Practical Law

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PRIVATE EQUITY

Private equity in the British Virgin Islands: market and regulatory overview

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MARKET OVERVIEW

1. What are the current major trends in the private equity market?

The major trends in the British Virgin Islands (BVI) private equity market tend to follow the trends in the global financial centres. Unlike other jurisdictions, the BVI remains a popular jurisdiction for start-ups in emerging markets.

As with other offshore territories and international financial centres, the BVI has introduced a number of legislative changes in response to the European Union (EU) economic substance requirements. This has included the introduction of amendments to regulate closed-ended funds, which until now have not been regulated in the BVI. Similar steps have been taken in other Caribbean jurisdictions as a result of this process.

2. What has been the level of private equity activity in recent years?

Investment

Over the last few years, there has been an increase in activity in private equity investment. Although investors' appetite to invest in emerging markets continues to decrease in other jurisdictions, there has been considerable interest in the BVI in smaller private equity funds which invest in emerging markets. The technology sectors in Latin America and the Middle East continue to attract attention. There also continues to be a steady stream of early stage start-up businesses and seed financings that are using BVI entities. The BVI is a popular jurisdiction for the start-up market due to the jurisdiction being more cost-efficient than most other offshore jurisdictions.

Transactions

The BVI private equity market typically tracks the trends in the global financial centres.

FUNDING SOURCES

3. How do private equity funds typically obtain their funding?

The typical sources of funding vary according to the asset class and investor base concerned but usually include:

- Sovereign wealth funds.
- Pension funds.
- Institutional investors.
- High net worth individuals
- Family offices.

TAX INCENTIVE SCHEMES

4. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

BVI investment vehicles are generally tax-neutral.

FUND STRUCTURING

5. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

Vehicles used for private equity funds in the BVI include:

- International limited partnerships.
- Business companies.
- Unit trusts.
- Segregated portfolio companies.

Limited partnerships

The Limited Partnership Act 2017 (LP Act) was brought into force in early 2018. The LP Act creates a modern regime for new limited partnerships and replaces Part VI of the former Partnership Act 1996 for new limited partnerships and for those existing limited partnerships that elect to re-register under the LP Act. The LP Act provides for the eventual re-registration of all existing international limited partnerships as limited partnerships under the LP Act. Inspired by the success of the BVI Business Companies Act 2004 (as amended) (BC Act), the LP Act and the Limited Partnership Regulations 2018 draw on a number of concepts introduced by the BC Act and have been drafted with the same balance of certainty and flexibility in mind.

The advantages of using a limited partnership as a structure include:

- Limited partnerships offer a tax transparent "pass-through" structure (that is, tax is imposed at investor level rather than at the level of the fund).
- It is possible to elect for the limited partnership to have (or not have) separate legal personality.
- It offers flexibility in relation to capital raising, allocation of distributions and carry structure.
- Limited partners are only liable for their uncalled capital unless they take part in the management of the partnership.

Business companies

BVI business companies (BC companies) incorporated under the BC Act are commonly used for BVI investment funds and are often incorporated to act as a general partner of a fund entity which is structured as an international limited partnership. The advantages of using a BC company include:

- No concept of "authorised share capital" and therefore no requirement for par value or capital to be attributed to shares (that is, shares of no par value can be issued).
- Shares can be issued in any currency.
- Privacy for the directors and the shareholders as there is no requirement to file the register of member or register of directors of a BC company in the public domain (the register of directors must be filed with the BVI Registry of Corporate Affairs, but this register will not be publicly available unless the BC company so elects).
- Only one shareholder and one director are required for incorporation.
- Neither the director(s) nor the shareholder(s) need to be resident in the BVI.
- No requirement to appoint a company secretary.
- Exemption from all local taxes.
- Accounts and records of a BC company do not need to be filed with the BVI authorities.

Segregated portfolio companies

The prior written consent of the Financial Services Commission (FSC) must be obtained before a BVI segregated portfolio company (SPC) can be incorporated.

A BVI SPC is a single company that contains a number of segregated portfolios. The assets in each portfolio are ring-fenced and only the assets in each portfolio are available to meet the liabilities of the relevant portfolio.

There are additional requirements imposed on a BVI SPC under BVI law (for example, implementing satisfactory procedures that ensure that the assets of each portfolio are held separately, and clearly identifying the relevant portfolio on all contracts that the BVI SPC enters into with third parties on behalf of a portfolio). However, a well-run BVI SPC can often be a more cost-effective structure than an umbrella fund structure consisting of multiple companies.

Unit trusts

A BVI unit trust is incorporated under a deed of trust and is similar to an English unit trust. A BVI unit trust is not a separate legal entity. The trustee of the BVI unit trust has the legal capacity and holds the assets of the fund for the investors in the BVI unit trust in accordance with the terms of the deed. The holders of units in a BVI unit trust are the beneficial owners of the trust assets. A BVI unit trust scheme is not commonly used but may be adopted where, for example, it is preferable for an investor to hold units instead of holding shares in a company.

6. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

The BVI is a tax-neutral jurisdiction and companies incorporated or registered under the BC Act are currently exempt from income, corporate and capital gains tax in the BVI. Onshore counsel advice should be obtained to confirm whether domestic tax is due onshore as a result of the fund's activity or for the individual investors.

7. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?

The BVI is a tax-neutral jurisdiction (*see Question 7*).

FUND DURATION AND INVESTMENT OBJECTIVES

8. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?

Duration

The investment objectives of private equity funds vary on a case-by-case basis.

The average fund life depends on the investment strategy. Generally, the average life of a private equity fund is five to ten years.

Investment objectives

The current market is dominated by global brands or niche players (rather than funds in between those two categories), which usually has an impact on the investor base and, therefore, the proposed objectives.

FUND REGULATION AND LICENSING

9. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

Private equity funds are typically set up as closed-ended funds (that is, funds with no redemption rights or a substantial lock-up period). Historically, only open-ended funds (that is, funds in which the shares, interests or units are redeemable at the option of the investor) were regulated under the Securities and Investment Business Act 2010 (SIBA). The Securities Investment Business (Amendment) Act 2019 and Private Investment Funds Regulations 2019 (PIF Regulations) came into force on 31 December 2019 and introduced a new regulatory regime for certain closed-ended funds, called private investment funds (PIFs) (*see Question 10*).

The management of private equity funds in or from within the BVI (whether by way of providing discretionary or non-discretionary investment advice) requires prior regulatory approval from the FSC.

Regulatory approval by the FSC can be obtained under either:

- SIBA.
- The Investment Business (Approved Managers) Regulations 2012 (Approved Manager Regulations).

The FSC's approval under SIBA requires the applicant for a SIBA licence to submit substantially more information than that required for a licence under the Approved Manager Regulations. In addition, the ongoing obligations of a SIBA licence holder are more comprehensive than for a holder of an Approved Manager licence.

Promoters and directors of a private equity fund do not require any regulatory authorisation, licence or registration.

10. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

Regulation

Private equity funds are usually set up as closed-ended funds and most of these entities are PIFs, which are defined as entities which:

- Collect and pool investor funds for the purpose of collective investment and diversification of portfolio risk.
- Issue fund interests, which entitle the holder to receive an amount computed by reference to the value of a proportionate interest in the whole or in a part of the entity's net assets.

Any closed-ended fund falling outside of this definition is not regulated under SIBA and the PIF regulations.

All PIFs must apply to the FSC for recognition and are subject to the ongoing requirements of SIBA and the Private Investment Funds Regulations 2019 (PIF Regulations). Any PIF must meet the FSC's eligibility criteria for it to be considered as a PIF. Any current entity that was in existence before 1 January 2020 has until 1 July 2020 to apply to the FSC for recognition and any entity created after 1 January 2020 must apply to the FSC for recognition within 14 days of incorporation.

There are numerous ongoing obligations with which each PIF must comply, including:

- Having an authorised representative in the BVI.
- Having two directors (if it is structured as a BC company).
- Having an offering document or term sheet which includes certain disclosures required by the PIF Regulations.
- Preparing and submitting audited financial statements with the FSC within six months of the end of each financial year.
- Notifying the FSC of certain key changes to the fund business as required under the PIF Regulations.
- Maintaining sufficient records as set out in the PIF Regulations.
- PIFs are now included within the definition of a relevant person under the Anti-Money Laundering Regulations 2009, and PIFs must comply with anti-money laundering requirements that are in place for regulated entities.

Exemption

Not applicable (*see above, Regulation*).

11. Are there any restrictions on investors in private equity funds?

There are no statutory restrictions on investors in private equity funds under BVI law. However, general contract law applies so that contracts are not binding on, nor enforceable against, individuals under the age of 18.

12. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

Subject to requirements applicable to public funds and public offers of securities, there are currently no statutory restrictions on investment periods, amounts or transfers of investment in private equity funds in the BVI.

13. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

The relationship between the investor and the fund (structured as a closed-ended fund) is mainly governed by the:

- Constitutional documents of the fund.
- Offering memorandum.
- Subscription agreements.

Protections that investors typically seek include:

- The establishment of investor committees.
- The ability to remove the general partner with or without cause.
- Information rights.

The BC Act and the LP Act (as applicable) provide investors with further statutory protections. These include:

- Restricting the powers of the directors/general partner through provisions in the memorandum and articles of association or articles of partnership.
- Allowing the removal of directors by a resolution of the members.
- Providing statutory remedies to members (for example, the right to bring a derivative action and minority protections for prejudiced members).
- Restrictions on actions that can be taken by the directors or general partner without the consent of the members or limited partners.

Funds will tailor their constitutional and fund documents as they require for the purpose of the proposed investment. There is no specific guidance in the BVI as to what should be included, however, a fund will usually adopt constitutional and fund documents that encourage investors to invest but provide adequate protection to the parties that oversee and administer the fund.

INTERESTS IN PORTFOLIO COMPANIES

14. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

Most common form

The most common forms of investment taken by a private equity fund are:

- Shares (either ordinary shares and/or preference shares).
- Loan notes.

The advantages of loan notes include that they:

- Rank above the equity capital in an insolvency situation.
- Can be easily structured as convertible instruments.
- May offer greater repayment flexibility.

The advantages of holding shares include that they:

- Offer greater direct control over a company.
- Benefit from any increase in value of the portfolio company.

Restrictions

Unless disapplied in the company's memorandum and articles of association, pre-emption rights apply on the issue of shares in a BVI company (*section 46, BC Act*). Pre-emption rights are usually disapplied.

A BVI company's memorandum and articles of association will set out any restrictions that may apply on the issue and transfer of shares, for example right of first refusal and tag- and drag-along rights.

Taxes

The BVI is a tax-neutral jurisdiction and does not impose any taxes on dividends or stamp duty on share transfers. There are also no withholding or capital gains taxes imposed in the BVI.

BUYOUTS

15. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

The BVI market for auctions is typically governed by onshore requirements.

The merger provisions in the BC Act are increasingly being used to effect buyouts of private companies where the target and/or purchaser is/are a BVI company.

16. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

There has been some interest in public-to-private transactions involving BVI listed companies. The provisions of the BC Act apply to such transactions together with the laws and rules applicable to the regulated market on which the shares of the BVI company are listed.

Principal documentation

17. What are the principal documents produced in a buyout?

The principal documents usually reflect onshore requirements. These typically include:

- A sale and purchase agreement.
- A shareholders' or investment agreement.
- Memorandum and articles of association.
- New service agreements for the directors.

Buyer protection

18. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

Contractual buyer protection clauses are usually determined onshore. However, contractual anti-dilution provisions (full ratchet and weighted average) are common. Private equity investors commonly request warranties and indemnities from the sellers and the management team. Indemnities typically cover specific items uncovered during the due diligence process. Private equity buyers can also be protected through the use of completion accounts and adjusting the consideration payable.

Buyers can also seek protection through restricting the activities of the sellers under restrictive covenants.

19. What non-contractual duties do the portfolio company managers owe and to whom?

A director must:

- Act honestly, in good faith and in a manner which he believes to be in the best interests of the company.
- Exercise his powers for a proper purpose.
- Not act, or agree to the company acting, in a manner that contravenes BVI legislation or the company's memorandum or articles of association.

However, BVI law allows the director of a subsidiary company to act in the best interest of its holding company (rather than the subsidiary itself) if they are expressly permitted to do so under the company's memorandum and articles of association. The BC Act also allows a director of a company involved in a joint venture to act in the best interest of the shareholder(s), even if his actions are not in the best interest of the company, provided he is expressly authorised to do so under the company's memorandum and articles of association.

The directors' duties are owed to the company itself (that is, the collective interests of the shareholders). The fiduciary duties are not owed to other companies with which the company is associated, other directors, or any individual shareholder. However, on insolvency (or doubtful solvency), directors must exercise their duties in the best interest of the company's creditors.

In addition to fiduciary duties, each director owes a duty of care, diligence and skill to the company. The duties of care, diligence and skill have been traditionally regarded as subjective (that is, the director must exercise such skill as he actually possesses). However, more recently, it has become clear that a director is required to exercise his powers and perform his duties in a way that a reasonable director would do in the same circumstances (taking into account the nature of the company, the decision being made, the position of the director and the nature of the responsibilities undertaken). A director may be liable in damages for failure to perform his duties if the company suffers a loss as a result of his actions.

When carrying out his duties, a director can rely on various records, financial information and any professional or expert advice. However, this only applies when the director acts in good faith and makes proper inquiry in relation to this information. A director cannot rely on any information or professional advice which he knows is incorrect or should not be relied on.

20. What terms of employment are typically imposed on management by the private equity investor in an MBO?

Terms of employment are usually determined by onshore requirements. Typical terms include either or both:

- Restrictive covenants to prevent the manager from competing with the business for a period of time.
- Rights of dismissal in certain circumstances.

21. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections

more likely to be given in the shareholders' agreement or company governance documents?

The protections are usually set out in the shareholders' agreement and are then usually incorporated in the memorandum and articles of association of the BVI company. Under BVI law, the memorandum and articles of association of a BVI company take precedence over any other agreement, even if contrary provisions are included in for example, a shareholders' agreement. It is therefore essential that any control provisions that are set out in the shareholders' agreement are properly incorporated into the company's memorandum and articles of association.

The level of management control given to a fund will vary depending on the commercial agreement, but typical protections include some or all of the following:

- Right to appoint directors and quorum requirements for meetings of the board and members.
- Information rights.
- Veto rights in respect of key management decisions, including:
  - approval of major transactions;
  - issue of new shares;
  - taking on indebtedness;
  - approval of capital expenditure; and
  - amendments to the memorandum and articles of association.
- Right of first refusal, drag-along and tag-along rights on the transfer of shares.
- Pre-emption rights on new share issues.

DEBT FINANCING

22. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

Debt financing can take various forms depending on the nature of the proposed transaction. This will usually be determined onshore. A term loan to finance the initial acquisition may be coupled with a working capital facility that will be used by the target.

The loan-to-value ratio will depend on the:

- Nature of the acquisition.
- Market conditions.
- Ability of the target to amortise the loans.

Generally, debt financing does not usually exceed 75% of the purchase price.

Lender protection

23. What forms of protection do debt providers typically use to protect their investments?

Security

Where the private equity structure is a BVI international limited partnership, a debt provider usually aims to protect its position by taking:

- A BVI law security over the uncalled capital commitment of the investors in the limited partnership.
- An account security over the relevant bank account(s) into which capital calls are paid.

If the borrowing is to be used to finance acquisitions, security may be taken over the assets to be acquired, but this is usually ring-fenced within a subsidiary entity. Such borrowing is more likely to be in the form of an amortising term loan. In addition, an equitable charge or mortgage may be taken over all the shares held by the SPV of the target. Following the acquisition of the target, further security will likely be granted by the target in favour of the lender.

If a share charge is granted over the shares of a BVI company, a lender will usually require that:

- A notation be made on the register of members of the BVI company stating that the shares are charged in favour of the lender (*section 66(8), BC Act*).
- The annotated register of members be filed with the BVI Registry of Corporate Affairs (*section 43A, BC Act*).
- The memorandum and articles of association of the BVI company be amended to restrict the BVI company from taking certain steps being without the lender's prior written consent (for example, any rights associated with the shares subject to a security interest).

A BVI company is required to keep a register of all relevant charges created by such company at its registered office or at the office of its registered agent (*section 162, BC Act*). Failure to do so does not affect the validity or enforceability of the security interest granted but may result in the BVI company being fined up to USD5,000. A lender will usually request the charge granted by the BVI company be registered with the BVI Registry of Corporate Affairs in accordance with section 163 of the BC Act. Registration is not mandatory and is made for the purpose of priority. On registration, the charge will have priority in the BVI over a charge that is subsequently registered under the BC Act, except for a registered floating charge (which will rank behind a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the BVI company to create any future charge ranking in priority to or equally with the charge).

Contractual and structural mechanisms

Contractual and structural mechanisms are usually determined onshore. Where there is competing finance in place, debt providers usually seek to protect themselves by agreeing the terms of any contractual subordination through an inter-creditor agreement, to rank the priority of debt and security.

Debt providers seek to include covenants covering the following considerations (among others), to allow the debt providers to trigger events of default (and accelerate loan repayments) if such term(s) are breached:

- Financial ratios, including:
  - loan-to-value regarding uncalled capital commitments of investors; and
  - more complex acquisition finance covenants for term loans used to leverage investment companies.
- Changes to the private equity structure.
- Changes to investors within their underlying facility agreements.

Debt providers may also seek to impose consent requirements in respect of the above matters.

Financial assistance

24. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give

security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

There are no statutory rules in the BVI that govern financial assistance by a BVI company. Directors of a BVI company must comply with their fiduciary duties and the provisions of the company's memorandum and articles of association (*see Question 20*).

Insolvent liquidation

25. What is the order of priority on insolvent liquidation?

Under the Insolvency Act 2003, on insolvent liquidation, the assets of a BVI company are distributed in the following order of priority:

- Costs and expenses properly incurred in the liquidation.
- Preferential claims admitted by the liquidator.
- All other claims admitted by the liquidator.
- Interest payable under section 215 of the Insolvency Act 2003.
- Any surplus assets remaining must be distributed to the members in accordance with their rights and interests in the BVI company.

Where the assets of a BVI company in liquidation which are available for the payment of unsecured creditors are insufficient to pay the costs and expenses of the liquidation and the preferential creditors, such costs, expenses and claims have priority over the claims of floating charge holders and must be paid out of the assets subject to such charges.

Priority between creditors can also be dealt with contractually through an inter-creditor agreement. Close-out netting, set-off and contractual subordination provisions are generally enforceable under the Insolvency Act 2003.

Equity appreciation

26. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

Although the decision to use rights, warrants or options is usually made onshore, a debt holder can hold convertible debt instruments that can convert into equity. A debt holder can also hold options and warrants.

PORTFOLIO COMPANY MANAGEMENT

27. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

Management incentives are usually negotiated onshore.

28. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

The BVI is a tax-neutral jurisdiction.

29. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

To pay a dividend or distribution, a BVI company's directors must pass a resolution containing a statement that, in their opinion, the company will, immediately after making a distribution, satisfy the solvency test set out in the BC Act.

A BVI company satisfies the solvency test if both:

- The value of the company's assets exceeds its liabilities.
- The company is able to pay its debts as they fall due.

30. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

Anti-corruption/anti-bribery protections in investment documents are usually driven by onshore requirements.

Although the BVI has not enacted any specific legislation on anti-corruption/anti-bribery, as it is a British overseas territory, the UK Bribery Act 2010 is relevant in certain circumstances. Although the UK Bribery Act does not extend to organisations in the BVI, such organisations can fall within the scope of the UK Bribery Act. The UK Bribery Act applies to relevant commercial organisations, which are defined as either:

- Companies registered in the UK.
- Non-UK companies that carry on a business, or part of a business, in any part of the UK.

EXIT STRATEGIES

31. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

Forms of exit

The form of exit is usually determined onshore. There are many exit strategies that can be used to realise a private equity fund's investment, including, but not limited to:

- Flotation on a stock exchange.
- Trade sale.
- Secondary buyout (that is, a sale to another private equity fund).
- Asset sale.

Advantages and disadvantages

The advantages and disadvantages of each form of exit are the same as those that apply in the UK market.

The most advantageous method will vary from deal to deal. For example, when the IPO market is buoyant, a seller may be able to raise more money through an IPO than through a trade sale or secondary buyout. In addition, a disadvantage to selling to another private equity firm can be that the acquiring firm achieves a large return on its investment on an exit after a relatively short period of ownership.

32. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

Forms of exit

The forms of exit available to a successful company can be used in some cases, however, if the private equity fund's investment is unsuccessful, its options to exit will be limited as some exit routes may not be available (*see Question 32*).

Advantages and disadvantages

See *Question 32*.

REFORM

33. What recent reforms or proposals for reform affect private equity in your jurisdiction?

There will be continuing legislative changes as part of the move to a substance economy, as BVI co-operates with the EU economic substance requirements. The Economic Substance (Companies and Limited Partnerships) Act 2018 will affect entities carrying out certain relevant activities and is beyond the scope of this Q&A.

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Recent transactions

- Advised a Hong Kong-based real estate private equity firm, on the purchase and financing on a significant commercial property transaction in London (USD774 million).
- Legal counsel to an international private equity and venture capital firm investing in innovation businesses and earning high returns on new companies, operating in areas such as technology, energy, natural resources, consumer products, real estate and financial services.
- Legal counsel to a leading global venture capital seed fund and start-up accelerator, managing USD200 million in assets with investments in over 1,300 technology start-ups.
- Legal counsel to a private equity fund on USD132 million acquisition of a global specialist in corporate, trust, and fund services.

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