



# Initial Public Offerings

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With contributions by:



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# British Virgin Islands

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Maples and Calder

## Introduction

In this chapter we will focus on the popularity of British Virgin Islands (“BVI”) companies as listing vehicles on international stock exchanges, including the Hong Kong Stock Exchange, the London Stock Exchange and the New York Stock Exchange (“NYSE”). The British Virgin Islands does not have a stock exchange but since the 1990s, the British Virgin Islands has been a popular jurisdiction for the incorporation of issuers to be listed on international stock exchanges. As the British Virgin Islands continues to develop its legal and regulatory regime to remain at the forefront of international standards, we anticipate that the use of British Virgin Islands companies as internationally listed companies will continue to grow. Reasons for the use of British Virgin Islands companies include:

- A stable political system, recognised as a world-class offshore financial centre.
- The laws of the British Virgin Islands are substantially based upon English common law, and a number of “key” English statutes. This gives the British Virgin Islands’ law and legal system a common origin with those of many of the jurisdictions of its users, including the United Kingdom and the United States. It also means that a company incorporated in the British Virgin Islands and its shares are well recognised and accepted around the world, and particularly in Hong Kong, London and New York.
- The speed with which companies can be established, usually within one business day, and without the need for any prior governmental approvals.
- The British Virgin Islands has a modern and flexible statutory regime for companies, providing a non-intrusive regime on dividends, redemptions/repurchases and financial assistance for the acquisition of shares, and minimal ongoing filing requirements.
- The British Virgin Islands’ status as a tax-neutral jurisdiction. A British Virgin Islands business company with no employees or property interests in the British Virgin Islands will be exempt from all forms of British Virgin Islands taxation.
- The British Virgin Islands is recognised by the Organization for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF) and other international bodies for its transparency and standards consistent with those of other major developed countries.
- There are no exchange control restrictions or regulations in the British Virgin Islands (unlike many other jurisdictions). This means that funds can be freely transferred in and out of the British Virgin Islands in unlimited amounts.
- There is no requirement that a company incorporated in the British Virgin Islands should have any local directors or officers. Nor is there any requirement for local service providers (other than a British Virgin Islands registered office). Except in the case of certain regulated entities, there is no requirement to appoint a local auditor.

The British Virgin Islands business company limited by shares is the British Virgin Islands vehicle used for the purpose of acting as the listed vehicle in an international IPO. The key features of a business company include:

- Same-day incorporation.
- Low government fees on registration and annually.
- It is not necessary that any of the shareholders, directors or officers be resident in the British Virgin Islands.
- The board of directors can be comprised of such number of persons as may be desired. Typically, the board would consist of at least two persons. No officers are required by law, although it is sometimes convenient for a company secretary to be appointed.
- There is no requirement that any meetings of the board of directors be held in the British Virgin Islands.

We regularly act for issuers completing initial public offerings on the large international stock exchanges including:

- Hong Kong Stock Exchange – Main Board and Growth Enterprise Market;
- London Stock Exchange – Main Market and Alternative Investment Market (“AIM”);
- NASDAQ Stock Market (“NASDAQ”);
- NYSE; and
- Toronto Stock Exchange.

Our work has included:

- acting for the BVI special purpose acquisition company, Justice Holdings Limited, which was listed on the London Stock Exchange and which closed its business combination agreement with Burger King Worldwide Holdings, Inc., the world’s second largest fast food hamburger restaurant chain, under the terms of which 3G Capital, a global investment firm and Burger King Worldwide’s principal shareholder, received approximately US\$1.4 billion in cash and continued as the majority shareholder;
- acting for the BVI special purpose acquisition company Ocelot Partners Limited which was listed on the London Stock Exchange and formed in order to undertake an acquisition raising gross proceeds of US\$418 million in the initial public offering;
- acting for Tianhe Chemicals Group Limited, a manufacturer of speciality chemicals, on its US\$1 billion initial public offering on the Hong Kong Stock Exchange;
- acting for Feishang Anthracite Resources Limited in connection with its listing by way of introduction on the Hong Kong Stock Exchange. Feishang Anthracite operates the anthracite coal exploration and mining business of its former parent China Natural Resources, Inc.;
- acting for Duoyuan Global Water Inc. which is based in China and is a leading supplier of domestic water treatment equipment on its listing on the NYSE, raising US\$88 million;
- acting for the BVI company, Biohaven Pharmaceutical Holding Company Ltd which was listed on the NYSE raising in the region of US\$195 million;
- acting for a key investor in respect of the listing of Despegar.com, Corp which was listed on the NYSE raising US\$382 million; and
- acting for the BVI company, Arcos Dorados Holdings Limited, the largest operator of McDonald’s restaurants in Latin America and the Caribbean, and the world’s largest McDonald’s franchisee, on the listing of its shares on the NYSE as well as on its issuance of bonds including bonds listed on the Luxembourg Stock Exchange.

To provide an indication of the popularity of the British Virgin Islands company as a listing vehicle of choice:

- as at 5 March 2018, there were 25 British Virgin Islands companies listed on AIM and 10 British Virgin Islands companies listed on the Main Market of the London Stock Exchange;
- as at 5 March 2018, there were nine British Virgin Islands companies listed on the Hong Kong Stock Exchange; and
- as at 5 March 2018, there were a total of 38 British Virgin Islands companies listed on NASDAQ (29) and NYSE (nine).

## **The IPO process: steps, timing and parties and market practice**

### Listing on an international exchange

The precise steps and timetable for an IPO on an international stock exchange are largely dictated by the requirements of the relevant exchange, and any related share offering timetable.

British Virgin Islands counsel works closely with the lead counsel for the IPO in the relevant jurisdiction. The input typically required from a British Virgin Islands perspective includes:

- advising in respect of the incorporation of the company;
- drafting the constitutional documents of the company, including any provisions required to comply with applicable listing rules or securities laws – British Virgin Islands law is flexible in this regard and can generally accommodate the broader constitutional provisions and shareholder protections required by the listing rules of the international stock exchanges;
- providing input on the British Virgin Islands aspects of the listing document, including the descriptions of the listed securities and the applicable corporate laws, and British Virgin Islands tax considerations;
- preparing any formal legal opinions required by regulators, stock exchanges, depositories, registrar and transfer agents and/or brokers/underwriters;
- preparing necessary corporate approvals for the IPO; and
- generally advising on British Virgin Islands corporate law.

A British Virgin Islands issuer can be incorporated on a same-day basis where necessary. There are no pre-incorporation publishing requirements and registration will be effective on the date of filing. Incorporation is effected by filing the memorandum and articles of association of the company, which set forth the objects and powers (which can be unlimited) and the internal governance requirements of the company.

## **Regulatory architecture: overview of the regulators and key regulations**

The key sources of regulation of British Virgin Islands companies are the BVI Business Companies Act (as amended) and common law. There are no specific statutes or government regulations concerning the conduct of IPOs or M&A transactions.

The Companies Act includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Act. This provides a flexible regime for common public company transactions including take-privates.

### Listing on an international exchange

The key legal documents applicable to an international IPO process from a British Virgin Islands perspective are the listing document, the memorandum and articles of association of the company, and requisite corporate approvals. Applicable underwriting agreements and depository or custody agreements should also be reviewed by British Virgin Islands counsel, notwithstanding they are not likely to be British Virgin Islands law-governed.

Typically, British Virgin Islands counsel would help prepare the necessary disclosures for inclusion in the listing document to describe British Virgin Islands companies and the corporate law framework of the British Virgin Islands. Such disclosure often includes a comparison of British Virgin Islands law with the equivalent law governing companies incorporated in the IPO jurisdiction – in order that potential investors are able to assess the impact of the use of a British Virgin Islands company as the listing vehicle as compared to a vehicle formed in the IPO jurisdiction.

The memorandum and articles of association of the company will need to follow a form which meets the requirements of the applicable stock exchange upon which the company is to be listed, as well as the legal requirements of the British Virgin Islands. British Virgin Islands counsel work with the lead counsel on the IPO to determine the requirements of the relevant stock exchange, and then draft the constitutional documents accordingly to ensure they are in compliance with such rules.

British Virgin Islands companies intending to list on the main US exchanges may be able to take advantage of “foreign private issuer” status, which provides certain advantages, including: (i) reduced reporting requirements; (ii) reduced disclosure requirements; (iii) certain exemptions from US proxy rules; (iv) ability to apply accounting standards other than US GAAP; (v) flexibility in choice of reporting currency; and (vi) ability to apply certain “home country” standards in respect of corporate governance practices, publication of interim and annual reports, and the composition, election and classification of directors.

Many British Virgin Islands companies listing on NYSE or NASDAQ choose to list American Depositary Receipts (“**ADRs**”) rather than making a direct equity listing, which allows the company’s equity to continue to be denominated in a currency other than US dollars, whilst permitting the listed security to be US dollar-denominated and to clear through US settlement systems. Each ADR is a negotiable certificate that evidences an ownership interest in American Depositary Shares (“**ADSs**”) which, in turn, represent an interest in the shares of the issuer, which are held by the applicable depository.

British Virgin Islands issuers listed on the London Stock Exchange (whether on the Main Market or on AIM) are not automatically subject to the United Kingdom Takeover Code and the jurisdiction of the Panel on Takeovers and Mergers of the United Kingdom. The Takeover Code regulates takeovers of, among others, public companies listed on the London Stock Exchange with a registered office in the United Kingdom, the Channel Islands and the Isle of Man. The Takeover Code is designed to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover, and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. It also provides an orderly framework within which takeovers are conducted. As British Virgin Islands issuers are not subject to the Takeover Code, where a British Virgin Islands issuer is listing in London, it is common for the issuer’s articles of association to include provisions that seek to provide shareholders with some or all of the protections that they would have under the Takeover Code. We work closely with the lead IPO counsel for the listing to ensure the appropriate protections required by investors are incorporated.

The British Virgin Islands is specifically approved by the Hong Kong Stock Exchange as a jurisdiction of incorporation for listed companies. A form of memorandum and articles of association for such listed companies and other relevant documentation has been agreed between the Hong Kong Stock Exchange and BVI legal practitioners, which facilitates the listing process. Many pre-IPO companies in mainland China are incorporated in

the British Virgin Islands and there is no longer any requirement for such companies to restructure to other jurisdictions (with consequent cost and potential onshore tax exposure) in order to list on the Hong Kong Stock Exchange.

Under recently enacted legislation, certain British Virgin Islands companies are required to maintain a beneficial ownership register that records details of the individuals who ultimately own or control 25% or more of the shares or voting rights or who otherwise exercise control over the management of the company, together with details of certain intermediate holding companies through which such interests are held. However, companies listed on the main international stock exchanges (including the NYSE, NASDAQ, London Stock Exchange and Hong Kong Stock Exchange) are exempt from this regime.

### **Public company responsibilities**

The listing of a British Virgin Islands company on an international stock exchange does not result in the imposition of any additional British Virgin Islands obligations for the company to satisfy.

### **Potential risks, liabilities and pitfalls**

Under British Virgin Islands law, subscribers for shares in an IPO offering could potentially bring certain claims against the company and other parties, such as its directors, its auditors and its advisers. The following considers only the position which would apply in respect of proceedings before a British Virgin Islands court applying British Virgin Islands law. With respect to British Virgin Islands companies with equity listed on international exchanges, it is perhaps more likely that proceedings will be brought in another jurisdiction, such as the jurisdiction from which an applicant subscribed for shares and in which a copy of the listing document was made available to them.

Also, while proceedings might be brought before a British Virgin Islands court, the court may be asked to apply, in accordance with British Virgin Islands conflicts of law rules, the laws of some other jurisdiction as the appropriate system of law to the relevant action.

The types of claims that could potentially be brought include:

#### *Negligent misstatement*

There may be civil liability in tort (under what is usually termed the rule in *Hedley Byrne v Heller*) for misstatements in a listing document. The terms of the listing document place a duty of care on the company, and may be argued to place a duty of care on the directors, the promoters and even professional advisers named or referred to in the listing document (or otherwise responsible for its contents), in favour of persons who subscribe or apply for shares in the company on the faith of the contents of the listing document. Breach of this duty would give rise to a claim against such persons for any loss attributable to statements in those parts of the listing document for which responsibility was expressly or impliedly accepted by such person. Reliance on the listing document would have to be proved by the relevant subscriber.

#### *Fraudulent misrepresentation*

Civil liability in tort may also arise in respect of a fraudulent misstatement of fact (although not a promise, forecast or expression of opinion). “Fraudulent” in this context is widely interpreted to mean made either with knowledge that the statement was false, or not caring whether the statement is true or false.



*Action for deceit*

An aggrieved investor may, by bringing an action for deceit (a civil claim in tort rather than contract), obtain damages for deceit if it can be shown that:

- (i) a material misstatement was made fraudulently; and
- (ii) they were induced to subscribe for shares as a result of such a misstatement.

“Fraudulently” again means made either with knowledge that the statement was false, or not caring whether the statement was true or false. It is not necessary to show either an intent to defraud or that the fraudulent statement was the sole cause which induced the investor to take up the shares.

*Contractual liability*

The listing document will also form the basis of a contract between the company and the successful applicants for shares. If it is inaccurate or misleading, applicants may be able to rescind the contract and/or sue the company and/or the promoters and/or the directors for damages.

Again, as a general matter, since the relevant contract is with the company itself, the relevant person against whom the subscriber would claim would be the company, although the company might be able in turn to claim against its directors, promoters or advisers.

So far as British Virgin Islands conflicts of law aspects are concerned, these questions would be determined according to the governing law of the contract for subscription. Where there is an express choice of British Virgin Islands law as the governing law, this is likely to be conclusive to determine the governing law. Where the documentation makes no express choice of governing law at all, it is likely that a British Virgin Islands court would still consider British Virgin Islands law as the governing law, since the offeror is incorporated in the British Virgin Islands and the subject matter of the contract is shares or an interest in shares, if ADRs are issued, in a British Virgin Islands company.



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