

## **Cross-border transactions and the advantages of using a BVI joint venture vehicle**

*By Erica Mandryco and Ray Wearmouth*

As cross-border transactions and international business partnerships become part of everyday life, parties are increasingly looking towards offshore jurisdictions for a neutral vehicle which can be tailored to all of the parties' needs. This article will take a look at why companies incorporated in the British Virgin Islands (BVI) are suited for such transactions and, given the current economic climate, will also highlight some of the remedies available to a shareholder when a joint venture relationship takes a turn for the worse.

### **Flexible nature of BVI entities**

One of the principal reasons why the BVI is the prime jurisdiction of choice for many international joint venture (JV) transactions is because of the unique structure of the BVI Business Companies Act, 2004 and the flexibility it provides to JV parties.

The Act (which came into force in January 2005) introduced several new concepts which lend themselves well to a JV scenario.

Although there are several types of corporate vehicle which can be established under the Act, the most commonly used is a company limited by shares. This is usually accompanied by a shareholders' agreement which will set out the parties' respective rights and obligations in detail. In many cases, the shareholders' agreement and the memorandum and articles of association are drafted so that they dovetail with each other. This ensures that any specific provisions of the shareholders' agreement will not contradict the constitutional documents of the company.

The versatility of a BVI company can also assist in a situation where the JV parties wish to take the JV company onto a new platform and list on a particular stock exchange. The BVI does not have any of its own securities laws and therefore, the company need only reflect changes required under the chosen forums for the listing and the place(s) of the offer.

## **Directors**

A key consideration in the management of any JV is the role of the directors. Each investor in a JV situation is likely to have at least one representative on the board of directors of the JV vehicle. Supplemental to the duties of a director set out in BVI insolvency legislation and common law duties, the Act codifies the principal duties of a director. The most significant provision in relation to JV directors is that a BVI company has the ability to include a provision in its memorandum and articles of association which provides that a director of a BVI JV can act in the best interests of one or more shareholders of the JV regardless of whether such actions are in the best interest of the JV itself. This helpfully addresses the situation where a director is required to act in a certain manner as dictated by a particular shareholder.

## **Dividends and distributions**

A major attraction of a BVI company to JV parties is the ease in which profits can be released from the company. Firstly, the Act abolished the concept of share capital which releases the parties from any restrictions relating to traditional capital maintenance. Secondly, the Act also introduced a new solvency test to be used when deciding on whether the company is able to make a distribution to its shareholders. Directors of a BVI company need only to resolve (on reasonable grounds) that: (i) the company's assets exceed its liabilities; and (ii) the company is able to pay its debts as they fall due. There are no distributable profits tests or similar requirements which provides much more flexibility, with the focus now being on solvency rather than archaic capital rules.

## **Tax**

As a general rule a BVI company is not required to pay any form of tax in the BVI (aside from the fixed annual government licence fees). It should be noted however, that a BVI company may still be subject to any taxes levied upon it by the jurisdiction in which any of the JV parties are based or where any activities of the JV are undertaken.

## **Regulatory issues**

Aside from legislation which deals with the regulation of companies acting as banks, trust companies, insurance companies, funds and company management companies in the BVI, there are no other general regulatory requirements for a BVI JV company. However, any regulatory requirements dictated by the jurisdiction in which the JV operates must still be complied with.

## **Shareholder remedies**

Given the current economic climate, it is not beyond comprehension that some JV partnerships will not make it through these tough times. This can arise because of a multitude of reasons; however, if the breakdown is due in part to the actions of one or more of the parties in relation to the company, there are some good 'safety' features under the Act for investor shareholders who are concerned about what happens when relations between the parties deteriorate.

*Compliance orders.* Under the Act, a shareholder can apply to the BVI courts for an order to enforce compliance with the provisions of the constitution of the company or to restrain conduct in contravention of it. This further supports the case for replicating any particular matters of importance to the parties which relate to its corporate governance contained in the shareholders' agreement, in the memorandum and articles of the company.

*Unfair prejudice.* If a shareholder considers that the affairs of the JV company have been, are likely to be conducted in a manner that is, or likely to be oppressive, unfairly discriminatory or unfairly prejudicial to them, they can apply to the court for the application of the remedies which can include an order to wind up the JV company or force a majority shareholder to purchase a minority shareholder's shares at a fair and reasonable price.

*Derivative actions.* A BVI court may also grant a particular shareholder permission to bring proceedings in the name and on behalf of the JV company or to intervene in proceedings to which the company is party. Permission to bring proceedings under this heading may only be granted by the court if it is satisfied that: (i) the JV company does not intend to bring, continue or defend (or even discontinue) the proceedings; or (ii) it is in the interests of the JV company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

## **Conclusion**

As the contents of this article demonstrate, the BVI is a well suited jurisdiction in which to base a JV company. Not only does it offer a flexible and versatile regime which can be tailored to suit all needs, it also provides protection for shareholders when relations between the parties turn sour – which can be a comfort to both novice and established JV parties in these extremely unsettled times.

**December 2008**

**This article was first published in *Financier Worldwide* in December 2008. If you would like further information on cross border joint ventures, please contact Erica Mandryko or Jacqueline Daley-Aspinall at our BVI office or your usual Harney Westwood & Riegels lawyer. Alternatively, you may visit our website at [www.harneys.com](http://www.harneys.com).**

**The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.**