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British Virgin Islands: Law and Practice

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Maples Group

BRITISH VIRGIN ISLANDS

Law and Practice

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The **Maples Group**, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives. For more information, please visit: maples.com/services/legal-services.

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

The British Virgin Islands (BVI) has long been a favoured jurisdiction for asset holding and transaction structuring among private equity sponsors, with clients benefitting from the jurisdiction's tax neutrality, robust legal system and ease of use and entity set-up. As long as these attractions remain, we expect the jurisdiction's popularity to continue and for BVI entities to retain a significant presence in M&A activity around the world.

1.2 Market Activity and Impact of Macro-Economic Factors

While other jurisdictions, including the Cayman Islands, have been dominant in the world of offshore investment funds, the BVI continues to increase in popularity in the closed-end sector of the industry. Increasingly, single-investor funds, single-investment funds and "club deals" are being structured through the BVI, in addition to co-investment vehicles set up to hold a single investment for one or more investors within the framework of an existing closed-end fund structure.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

The rise in BVI investment fund activity has been driven in part by certain differences in the regulation of closed-end funds between the Cayman Islands and the BVI, which are discussed below.

Limited Partnership Act (As Revised) (the "LP Act")

In addition to such regulatory arbitrage, the introduction in the BVI in 2017 of refreshed partnership legislation in the form of the LP Act has also attracted new users to the jurisdiction. The LP Act replaced the somewhat under-utilised international limited partnership regime and offers managers an extremely flexible and modern tool for structuring closed-end investment funds.

The LP Act draws significantly from the limited partnership regimes of other jurisdictions. BVI limited partnerships now share many of the features of those of other offerings, including broad freedom of contract and the ability to limit the liability of passive investors.

BVI limited partnership general partners are also subject to substantially the same unlimited liability for limited partnership debts and liabilities, as well as statutory duties to always act in good faith and (subject to any express provisions to the contrary in the limited partnership agreement) in the interests of the limited partnership.

The BVI limited partnership regime demonstrates a handful of technical refinements over and above those of certain other popular jurisdictions in the investment fund industry. For example, while it is not uncommon for limited partnership legislation to permit the use of non-domestic entities as general partners, under the LP Act a non-BVI entity does not need to first register as a foreign company in the BVI to be eligible to act as general partner of a BVI limited partnership.

BVI limited partnerships may also be formed with a separate legal personality – an option that is not available in all other competitor jurisdictions. While this does not make them separate

bodies corporate, it does permit any charge created over an asset of a BVI limited partnership that is then registered with the Registrar of Limited Partnerships in the BVI (the "Registrar") to have priority over any other charge over the same asset that is either unregistered or registered subsequently.

The registration process for BVI limited partnerships is straightforward and requires only submission to the Registrar of a registration statement (signed by each general partner) containing certain prescribed limited partnership information, a letter of consent from the limited partnership's proposed registered agent in the BVI, and confirmation of whether the limited partnership is to be formed with separate legal personality, together with the payment of the requisite USD750 government registration fee. Registration will usually take up to four working days.

Investment Business (Approved Managers) Regulations (As Revised) (the Approved Managers Regime)

Prior to the introduction of the Approved Managers Regime, all BVI managers of open- and closed-end funds were required to be fully licensed under the Securities and Investment Business Act (As Revised) (SIBA), which requires full compliance with the regulatory requirements of SIBA, the BVI's Regulatory Code (As Revised) and the BVI's anti-money laundering regime.

The Approved Managers Regime was introduced to address the fact that the systemic risk posed by start-up and existing mid-sized managers of both open- and closed-end funds is generally acknowledged to be lower than for those managing larger sums of investor money; application of the same regulatory requirements for all managers would lead to a disproportionate level of regulatory compliance costs for smaller managers.

The Approved Managers Regime is available to any qualifying BVI manager who acts as:

- an investment manager or investment adviser to private or professional funds recognised under SIBA, feeder funds into such funds and affiliates of those funds, as well as funds from "recognised jurisdictions" that have equivalent characteristics to BVI private or professional funds, provided the assets under management in such open-end structures are USD400 million or less;
- an investment manager or investment adviser to closed-end funds incorporated, formed or organised under the laws of the BVI or any recognised jurisdiction and that have the characteristics of a private or professional fund, together with their feeders and affiliates, provided the assets under management (ie, aggregate capital commitments) in such closed-end structures are USD1 billion or less; and/or
- an investment manager or investment adviser to such other person as the BVI Financial Services Commission (FSC) may approve on a case-by-case basis on application – this can include managed accounts.

The "recognised jurisdictions" for these purposes are currently Argentina, Australia, the Bahamas, Belgium, Bermuda, Brazil, Canada, the Cayman Islands, Chile, China, Curacao, Denmark, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hong Kong, Ireland, the Isle of Man, Italy, Japan, Jersey, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Panama, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, the United Kingdom and the United States.

The Approved Manager Regime also permits an investment manager or adviser to provide services to a fund that is not from a recognised jurisdiction where such funds invest all or a substantial part of their assets in a qualifying fund based in the BVI or a recognised jurisdiction.

The Approved Manager Regime is becoming an increasingly popular choice for smaller managers seeking a regime and regulation more aligned with their business model.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

SIBA

BVI closed-ended funds are subject to regulation under SIBA if they constitute "private investment funds". A private investment fund is defined under SIBA as a company, partnership, unit trust or any other body that:

- collects and pools investor funds for the purpose of collective investment and diversification of portfolio risk; and
- issues fund interests that 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 net assets of the company, partnership, unit trust or other body.

Accordingly, where there is no collective investment or diversification of portfolio risk, a fund will not technically constitute a private investment fund and accordingly will not be subject to regulation under SIBA. This is a notable driver of the increased use of the BVI for single-investor funds, single-investment funds, club deals and co-investment vehicles, as mentioned above – particularly where time is of the essence in deal structuring and execution.

SIBA imposes a general prohibition (with limited carve-outs) on the promotion of private investment funds and their carrying on of business unless and until recognised formally as such by the BVI FSC.

To be eligible for recognition, the constitutional documents of a private investment fund must:

- specify that the offer of fund interests to investors must be made on a "private basis" only;
- restrict the number of shareholders or investors to 50; or
- restrict the offer to "professional investors" and a minimum initial investment of USD100,000 for each such investor.

The application process for recognition requires the payment of application fees and the submission to the FSC of a completed application form together with a number of supporting documents, including the fund's constitutional documents, offering documentation (if any; if none, then an explanation for the lack of it must be provided) and valuation policy. The recognition process will typically take between five and seven working days following the submission of all required documents.

Private investment funds are subject to various ongoing obligations following recognition, including the retention of:

- a suitably qualified person – known as an "appointed person" – to take responsibility for undertaking the management, valuation and safekeeping of fund property;

- an auditor (although this need not be a local auditor based in the BVI), together with the submission to the FSC of annual audited accounts unless exempted under certain limited circumstances; and
- an authorised representative based in the BVI empowered to liaise with the FSC on a fund's behalf.

Any change to any of the foregoing personnel must be notified to the FSC within certain prescribed timeframes specified under SIBA.

Anti-money Laundering

The business of being a private investment fund constitutes "relevant business" for the purposes of the BVI Anti-Money Laundering (AML) Regulations (As Revised), and as a result, private investment funds are subject to the BVI AML regime. In addition to the regime's know-your-client (KYC) investor onboarding requirements, a private investment fund must also appoint a suitably qualified money laundering reporting officer.

The officer, who may be internal or appointed externally, will act as the liaison with the BVI Financial Investigation Agency in relation to AML compliance matters, and will have responsibility for ensuring compliance by the fund's staff with AML law and regulation, and any internal reporting protocols and compliance procedures the fund may have adopted.

A BVI investment fund that does not constitute a private investment fund under SIBA and is not otherwise regulated in the BVI will not technically be subject to the jurisdiction's AML regime. However, it is both recommended and accepted market practice for unregulated funds of this nature to conduct investor onboarding KYC and due diligence as if subject to the regime.

US Foreign Account Tax Compliance Act (FATCA) and the OECD's Common Reporting Standard (CRS)

BVI funds, whether recognised as private investment funds or not, will also constitute "(foreign) financial institutions" under FATCA and CRS (as each is extended to the BVI). Accordingly, such investment funds are subject to the regimes' registrations, account due diligence and account reporting requirements.

4. Due Diligence

4.1 General Information

It is uncommon for substantive activity to be undertaken by BVI entities within the territory itself, so BVI due diligence will typically be limited to an entity's constitution, books and records, and its compliance with applicable local law and regulation.

4.2 Vendor Due Diligence

It is not uncommon for a buyer to rely on vendor due diligence provided the transaction does not have any specific BVI regulatory or complex financial aspects. In such cases, the buyer may prefer their own due diligence report to address these issues.

5. Structure of Transactions

5.1 Structure of the Acquisition

The structure for the acquisition of shares in a BVI company will predominantly be driven by the structure of the shareholding. Where shares are closely held, the execution of a private treaty sale and purchase agreement or the use of applicable drag-along provisions would be typical. If shares are more widely held, it would be common to see the use of the BVI statutory

merger provisions. BVI statutory mergers have been a popular mechanism in the jurisdiction for many years, being used in both private and public transactions. Court-sanctioned schemes of arrangement are possible in the BVI but are not generally used. The terms of an acquisition will be driven by commercial rather than BVI-specific factors.

5.2 Structure of the Buyer

The single-investor, single-investment, club deal and co-investment fund structures that have become increasingly common in the BVI will quite often invest into underlying portfolio investments directly and will themselves be party to transaction documentation. BVI closed-end investment funds structured more as fully functioning blind pool funds – which remain rarer – will, however, more typically establish separate acquisition structures for their downstream transactions rather than investing directly. Such special purpose vehicles will usually be corporate entities and may be formed in a wide range of jurisdictions, including the BVI, with the choice often being driven by broader tax considerations.

5.3 Funding Structure of Private Equity Transactions

There is no overarching norm for the financing of transactions undertaken by BVI funds – nor need there be as a matter of BVI law, given the inherent flexibility that BVI investment structures can offer. The choice of financing methodology will therefore usually be driven more by commercial (and cultural) considerations at the sponsor, fund and portfolio company level.

5.4 Multiple Investors

Club deal arrangements and co-investment vehicles are more and more frequently being structured via the BVI, where they can avoid the need for private investment fund registration because they are established either for a single investment or a single investor.

Club deals will typically comprise a consortium of investors who will come together through a BVI aggregator vehicle to invest collectively and who will have management and economic rights apportioned between them, as agreed contractually.

Classic co-investment structures (where they involve multiple investors), however, will usually have investors take passive stakes as limited partners, with the vehicles then investing alongside the main private equity funds in which the co-investment vehicle limited partners are also separately invested.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

There is generally no restriction on the type of consideration that can be offered on a private treaty sale or negotiated offer. Consideration can therefore include, among other things, cash, loan notes and shares. The structuring of the consideration will be driven and agreed by the parties.

6.2 Locked-Box Consideration Structures

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.3 Dispute Resolution for Consideration Structures

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.4 Conditionality in Acquisition Documentation

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.5 "Hell or High Water" Undertakings

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.6 Break Fees

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.7 Termination Rights in Acquisition Documentation

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.8 Allocation of Risk

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.9 Warranty and Indemnity Protection

Warranty coverage in transactions in the BVI is generally limited to the title of target shares or assets, the capacity and authorisation to enter into the transaction, solvency and accuracy, and the completeness of the information provided to the buyer.

6.10 Other Protections in Acquisition Documentation

There is no common practice in the BVI; this will be driven and agreed by the parties in each transaction.

6.11 Commonly Litigated Provisions

Litigation of private equity transactions is rare in the BVI. The most likely reason for litigation would be the exercise of a dissenter's rights in the context of a statutory merger.

7. Takeovers

7.1 Public-to-Private

The market for take-private transactions involving BVI companies continues to be active, and these often involve private equity parties. There have been a number of take-privates in Asia involving Chinese ListCos, and in the UK involving companies listed on the London Stock Exchange.

There is no common practice in the BVI in respect of "relationship agreements", "transaction agreements" or other similar arrangements; any agreements between the parties will be determined by the parties in each transaction.

7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

There are no material shareholding or disclosure thresholds relevant under BVI law. Where the founders (and others) are leading a listed take-private transaction, disclosure around shareholdings in a target would usually be included in the offer documents for the transaction.

7.3 Mandatory Offer Thresholds

There are no material offer thresholds relevant under BVI law.

7.4 Consideration

Both cash and shares are commonly used in the BVI; there are no minimum price rules applying to tender offers in the BVI.

7.5 Conditions in Takeovers

Any conditions to an offer will be determined by the jurisdiction in which the business operates and relevant market considerations rather than by any BVI-specific factors. There are no restrictions, as a matter of BVI law, as to what deal-security measures a bidder can seek; break fees, match rights, force-the-vote provisions and non-solicitation provisions would all be permitted. However, it should be noted that, in agreeing any such provisions, the directors of a BVI company must act in accordance with their fiduciary duties (ie, their duties to act honestly, in good faith and in the best interests of the company).

7.6 Acquiring Less Than 100%

There are no restrictions under BVI law in respect of governance rights for a shareholder holding less than 100% of the issued shares of a company. In the absence of any provisions that state otherwise or class rights in the constitutional documents, a shareholder acquiring a majority of shares in a BVI company can amend the memorandum and articles of association, approve a statutory merger (subject also to board approval) and put the company into voluntary solvent liquidation.

There are two statutory mechanisms to squeeze out minority shareholders under BVI law. Members of a company holding 90% of the votes of the outstanding shares entitled to vote may give written instructions to the company directing it to redeem the shares held by the remaining shareholders. A squeeze-out will give rise to the right of the minority shareholder to dissent and receive payment for the "fair value" of their shares.

In addition, an alternate option is to squeeze out the minority by way of a statutory merger, as BVI law provides that a parent company (meaning a company that owns at least 90% of the outstanding shares of each class of shares in another company) may merge with its subsidiary without the need for shareholder approval. While it is unclear if, in the context of a parent-subsidiary merger, dissent rights are available to a minority shareholder, it would be prudent to make such right available to avoid any implication that the statutory merger route was used (as opposed to the statutory squeeze-out) to deny the minority shareholders the opportunity to dissent.

There are no specific thresholds or mechanisms under BVI law in connection with a "debt push-down"; any consents required would be subject to the usual corporate approvals depending on how the arrangement was structured.

7.7 Irrevocable Commitments

Where an offer is recommended by the board of directors of the target, obtaining irrevocable undertakings or commitments from the main shareholder(s) is common. There is no common practice in the BVI as to the timing or nature of the undertakings, which will be determined and agreed by the parties in each transaction.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

There is no common practice in the BVI; any terms will be determined and agreed by the parties in each transaction.

8.2 Management Participation

See **8.1 Equity Incentivisation and Ownership**.

8.3 Vesting/Leaver Provisions

See **8.1 Equity Incentivisation and Ownership**.

8.4 Restrictions on Manager Shareholders

See **8.1 Equity Incentivisation and Ownership**.

8.5 Minority Protection for Manager Shareholders

See **8.1 Equity Incentivisation and Ownership**.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

The extent and scope of control and governance rights enjoyed by BVI closed-end funds at the portfolio company level will often be driven by the relative size of the stake acquired, as well as by the market norms where the portfolio company is situated. This will therefore not usually be a question driven by BVI-specific matters.

9.2 Shareholder Liability

The "corporate veil" effectively separates the legal person who owns a company from the company itself. A duly incorporated BVI company is a legal entity separate from those who incorporate it, with rights, liabilities and property of its own. This is also the position within a group of companies where the fundamental principle is that each company in a group is a separate legal entity possessed of separate legal rights and liabilities.

Under BVI common law, the circumstances where a BVI court will allow the corporate veil to be "pierced" or "lifted", so as to hold a member of a company liable for the company's acts, are rare and limited. Such circumstances include, for instance, where a company is misused as a device or façade to conceal wrongdoing, or is used for an illegal or immoral purpose.

10. Exits

10.1 Types of Exit

There is no typical practice in the BVI, with private equity funds being established with a wide variety of exit terms. "Dual-track" and "triple-track" exits are uncommon.

10.2 Drag and Tag Rights

It is common to see the inclusion of drag rights in the constitutional documents of BVI companies. There are no typical terms in the BVI; these will be determined and agreed by the commercial parties in each transaction rather than by any BVI-specific factors.

As with drag rights, the use of tag rights is common in the BVI. Again, there are no typical terms in the BVI; these will be determined and agreed by the parties in each transaction rather than by any BVI-specific factors, legal or otherwise.

10.3 IPO

The use of BVI entities to effect IPOs on a variety of international exchanges is a well-trodden path. However, the terms of any lock-up arrangements or ongoing relationships will be determined by reference to the relevant exchange and jurisdiction rather than by any BVI-specific factors.

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