had been appointed under the Act. The court in that case held that the trustees were entitled to specific orders in aid of the foreign proceedings in which they were appointed, Hong Kong being a relevant country for the purposes of Part XIX. However, the court expressed the *obiter* view that the common law approach to recognition and assistance did not survive in parallel with the statutory scheme. As such, it would not have been possible to confer upon the trustees the general powers that would be conferred upon a trustee appointed under the Act.

Net International Property Limited v Erez (Appeal No. BVIHCMAP2020/0010, 22 February 2021) concerned an appeal against a decision of the BVI Court recognising the appointment of a trustee in bankruptcy by an Israeli court and ordering, amongst other things, that the trustee be registered as the shareholder of the appellant BVI company. The Court of Appeal was required to consider whether the common law right of assistance survived the enactment of Part XIX of the Act, and if so, whether it was open to the courts of the BVI to grant the trustee in bankruptcy assistance. Although not binding on the Court of Appeal, the trustee argued that the views regarding the existence of common law assistance expressed in *Re C* had been incorrect.

The Court of Appeal had no hesitation in finding that the common law right of recognition survived in the BVI notwithstanding the statutory scheme. However, the fact of recognition did not necessarily carry with it the right of assistance. As Israel was not a designated relevant country for the purposes of Part XIX of the Act, the trustee was not entitled to assistance under that Part.

As regards the possibility of providing assistance to the trustee at common law, the Court of Appeal held that *Re C* had been correctly decided and should be followed. It held that:

'... when the Legislature enacted Part XIX of the Act the intention was to provide a complete code for foreign representatives to apply to the BVI courts for assistance in cross-border insolvency matters such that foreign representatives from non-scheduled countries are unable to obtain assistance.'

In arriving at this conclusion, the Court of Appeal said that it did so with some regret because it did not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross-border insolvency cases.

There has not been any reported instances in the BVI of applications for assistance made by foreign representatives appointed over a BVI incorporated company by a foreign court. However, case law in Bermuda and Cayman suggests that some of the matters that the BVI Court may take into account in exercising the discretion to recognise a foreign appointee may include:

- (a) that the company's board and its directors have been unable or unwilling to act;
- (b) that there is no likelihood of an application being made for the appointment of liquidators in the BVI;
- (c) that the company in question has substantial connections with the foreign jurisdiction;
- (d) whether there would be competing claims by creditors which would result in different levels of recovery or returns if a local order were made; and
- (e) whether there were any public policy considerations that would arise as a result of the liquidation taking place in a country not being the country of incorporation. In one particular case it was said that in appropriate cases the requested court may have to refuse to grant assistance and the relief sought by the foreign liquidator where a local liquidation or provisional liquidation is needed.



BVI Finance, Road Town, Tortola, British Virgin Islands
E: info@bvifinance.vg
W: bvifinance.vg | bviglobalimpact.com

BRITISH VIRGIN ISLANDS CORPORATE BUSINESS

WHY BVI?

The BVI is an internationally respected financial centre which connects markets and facilitates investment, trade and capital flow by offering an efficient, cost effective and trusted means of mediating capital and investment across borders.

BVI companies are hugely versatile operating in multiple roles and industries. BVI companies are holding companies, joint venture vehicles, listing vehicles, investment funds, as well as efficient and convenient structures for real estate investment or holding high value assets such as ships or aircraft. Elsewhere, BVI companies are used equally successfully for family, trust and succession planning, and, ever increasingly, as platforms for a new wave of entrepreneurs from emerging markets. BVI companies can be found operating in almost every sector of the world economy, arranging structures for projects and transactions in such areas as oil and gas, metal and minerals, manufacturing, electronics and even food and agriculture.

WHY USE A BVI BUSINESS COMPANY?

At the centre of BVI corporate business is the BVI business company formed under the BVI Business Companies Act, 2004. BVI business companies are formed and surrounded by a legal and administrative infrastructure that makes them popular around the world.

- Political stability and a legal system rooted in English common law. This protects assets from potential loss, damage or sequestration resulting from socio-political instability.
- Company and related laws, like the BVI Business Companies Act itself and the new and groundbreaking BVI Limited Partnership Act, 2017, which are modern, commercially literate and adaptable for the needs of individuals.
- A robust and internationally well-regarded regulatory regime overseen by the BVI Financial Services Commission.
- A statutory infrastructure which is respected by international regulators and standard setters. The BVI offers respected standards and oversight, and grants transparency without sacrificing confidentiality for those engaged in lawful activities.
- The presence of a strong cadre of legal, finance and fiduciary professionals, ensuring that transactions are professionally handled and "transaction fluency" is optimized.

- The ability to settle complex legal disputes efficiently. The BVI International Arbitration Centre maintains a roster of over 190 highly regarded international arbitration and dispute resolution practitioners. Ultimately actions can be decided through the Eastern Caribbean Commercial Court which is based in the BVI and recognizes and allows rights of appeal to the Privy Council in London.
- Tax neutrality – the BVI does not itself impose a tax on corporate profits. This means that investors are not exposed to double taxation and only pay taxes due to the authorities in their domicile and/or where funds are invested.

SUPPORTING THE WORLD ECONOMY

Recent studies have shown that the investment mediated by the BVI as an international business and finance centre, and by BVI companies in particular, supports around 2.2 million jobs worldwide.

BVI companies hold some US\$ 1.5 trillion assets equivalent to 2 per cent of global GDP - a substantial portion of which is firmly invested back into the world economy, with the United Nations ranking the BVI as the seventh largest source of outward flows of funds and capital in 2015.



BVI INCORPORATIONS

As a result of the BVI advantage, BVI business companies are used extensively around the globe. Central to this success is one of the most innovative and efficient electronic systems for incorporating companies and administering corporate filings and records – the BVI Registry of Corporate Affairs' Virtual Integrated Registry Regulatory General Information Network or "VIRRRGIN". Using VIRRRGIN incorporations can take place within one or two days, and VIRRRGIN filing procedures have recently been streamlined even further.

In 2015, the BVI Registry introduced a Premium Services Department to provide an express "Premium Service" for time certain sensitive transactions, with extra fees applying. Transactions for which the Premium Service is available include filings for time sensitive, complex and special transactions such as continuations, mergers, amendments to memoranda and articles of association and registration of charges. In most cases filings made using the Premium Service can be processed within 4 hours.

"VIRRRGIN Lite" was launched in early 2016 to allow users located in Hong Kong external access to some of the online BVI Registry functions.

CONFIDENCE AND FUTURE

Shareholders, investors and those providing finance to BVI companies know that BVI companies exist under the oversight of the BVI FSC and subject to a respected legal and judicial system in a jurisdiction that has been named among the best regulated in the world and conforms to the highest global standards.

It is no exaggeration to say that in virtually every corner of the world today businesses are being run, profits are being generated, people are being employed and local taxes are being paid by companies that are domiciled in the BVI. The BVI is truly the international partner of choice.



BVI Finance, Road Town, Tortola, British Virgin Islands
E: info@bvifinance.vg
W: bvifinance.vg | bviglobalimpact.com

BRITISH VIRGIN ISLANDS

TRUST, ESTATE & SUCCESSION PLANNING

WHY BVI?

Pioneering, innovative and leading the way in global business solutions, the British Virgin Islands (BVI) is an internationally respected business and finance centre with a proven commitment to connect markets, empower clients and facilitate investment, trade and capital flow.

Our resourceful pool of trust experts can provide tailored solutions and practical advice on ownership and succession planning based on decades of specialisation and experience.

For private clients, family businesses, charities or trustees, the BVI can provide the expert advice and the realistic choices you need, on every aspect of trusts.

USES OF BVI TRUSTS:

- Will substitute and avoidance of probate
- Ease of administration of family wealth
- Tax planning
- Business and Family succession planning
- Testamentary freedom for those subject to forced heirship principles
- Philanthropy and other non-charitable purposes
- Asset protection

BVI TRUSTS		
	VISTA TRUSTS	PTC
<i>What are they?</i>	The Virgin Islands Special Trusts Act ("VISTA") came into force on 1 March 2004 and was introduced in order to allow a shareholder to establish a BVI trust over a BVI company which disengages the trustee from administrative and managerial responsibility in relation to that BVI company.	A Private Trust Company ("PTC") is a company incorporated with its main function being to act as the trustee of a specific trust or a number of related trusts. It should be contrasted with a professional corporate trustee, bank or financial institution which offers its services to the general public for a fee.
<i>What are the advantages?</i>	<ul style="list-style-type: none"> • The duty of prudence imposed on trustees may be incompatible with a settlor who believes that risk taking is an integral part of business practice • There may be wider considerations than pure investment return • The skill set of the trustee may not be relevant to the range of business activities carried out by the company held in trust and the directors are better placed to take the lead in that regard • The costs involved with a trustee ensuring that it is properly discharging its administrative and monitoring obligations may be prohibitively expensive 	<ul style="list-style-type: none"> • The principal advantage of a PTC is that its establishment generally enables settlors or family members or their appointees to exercise a significant degree of control over trustee decisions by being directors of the PTC. • The corporate structure will be readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure • Privacy can be enhanced and this is an issue which is of increasing importance to those from jurisdictions where concerns over financial privacy are driven by issues of personal safety • PTCs are often set up in circumstances in which the underlying assets of a trust are speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee
<i>Why set up in the BVI?</i>	<ul style="list-style-type: none"> • Legal protection of assets • Protection of family business – avoiding fragmentation of ownership and preservation of family wealth • Still allows for effective succession planning, avoiding the need for probate upon death • Tax planning – including possible mitigation of estate taxes • No requirement to register trusts 	<ul style="list-style-type: none"> • It is not required to have a local director or authorised representative • It is not required to establish a physical presence in the jurisdiction • Only the company's Registered Agent is provided with copies of the trust deeds and other documents and these remain held confidentially • There are no capitalisation requirements in the BVI for PTCs • In the BVI only the PTC's memorandum and articles of association will be filed publicly

TRUST SERVICES INCLUDE:

- Establishment and administration of commercial and private wealth trusts
- Provision of trustee services
- Services to charities
- Trust litigation
- Preparation of trust accounts
- Establishment of Private Trust Companies



BVI Finance, Road Town, Tortola, British Virgin Islands
E: info@bvifinance.vg
W: bvifinance.vg | bviglobalimpact.com

BRITISH VIRGIN ISLANDS INVESTMENT FUNDS

WHY BVI?

Pioneering, innovative and leading the way in global business solutions, the British Virgin Islands (BVI) is an internationally respected business and finance centre with a proven commitment to connect markets, empower clients and facilitate investment, trade and capital flow.

The BVI is the second largest offshore jurisdiction for hedge and private equity fund formation. Funds experts in the BVI provide first-class advice on all types of fund structuring options.

FUND FORMATION

Funds in the BVI may be incorporated as business companies or formed as partnerships or unit trusts.

- Business Companies ("BCs") – BCs are a very flexible vehicle for structuring a fund, the shares in a BC are not required to have any par value or capital attributed to them which facilitates their ability to raise and retain investments.
- Segregated Portfolio Companies ("SPCs") - An SPC is a single legal entity formed as a BC but with the statutory ability to segregate assets and liabilities linked to a particular portfolio from the assets and liabilities of other portfolios within the SPC and the general assets of the SPC. Private, Professional and Public Funds can be incorporated as SPCs.
- BVI Limited Partnerships ("LPs") - The new BVI Limited Partnership Act introduced in 2017 provides a modern and flexible partnership regime, in particular for those conducting investment activities.
- Unit Trusts – Highly flexible and, like BCs and LPs exempt from BVI income tax, estate tax, inheritance tax, succession tax, gift tax, or any other duty unit trusts are suitable for a variety of investment structures, including the stand-alone trust and the umbrella trust.

TYPES OF FUNDS

INCUBATOR FUND

A start-up fund for those managers who want to keep costs in line until they have a track record to attract sufficient subscriptions to make the fund viable for the long term. The fund must remain within the following thresholds:

- have a maximum of 20 investors;
- have a minimum initial investment per investor of US\$20,000;
- have net assets not exceeding US\$20 million;
- After 2-3 years the fund may convert to a Private or Professional Fund, or an Approved Fund.

APPROVED FUND

Another low cost fund vehicle which allows a manager to bring together a small number of investors on a longer term basis. This fund is cost-effective and designed to avoid the regulatory burden when establishing a small fund. An Approved Fund is restricted to:

- a maximum of 20 investors;
- net assets not exceeding US\$100 million;
- an Approved Fund may be established for an unlimited period.

PRIVATE FUND

Has no minimum initial investment amount but may have no more than fifty investors or must be offered on a private basis only. It is therefore ideal for family offices and other smaller fund structures. A Private Fund is, however, still classed as a mutual fund and therefore benefits from being certified as a recognised mutual fund by the BVI Financial Services Commission ("FSC").

PROFESSIONAL FUND

Make up the majority of open-ended funds in the BVI. They are aimed typically at professional investors or investors who are high net worth individuals. The minimum initial investment requirement for an investor in a Professional Fund is US\$100,000. A Professional Fund is also classed as a mutual fund and it also benefits from FSC certification.

PUBLIC FUND

Has no minimum investment criteria, but since these are retail funds are generally subject to more extensive regulation than Private or Professional Funds. A Public Fund is not only subject to regulation under the Securities and Investment Business Act ("SIBA"), but must also comply with the BVI Public Funds Code. This type of fund is an ideal investment vehicle for retail investors as it offers a mixture of accessibility for smaller investors with the benefit of more extensive regulation and oversight.

WHY SET UP IN THE BVI?

- Speed and simplicity of establishing BVI entities
- Relatively low cost of doing so, particularly in the context of typical transaction sizes and government fees
- Flexible and practical business statutes
- BVI insolvency law is simple and effective, and hence of great appeal to lenders
- Robust and healthy compliance culture
- Professional infrastructure and reputation
- Compliance with international anti-money laundering, anti-terrorist financing and other financial regulatory standards
- Tax and exchange control neutrality
- Service providers to the fund (investment managers, advisers, brokers, administrator, auditors, etc.) may usually be located anywhere in the world
- No local audit or sign off requirement

INVESTMENT FUND SERVICES:

- Establishment and administration of funds
- Structuring and restructuring advice
- Regulatory and corporate governance advice
- Ongoing advice to fund managers and promoters
- Listings and continuing obligations
- Fund liquidation
- Registered Agents

Faculty

Charlotte Caulfield is a managing director with Kalo Advisors in Tortola, British Virgin Islands, and has more than 23 years' experience in the insolvency and restructuring industry gained in the BVI and London. She specialises in complex, cross-border insolvency matters and has experience in Madoff-related appointments and cross-border instructions related to the investment funds industry.. Previously, Ms. Caulfield practiced in KRYs Global's BVI office and in London. She holds a UK Joint Insolvency Examination Board qualification and a Certificate of Proficiency in Insolvency, and she is licensed by the British Virgin Islands Financial Services Commission as a Licensed Insolvency Practitioner. Ms. Caulfield is a member of R3, the Insolvency Practitioner's Association (England). She is also a member of the Restructuring & Insolvency Specialists Association (BVI) and currently serves on its Education and Training Committee.

Shane Donovan is a partner with Mourant in Tortola, BVI, in its Litigation Practice. He is a commercial litigation lawyer with specialist experience in complex international litigation, including fraud and asset recovery, insolvency, and corporate and shareholder disputes. He is also experienced in obtaining urgent injunctions, such as worldwide freezing orders and anti-suit injunctions, and Norwich Pharmacal (disclosure) orders. Prior to joining Mourant, Mr. Donovan worked for Martin Kenney & Co in the BVI, for PCB Litigation in London and for Thynne & Macartney in Brisbane. He received his B.S. in pharmacology and his Bachelor of Laws from the University of Queensland.

Nathan Mills is a director with R&H Restructuring Ltd. in Tortola, BVI, and has more than 20 years' experience specializing in corporate restructuring. He has experience leading complex insolvency engagements in numerous jurisdictions within a wide range of industries, including financial services, mining, transport, hospitality, real estate, civil contracting and agriculture. He has also worked with a major Australian bank in its credit-restructuring area; in this role, he was responsible for assessing customers' financial circumstances and developing and monitoring strategies with the customer that were mutually beneficial. Mr. Mills is a Chartered Accountant with the Institute of Chartered Accountants in Australia and New Zealand and has completed the Australian Restructuring Insolvency & Turnaround Association's post-graduate course. He is also a member of INSOL and the current Treasurer of RISA BVI.

Anna Silver manages the British Virgin Islands office of FFP in Tortola and guides clients through a variety of situations throughout the life cycle of their businesses, from incorporation to acting as registered agent or authorised representative, to liquidating their interests and dissolving the company or fund. In the distressed space, she has experience as an insolvency practitioner and advisor, providing guidance to stakeholders of businesses. Ms. Silver has been offshore for four years and prior to that worked at independent boutique firms across the U.K., leading trading administrations and company voluntary arrangements..With more than 15 years of experience working across a wide range of industries and jurisdictions, she has practical experience leading assignments involving offshore and onshore structures, as well as complex jurisdictions such as the Middle East, Russia and Eastern Europe. Ms. Silver also has provided advisory services to other fiduciaries providing financial analysis and forecasting, and she has been appointed as an independent director in both

distressed and noncontentious situations. She is a qualified chartered accountant and a member of the Institute of Chartered Accountants in England and Wales. In addition, she is Joint Board qualified, a member of the Insolvency Practitioners Association and a BVI insolvency license holder. Ms. Silver received her B.A. Hons in Law and a post-graduate diploma in international insolvency law, which she completed with distinction in 2016.

Andrew Thorp is a partner with Harneys in Road Town, Tortola, British Virgin Islands, where heads up the firm's BVI litigation and insolvency practice group. For over a decade, he has advised law firms, banks, funds, private-equity houses and trust companies on all aspects of BVI contentious law. Mr. Thorp has particular expertise in cross-border asset recovery and insolvency work and is a recognised industry leader. Much of his focus is on pre-emptive remedies, including freezing orders, provisional liquidations and discovery orders, often against a background of fraud. He has acted in numerous successful asset-retrieval operations across CIS, Latin America and Asia alongside teams from Harneys, other international law firms and investigatory professionals. Mr. Thorp has been at the forefront of developing insolvency law in the BVI, having successfully led teams in the seminal hedge fund cases following the liquidity crises and high-profile frauds of the last 10 years. Additionally, he has pioneered a number cross-border protocols between court officers and is regularly retained to advise on the restructuring of international distressed structures. Mr. Thorp is a director of INSOL Global as well as chairman of RISA (Restructuring and Insolvency Professional Association). He is also an honorary member of COMBAR and the Chancery Bar Association, and he contributes to The Offshore Litigation Blog, a Harneys blog that shares news and views about litigation, dispute resolution, restructuring and insolvency offshore. Mr. Thorp is ranked in Band 1 by *Chambers & Partners* in the British Virgin Islands, is recommended by *Legal 500*, *IFLR 1000* and *Citywealth's* Leaders List; and is recognized as being among the world's leading asset-recovery and private client lawyers by *Who's Who Legal*.