

Incorporating joint venture companies in the British Virgin Islands

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When setting up a joint venture involving parties from different countries, the choice of jurisdiction for the incorporation of the joint venture company ("JVC") is a crucial one.

Drivers for the choice of location of the JVC include both tax structuring considerations and also availing the joint venture parties to a legal regime which provides them with both certainty and flexibility, so as to enable the joint venture to operate as contractually agreed between the joint venture parties.

This briefing looks at some of the reasons why the British Virgin Islands (or "BVI") is a popular choice for incorporating an offshore joint venture.

Its reputation

The BVI is an overseas dependent territory of the United Kingdom and has successfully developed its reputation as a sophisticated international finance centre.

It is a politically stable jurisdiction with a judicial system based upon long-established English legal principles, with a right of final appeal at the Privy Council in London. It has a dedicated Commercial Court, with a full time Commercial Court judge, together with the BVI International Arbitration Centre, so enabling the speedy and efficient resolution of commercial disputes.

BVI maintains a balance between a strong regulatory framework, an entrepreneurial business community and a government committed to developing cutting edge legislation and policies, thereby fostering both an internationally recognised and respected regulatory regime with a well-developed and professional corporate infrastructure and a business friendly operating environment.

Flexible company law

Companies incorporated in the BVI under the BVI Business Companies Act, 2004 (as amended) (the “Act”) are the usual vehicle for JVCs (although limited partnerships form under the Limited Partnership Act, 2017 are also available).

The Act is intentionally drafted so as to provide a flexible “light-touch” corporate governance regime, thereby enabling the JVC to operate in the manner contractually agreed by the joint venture parties.

Underpinning the joint venture arrangements will be a joint venture agreement/shareholders' agreement, which will be entered into between the joint venture parties and contain the contractual terms agreed for the joint venture. This agreement will be a private agreement between the joint venture parties and does not need to be filed publicly in the BVI. However, confidentiality/commercial sensitivity considerations permitting, it would be usual for certain of the operative provisions of this agreement to also be contained within the constitutional documents of the JVC. This is done so as to bind the company as a matter of company law to operate in the manner agreed contractually between the joint venture parties.

Importantly for joint ventures, the Act varies the traditional fiduciary duty of directors to act in the best interests of the company for whom they act as a director by permitting the JVC to provide in its constitutional documents that the appointees of joint venture parties can act in the best interests of the joint venture party appointing them, even if in so doing it may not be in the best interests of the JVC. This makes the use of BVI incorporated companies in joint ventures particularly appealing, as it provides joint venture parties with the security that their appointed director(s) can truly represent their interests on the board of directors of the JVC without risking potential personal liability for a claim for a breach of director's duties.

The Act also provides for a flexible regime regarding the payment of dividends and distributions, by permitting such payments to be paid out of any source provided that the company passes a solvency test (which is a cash flow and balance sheet solvency test), making it easier to remit profits back to the joint venture parties

Other considerations

Corporate insolvency in the BVI is governed by the Insolvency Act 2003 and Insolvency Rules 2005. The laws are closely based on the English Insolvency Act 1986 and the similarities to the UK legislation will provide comfort to joint venture parties who will be able to tailor their affairs accordingly.

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