Private Equity

Contributing editor
Bill Curbow

2019

GETTING THE DEAL THROUGH

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Private Equity 2019

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Bill Curbow
Simpson Thacher & Bartlett LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Preface

Private Equity 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE DEAL THROUGH

London
February 2019

British Virgin Islands

Robert Varley and Rebecca Jack

Appleby

Formation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

Private equity funds in the British Virgin Islands (BVI) have typically favoured establishment as a company. New legislation, however, looks to encourage use of a limited partnership structure.

Companies

A BVI company is incorporated under the BVI Business Companies Act 2004. A company has separate legal personality and BVI companies can elect their classification for US federal tax purposes. The company will typically have a range of share classes, allowing for the shares held by the manager (or its affiliates) to have different rights to those of investors. Shares can be issued with or without a par value.

As a shareholder in a BVI company, an investor's liability will be limited to:

- the amount, if any, unpaid on the shares it holds;
- any liability expressly set out in the memorandum and articles of the company; and
- any liability to repay a distribution (see question 5).

Segregated portfolio companies

Previously limited to certain regulated entities and open-ended funds, the new Segregated Portfolio Companies (BVI Business Company) Regulations 2018, which came into force on 1 October 2018, allow closed-ended funds and other BVI entities to be structured as segregated portfolio companies (SPCs). An SPC is a single company whose assets and liabilities can be allocated and ring-fenced between separate sub-funds or segregated portfolios, similar to the concept of 'protected cell' or 'segregated account' companies in other jurisdictions. Shares may be issued in respect of a certain portfolio, and investors will be entitled to receive distributions from that portfolio alone. Similarly, creditors may contract with a particular portfolio, and only have recourse to assets from that portfolio. This development allows private equity funds to house multiple funds within one centralised body, providing cost and administration savings.

Limited partnerships

While a common structure for funds in other jurisdictions, the limited partnership (LP) has traditionally been underused in the BVI partly as a result of outdated and imprecise legislation. As at 30 June 2018, there were only 769 limited partnerships registered in the BVI, compared with 417,125 companies.

The BVI's new Limited Partnership Act 2017 (the LP Act), which came into force on 11 January 2018, seeks to address this by introducing commercial and flexible provisions, aimed at both private equity and open-ended mutual funds. Under the new LP Act, an LP can be established either with or without separate legal personality, making them suitable for both funds and carried interest distribution vehicles. For LPs established after the LP Act, the choice of whether or not the LP has legal personality is irrevocable. All LPs in existence prior to the new LP Act coming into force may be re-registered with or without legal personality, at the election of the general partners.

Investors join as limited partners. Subject to the fund's limited partnership agreement (LPA), a limited partner may, but is not required to, make a contribution to the LP. Save in circumstances where limited liability is lost (as described in question 5), a limited partner's liability for the debts and liabilities of the LP will be limited to the amount of the limited partner's contribution or unpaid commitment to the LP, if any.

An LP must also have at least one general partner, often controlled by the fund manager, who will be responsible for managing the partnership. The general partner is liable for the unpaid debts and liabilities of the LP incurred while they are a general partner. Where there are multiple general partners, each general partner is jointly and severally liable. Provided the LPA does not provide otherwise, a general partner will only be liable for the debts and liabilities of the LP to the extent that the LP cannot itself pay those debts or liabilities.

In most cases, the general partner will be a limited liability company, acting as a 'liability blocker' to prevent liability from flowing higher up the chain of ownership. There is no requirement for the general partner to be established within the BVI.

Other structures

Unit trusts are recognised under BVI trust law. Unit trusts are not separate legal entities and are established by way of a deed of trust. The principal benefit of offshore unit trusts for private equity vehicles (being that units could be redeemed without issuing new shares) has been reduced with the ability of companies to issue shares with no par value.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

Once the formation documents (being memorandum and articles for a company, and a written LPA for an LP) and any other commercial matters are agreed between any interest parties, a company or an LP can be established relatively quickly, normally within one to two working days.

The incorporation of a company will require the filing of the following with the BVI Registrar:

- memorandum and articles; and
- a document from the proposed registered agent, consenting to their appointment.

If the company is to be incorporated as an SPC, prior approval from the BVI Financial Services Commission (FSC) must be obtained. We would expect this to take one to two weeks.

The formation of an LP will require the filing of the following with the BVI Registrar:

- a statement confirming the LP's name, address, registered agent, the name and address of each general partner and a confirmation of whether the LP is being entered into for an unlimited duration or a fixed term;
- if desired, an election by the general partners for the LP to be formed without legal personality (the default position being an LP with legal personality); and

- a document from the proposed registered agent, consenting to their appointment.

The LPA is not filed and is not otherwise made public.

A registered agent within the BVI will need to be engaged in order to assist with establishing either a company or an LP. Only a registered agent is permitted to file registration documents with the BVI Registry. Provided the BVI Registrar is satisfied that the registration requirements for the company or LP (as applicable) have been complied with, it shall issue a certificate of registration, being conclusive evidence that the requirements have been met and that the company or LP (as applicable) has been established.

BVI entities will need to pay a fee to the BVI Registrar on registration and an annual fee each year thereafter. Registry fees for a company will depend on the number of shares the company is authorised to issue under its articles. For companies authorised to issue 50,000 or fewer shares, the initial registration fee is currently US$450, with an annual fee of the same amount thereafter. For companies authorised to issue over 50,000 shares, the initial registration fee is currently US$1,200 and the annual fee the same thereafter. Non-regulated SPCs must pay an additional application fee to the FSC on incorporation of US$450, plus an additional US$400 for each segregated portfolio and US$250 on approval, and annual fees of US$450 for the company and an additional US$400 for each segregated portfolio for each year thereafter.

For LPs, the registry fees are currently US$500 and the annual fee the same thereafter. Additional costs (such as legal fees and fees for the registered agent) will depend on the complexity of the transaction, including the level of negotiation for the formation documents, the timescale and the number of parties involved.

If the suggested name of the entity is to include the word 'fund' (or any translation or derived term thereof), prior approval of the FSC will be required. A fee of US$200 is payable for such approval.

Open-ended funds require approval from the FSC to operate as a fund. Among other obligations, certain open-ended funds and their investors are subject to minimum initial investment amounts. As discussed in question 10, open-ended funds are not the focus of this chapter.

Closed-ended funds (whether companies or LPs) do not require approval from the FSC to operate (though note approval for names above) and do not have any minimum capital or investment requirements.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

A private equity fund vehicle (as with any BVI-registered entity), whether established as a company or a limited partnership, is required to maintain both a registered agent and a registered office in the BVI. In almost all circumstances, the registered office of the entity will be that of the registered agent, who will be one of a number of registered agents operating and licensed in the BVI.

All BVI companies are required to maintain their registers, memorandum and articles and all notices and other documents filed by the company in the past 10 years (in each case, or copies thereof) at the office of its registered agent. A BVI company must also maintain copies of all minutes, financial records and underlying documents (for a period of five years) at the office of its registered agent or at such other place inside or outside the BVI as the directors determine. BVI LPs are required to maintain their registers (or copies thereof) at the office of its registered agent, and to maintain copies of all financial records and underlying documents (for a period of five years) at the office of its registered agent or at such other place inside or outside the BVI as the general partner determines.

All BVI registered entities are required to keep such records and underlying documentation that are sufficient to show and explain the entities transactions and enable, at any time, the financial position of the company or LP, as applicable, to be determined with reasonable accuracy. Non-regulated SPCs are required to maintain financial statements that take into account the segregated nature of the company. There is no requirement for a closed-ended fund to file returns or audit its accounts (though investors may require this).

For closed-ended funds, there is no requirement to maintain either a custodian or an administrator. There is no requirement in the BVI to maintain a corporate secretary.

Open-ended funds are subject to greater requirements, such as the need for funds to file annual returns, maintain and submit to the FSC audited accounts (for public, private and professional funds) and the need to maintain an independent custodian (for public and non-exempted private and professional funds), an administrator (save for incubator funds) and an authorised representative in the BVI (who acts as an intermediary between the fund and the FSC). Question 10 discusses open-ended funds and why these are not the focus of this chapter.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

Limited information is available publicly about private equity funds established in the BVI and, where information is available publicly, such documents are only accessible through the BVI FSC's online database, which requires registration with the FSC to access and the payment of fees.

For all BVI registered entities, the information available on the database includes registered office and agent details, details of whether the entity is up-to-date with its fees, name and company or LP number and any publicly registered charges over its assets. For companies, the memorandum and articles (and any resolutions amending these) will also be available. For LPs, the identity of general partners will be available. Entities are required to keep filed information up-to-date and any failure to do so may result in a fine.

A BVI company is also required to file a copy of its register of directors (and any changes thereto within 30 days) with the BVI Registrar. This document shall not be made public except on an order of the court, on a written request by a competent authority (for tax compliance or other law enforcement purposes) or at the election of the company.

The identities of shareholders in a company and limited partners in an LP, and the amounts of their capital commitments, are not publicly available. However, both a limited partner and a member of a company is entitled to inspect, on giving written notice, the records, the register of limited partners (in the case of an LP and subject to the LPA) and the registers of members and directors (in the case of the company). For an LP, the LPA may restrict these inspection rights. For a company, subject to its memorandum and articles, a director may refuse an inspection request if they are satisfied that it is contrary to the company's interests. The articles of a company, or the LPA for an LP, may allow for further inspection or information rights for investors.

In 2017, the BVI introduced a centralised system for recording the beneficial owners of BVI entities (being persons who ultimately own or control more than 25 per cent of an entity). Open-ended mutual funds and any licensed BVI entities are exempt from this regime, but unregulated close-ended funds are not. The system is not available to the public and can only be accessed following a formal request from the BVI Financial Investigation Agency, the FSC, the BVI International Tax Authority or the Attorney General's Chambers, who will in turn be bound by strict confidentiality rules. Non-compliance can result in a fine, imprisonment or both.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

A BVI company is treated as an entity separate from its investors and the limited liability of shareholders will generally be respected. As noted in question 1, an investor's liability will generally be limited to:

(i) the amount, if any, unpaid on the shares it holds;
(ii) any liability expressly set out in the memorandum and articles of the company; and
(iii) any liability to repay a distribution.

Regarding point (iii), a shareholder will be liable to repay a distribution if, at the time of the distribution, the company was insolvent, unless the shareholder received the distribution in good faith, without knowledge of the company's insolvency, has altered its position in reliance of the distribution and it would be unfair to require repayment.

Similarly to other English-law-based jurisdictions, there may be extremely unusual circumstances where the BVI courts 'pierce the corporate veil' and seek to find shareholders liable for debts of a company, such as cases involving fraud or a deliberate attempt to evade legal obligations. English case law regarding this topic will have persuasive effect in the BVI.

Limited partners will be liable for the debts and liabilities of the LP only if:

- the limited partner takes part in the management of the LP; and
- at the time the liability was incurred, the person to whom the liability was incurred:
  - knew that the limited partner took part in the management of the LP; and
  - reasonably believed, based on the limited partner's conduct, that the limited partner was, in fact, a general partner.

This two-step process provides additional certainty to limited partners.

The legislation provides for a number of safe harbours to the loss of liability, including the following activities, which do not constitute 'taking part in the management' of the LP:

- holding an office (including a directorship) or interest in (including as a shareholder or partner), acting as a consultant, contractor or agent for, being an employee of, or being engaged in business with a general partner;
- consulting with or advising a general partner about the business or activities of the LP, including as a member of an investment or advisory committee of the LP;
- acting as a surety or guarantor for the LP;
- serving on, or appointing a person to, or removing any person from, any board or committee of the LP or calling, requesting, attending or participating in any meeting of the partners; and
- giving advice in regard to, consenting or withholding consent, to any action proposed with respect to the LP, in accordance with the LPA or taking part in decisions concerning the winding up of the LP, any amendments to the LPA, the acquisition or disposal of any assets or businesses by or of the LP, whether to approve or veto investments proposed to be made by the LP as a member of an investment or advisory committee of the LP, incurrence of debt, appointment or removal of a general or limited partner, change in senior employees of the LP or the general partner.

The carve-out for membership of an investment or advisory committee provides greater certainty for investors who have representatives on such committees. If limited liability is lost, a limited partner will be liable to the same extent as a general partner. For an analysis of the extent of a general partner's liability, see question 1.

A limited partner who has been repaid all or part of their contribution, or who has been released from their commitment to fund the LP, may have renewed liability for that amount or commitment if the LP was insolvent at the time of and immediately following the repayment or release, and the limited partner was aware of this insolvency. The limited partner will only be liable to the extent that the renewed liability is necessary in order to discharge a debt or liability of LP incurred while the contribution or commitment represented an asset of the LP. Further, the risk of renewed liability expires six months after the date of the repayment or release. Both of these requirements provide a level of certainty to the limited partner. Aside from the above, as further provided in the LPA, or in the event of fraud committed by or with the consent of the limited partner, the limited partner has no liability in respect of a contribution repaid or a commitment released by the LP.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

Where the fund is established as a limited partnership, the fund manager will typically be the general partner. A general partner is required to act at all times in good faith and, subject to the anything agreed in the LPA to the contrary, in the interests of the partnership. Further responsibilities may be agreed upon in the management agreement.

Where the fund is incorporated as a company, management duties will be performed by its directors. Under statute, directors must:

- act honestly and in good faith and in what the director believes to be in the best interests of the company;
- exercise powers as directors for a proper purpose and not act in a manner that contravenes BVI company law or the company's memorandum and articles; and
- exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances (taking into account, among other things, the nature of the company, the decision and the position and responsibilities of the director).

These statutory duties do not exclude any duties under common law, and as such a director could be found liable for negligence, or for putting himself or herself in a position where his or her duties and own interests conflict.

Where expressly permitted in the memorandum or articles of the company, the directors may act in the interests of its wholly owned parent company or, if not wholly owned, in the interests of any of its majority shareholder (provided it has the prior agreement of its other shareholders), even where such actions may not be in the best interest of the company.

Both LPs and companies can indemnify their partners or directors, as relevant, for any judgments, claims or demands made against any partner or director in that capacity, provided that this does not extend to claims, in the case of LPs, arising out of the fraud or gross negligence of the partner and, for companies, where a director did not act honestly, in good faith and in what he or she believed to be the best interests of the company. The indemnity provisions will typically be set out in the LPA for LPs and in the articles for companies.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

It is common for a fund's constitutional documents to include provisions limiting a director's liability, except where gross negligence (or some other default) has occurred.

The LP Act states that indemnities for general partners will not extend to claims arising out of fraud or gross negligence of a partner. The term 'gross negligence' is left undefined and a conclusive definition of the distinction between the concepts of 'gross' and 'ordinary' negligence has not been arrived at by the BVI courts. In line with English case law, which has persuasive effect in the BVI, the courts will likely look to the intentions of the parties in referring to 'gross' as opposed to 'ordinary' negligence and will regard gross negligence as connoting negligence of a more serious type than a mere failure to exercise due care and skill.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

Other than as discussed in this chapter, there are no further material issues or requirements applicable to a closed-ended fund formed in the BVI.

There is a default position for BVI companies that, other than by way of security or otherwise than in the ordinary course of business, any disposal of more than 50 per cent in value of the assets of the company requires majority shareholder approval. However, this requirement can be contracted out of under the fund's constitutional documents or limited to votes of the managing entity. No such requirement applies to limited partnerships.

Conversion or redomiciling to vehicles into the BVI is permitted, provided that this is permitted under the laws of the entity's original jurisdiction. This applies to both companies and limited partnerships. The continuation of a foreign LP or company into the BVI has no effect on the existing debts of, or claims against, the LP or company that existed prior to the continuation. Similarly, BVI LPs and companies can continue out of the BVI, provided that this is permitted under the laws of jurisdiction where the entity wishes to redomicile.

The LPA, in the case of an LP, or the memorandum and articles, in the case of a company will usually be amended on continuation into the BVI to address BVI law. However, given the lack of special issues or requirements in the BVI, this should not have any material effect on the commercial terms of the fund.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Provided the fund is an unregulated closed-ended fund (see question 10), there are no express consequences for the private equity fund, its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor. Where such an event results in a general partner resigning, or otherwise being replaced, a notice of change of general partner must be filed with the BVI Registrar within 14 days of a person ceasing to be, or becoming, a general partner in the limited partnership. Such person remains liable as a general partner of the partnership until this notice has been registered.

The LPA (where the fund is structured as an LP) or the memorandum and articles (where the fund is structured as a company) should be consulted to determine any additional consequences specific to that fund.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The primary legislation regulating funds in the BVI is the Securities and Investment Business Act 2010 (SIBA), compliance with which is monitored by the FSC. SIBA is supplemented by regulations, including the Mutual Fund Regulations, the Financial Services Commission (Securities and Investment Business Fees) Regulations 2010 and the Securities and Investment Business (Incubator and Approved Funds) Regulations 2015.

SIBA only regulates open-ended funds and entities engaged in investment activities in or from within the BVI. The vast majority of private equity funds are closed-ended and, as such and unless where otherwise stated, this chapter focuses primarily on unregulated, closed-ended structures only. As unregulated funds, there are no audit or inspection rights held by regulators over closed-ended private equity structures.

The regulation of persons engaged in investment activities in or within the BVI (for instance, managers) is set out in more detail in question 12. Any regulatory reporting requirements of a regulated manager will relate to the accounts and business of the manager, rather than the underlying private equity fund.

As a BVI entity, a fund (whether open- or closed-ended), if structured as a company, will be registered with the BVI Registry of Corporate Affairs and its corporate affairs will be governed by the BVI Business Companies Act 2004 (as amended) and, if structured as an LP, will be registered with the BVI Registrar of Limited Partnerships and its corporate affairs will be governed by the LP Act. There is no requirement for a BVI entity, which is not regulated, to submit annual accounts or returns.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

As noted in question 10, closed-ended funds are not regulated in the BVI and so are not required to obtain government approvals or any license or to register to act as a closed-ended fund.

There are no additional licensing requirements where the fund invests within the BVI, save that any non-belonger entity (see question 17) that wishes to invest in land within the BVI must first obtain a land-holding licence and any significant investment into a BVI regulated business (for instance insurance or fiduciary companies) will often require approval by the applicable authority.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Where fund managers, investment advisers or fund administrators are established outside the BVI, they (and their directors and officers) will not normally need to be registered or licensed in the BVI, provided that they have no physical presence in the BVI, and the fund has no presence in the BVI save for its registered office and agent. Where a manager, adviser or administrator is established in the BVI, or where the fund has operations or investments within the BVI, and such functionary carries out services for persons other than members of its group, the manager, adviser and administrator will normally be required to be licensed under SIBA as carrying on an 'investment business'.

Licensees under SIBA are subject to requirements to, among other things, file audited financial statements and seek approval from the FSC for any change in its directors, officers or significant interest holders, for any business carried on outside the BVI and any establishment of a subsidiary.

An alternative option to registration under SIBA is to register as an 'approved manager' under the BVI Investment Business (Approved Managers) Regulations, which impose lighter requirements than SIBA, including no requirement to appoint an auditor. The 'approved manager' regime is available for BVI entities that act as investment managers or advisers to closed-ended funds that meet the characteristics of a public or private open-ended fund (excluding the redemption rights, among other things), and, in each case, whose aggregate assets under management do not exceed US$1 billion (or its equivalent in another currency).

Registration under either SIBA or the 'approved manager' regime will require payment of an initial and recurring annual fee.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

As noted in question 12, fund managers established outside the BVI will not normally require registration or licensing in the BVI, provided they, and the funds they manage, have no physical presence in the BVI save for the fund's registered office and agent. There are no specific qualifications or other requirements on such unlicensed managers.

Where managers are required to be licensed under SIBA or the 'approved manager' regime (see question 12), the FSC must find the licensee to be 'fit and proper' to carry out their roles, taking into account, among other things, their reputation, financial soundness, experience and past conduct. Licensees or 'approved managers' must have at least two directors (neither of which are required to be based in the BVI) and must satisfy itself that its directors and officers are also 'fit and proper' for their roles.

BVI-incorporated and SIBA-licensed fund managers may be required to meet substance requirements under new economic substance regulations (see 'Update and trends').

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are currently no specific rules in the BVI that restrict, or require disclosure of, political contributions by a PE fund manager, investment adviser or their employees. The Elections Acts 1994 (as amended) empowers the government to regulate the financing of election campaigns, however to date no such regulations have been brought into force.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are currently no such rules applicable to BVI closed-ended funds.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

There have been no specific developments in the BVI following the global financial crisis aimed at regulating banks' investment into, or sponsoring of, private equity funds. In general, non-BVI banks would need to have regard to applicable overseas legislation where this restricts investment in private equity funds.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

As a tax-neutral jurisdiction, the British Virgin Islands operate a zero-rated income tax regime for all entities established in the BVI. Similarly, there is no capital gains tax payable in the BVI on any gains realised by a BVI entity or with respect to any shares, debt obligations, partnership interests or other securities of a BVI entity. Furthermore, no withholding tax on interest or distributions paid by BVI entities to investors.

If the fund employs anyone within the British Virgin Islands, such person will be subject to payroll tax of between 10 and 14 per cent (8 per cent being paid by the employee, and the remainder paid by the employer) on remuneration (including severance pay, bonuses and money paid under profit-sharing scheme) for services rendered wholly or mainly in BVI. Contributions are also required to social security and national health insurance. It is rare that a BVI fund would have employees within the territory.

If the fund invests in real estate within the British Virgin Islands, it would be required to pay BVI stamp duty at a rate of 4 per cent for 'belonger' entities and 12 per cent for 'non-belonger' entities on the appraised value of the land. 'Non-belonger' companies, in simplified terms, are those with over one-third of its members being non-BVI citizens or with any directors that are not BVI citizens. Similarly, the transfer of shares or partnership interests in a BVI entity that holds, directly or indirectly, an interest in land situated in the British Virgin Islands would attract BVI stamp duty at the same rate.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Provided the fund does not invest in BVI land, non-resident investors in a private equity funds will not be subject to any taxation or return-filing requirements in the BVI. Stamp duty payable on transfers of interests in BVI land-holding entities is discussed in question 17.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

It is not necessary to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in the BVI. If a fund requires further comfort, a certificate of tax exemption can be requested from the BVI Inland Revenue Department.

Aside from differing stamp duty rates for 'belonger' and 'non-belonger' companies on transfer of their interests (see question 17), there are no special tax rules relating to BVI-resident investors. BVI residents will similarly be exempt from tax on any distributions from the fund and any gains on their interests.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are no organisational taxes to be paid with respect to private equity funds organised in the BVI. However, see question 2 regarding registration and annual fees payable by BVI entities and question 12 regarding annual licence fees for licensed entities.

Update and trends

Revised legislation and renewed corporate forms
The BVI provides a tax-efficient base for both investors and a fund's management team, together with a commercial, relatively light and credible regulatory regime. The BVI Partnership Act 2017, which came into force in January 2018, and the new Segregated Portfolio Companies (BVI Business Company) Regulations 2018, which came into force on 1 October 2018, are further additions to the range of products available to private equity funds, the benefits of which are further detailed in question 1, and presenting flexibility for those proposing to establish offshore private equity vehicles.

Substance
In response to concerns by the EU and OECD over cross-jurisdiction profit allocation, the BVI has enacted legislation that introduces requirements for certain BVI entities conducting 'relevant business' and registered and tax-resident within the BVI, to demonstrate adequate economic substance within the BVI. Such 'relevant business' includes fund management and holding companies, and structures will need to be evaluated on a case-by-case basis to ensure compliance. The EU's response to such legislation, and further guidance, is expected in the first quarter of 2019.

Cryptocurrency and tokenised funds
As a result of flexible and pragmatic existing securities legislation and willingness from regulators to engage and embrace this sector, the BVI has experienced a surge in entities engaged in blockchain-based technology and crypto-assets, and funds invested therein. Further to this, there has been an increase in interest in tokenised funds, where an investor's interest is represented by a cryptographic token, as opposed to shares or other interests or units offered to investors in a more traditional fund structure. There is currently no separate framework for the regulation of tokenised funds in the BVI, and their formation would be as otherwise set out in this chapter, save that such funds may also wish to appoint additional functionaries such as smart contract auditors.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Save as discussed above and below, there are currently no special BVI tax considerations with respect to a private equity fund's sponsor. With no value added tax or similar fees payable in the BVI, any management fee can be paid by the fund to the manager as a service fee, rather than distribution as a profit share to the general partner.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

While the BVI has not focused on entering into double taxation treaties, it has entered into nearly 30 tax information exchange agreements, including with Australia, Canada, China, the United Kingdom, the United States and a number of EU member states. The BVI is also a party to the Convention on Mutual Administrative Assistance in Tax Matters, which allows for the exchange of information upon request to facilitate tax avoidance and evasion among over 100 signatories.

The BVI has also entered into a non-reciprocal intergovernmental agreement with the United States under the US Foreign Account Tax Compliance Act (FATCA) and has adopted the Organisation for Economic Co-operation and Development's (OECD) Common Reporting Standards (CRS), in each case for the automatic exchange of tax information between the United Kingdom and other OECD members (save for the United States). BVI private equity funds will need to establish if they are reporting financial institutions under these agreements.

A legacy double taxation agreement between the United Kingdom and Switzerland, which was extended to the BVI in 1963, remains in place. However, given the limits on taxes in the BVI and the scope of the agreement, it is not regarded as having practical effect.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

There are no other significant tax issues relating to private equity funds organised in the BVI.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

While SIBA does set out requirements for approval and registration of prospectuses for offers to the public in the BVI, these provisions have not yet been brought into force. No prospectus or other measures are required for offers of securities by BVI closed-ended funds outside the BVI, provided the securities laws of the investors' jurisdictions are complied with.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

For closed-ended funds, there are no restrictions on the type of investors that may participate in such funds in the BVI.

There are restrictions on investors in open-ended funds, depending on the type of fund established. As discussed in question 10, open-ended funds are outside the scope of this chapter.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

Save as set out below, there are no requirements to file or notify regulators in the BVI of the identity of investors in, or a change in the composition, management or control of, a non-regulated closed-ended fund.

Following any transfer of interests which result in any change in the beneficial owner of a fund (being persons who ultimately own or control more than 25 per cent of an entity), the centralised beneficial ownership system (see question 4) will need to be updated by the fund's registered agent. This can only be accessed following a formal request from an authorised BVI agency.

Further, if the fund is a reportable entity for the purpose of FATCA or the CRS (see question 22), such fund will be required update its filings to the relevant tax authorities.

Upon any changes to the directors of a non-regulated company, an updated register of members must be filed with the BVI Registrar (see question 4).

Where the investment manager, adviser or administrator is licensed under SIBA (see question 12), prior approval of the FSC must be sought for any change in directors or senior officers, and any disposal or charge of any 'significant' interest in the licensee. A 'significant interest' is any interest that allows a person to control 10 per cent of the voting or asset rights or to appoint one or more directors. Entities registered as 'approved managers' (see question 12) must notify the FSC of any changes in directors or interest holders.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

An entity that arranges deals in, or provides advice regarding, investments in a BVI closed-ended fund will need to be registered under SIBA in the BVI only if the promoting entity is established in the BVI or operates in or from within the BVI (see question 12).

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The BVI has adopted money laundering regulations in line with the Financial Action Task Force standards. All BVI entities (including closed-ended funds) will be required to comply with the BVI Proceeds of Criminal Conduct Act, which sets out the key money laundering offences, including assisting in concealing criminal proceeds and failing to report suspicions.

Where an entity is regulated (see question 10 in relation to open-ended funds and question 12 in respect of fund managers), further regulations apply, including the need to appoint a money laundering reporting officer. A fund's registered agent (see question 3) will also be subject to enhanced anti-money laundering responsibilities and will take a key role in verifying the identity of significant new investors.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

There is currently no securities exchange operating within the BVI. BVI companies are, however, frequently listed on stock exchanges outside the BVI, including the New York Stock Exchange, NASDAQ, the London Stock Exchange (both the Main Market and, more frequently, AIM), the Tokyo Stock Exchange and the Hong Kong Stock Exchange. In spite of this and following global trends, it has not been customary for BVI private equity funds to be listed.

The initial and ongoing requirements for listing will be governed by the rules imposed by the relevant exchange, and there are no further requirements under BVI law that would prevent an unregulated, closed-ended direct fund or feeder fund from listing on an overseas exchange. Where a regulated BVI investment manager or fund (see question 10 and 12) wished to list, the BVI FSC's consent would be needed prior to any individual beneficial owner disposing or acquiring a 'significant interest' (see question 26).

The advantages and disadvantages of listing would mirror those in other jurisdictions, primarily being the advantages of enhanced liquidity for investors (given that a closed-ended fund would not otherwise allow for interests to be redeemed) and access to a broader scope of investors (for example pension funds who may favour listed securities) and the disadvantages of increased administrative costs arising from additional corporate governance and disclosure requirements imposed by the rules of the relevant exchange.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

There is nothing under BVI law that would prohibit a listed fund from imposing transfer restrictions. Nevertheless, the ability to impose transfer restrictions is likely to be regulated by the rules of the relevant exchange. Where required, the constitutional documents of the fund can be written so as to reflect the relevant exchange's free transferability rules and exceptions.

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

Save as discussed in question 11, there are no such restrictions.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

There are no specific legal or regulatory restrictions in the BVI on the sponsor's ability to take management fees, transaction fees, a carried interest or any other form of profit share from the fund. Such abilities will normally be governed by the terms of the fund and any restrictions in relevant onshore jurisdictions.

APPLEBY

Robert Varley **rvarley@applebyglobal.com**
Rebecca Jack **rjack@applebyglobal.com**

4th Floor, Jayla Place
Wickhams Cay I
Road Town
Tortola VG1110
British Virgin Islands

Tel: +1 284 393 5346
Fax: +1 284 494 7279
www.applebyglobal.com

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