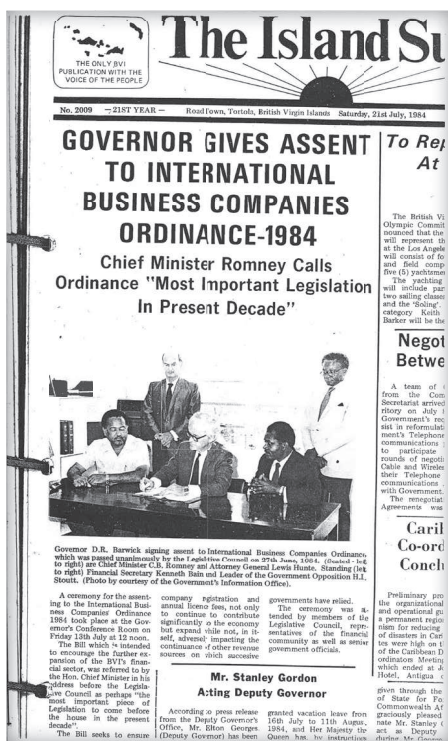


## The IBC Act – the building of a nation



Although nobody knew it at the time, the inception of the BVI's International Business Company Act occurred at some point during the year 1976. Nobody now recalls the exact date, except that it was during the summer. It is reasonable to assume that it was a hot day, and in most of the offices in Road Town, Tortola the overhead fans would have been turning lazily to avoid creating enough breeze to disrupt the piles of paper on assorted desks. Amongst those offices there was only one law practice in the Territory at the time, and that was the firm of Harney Westwood & Riegels. Within their offices on Russell Hill there were just two lawyers: Neville Westwood, a veteran of the Second World War who had settled in the Caribbean with his wife and daughter in search of a more peaceful life, and Michael Riegels, who had recently come to the BVI with his family from Tanzania after a period of civil unrest. Harold Harney had by this time passed away.

On this otherwise unremarkable day, the rotary telephone rang with a deafening jangle, and the receptionist would have answered. On the other end of the line was a Wall Street lawyer by the name of Paul Butler from renowned New York law firm, Shearman & Sterling. Like so many Wall Street lawyers Mr Butler was a highly capable and astute businessman. He also

had characteristic American friendliness and charm in abundance. He could anticipate immediate attention because international telephone calls were uncommon in those times. Cable & Wireless had laid the necessary undersea cables only a few years before. Mr Butler asked politely if he could speak to either Mr Westwood or Mr Riegels, and in the end he was connected with Michael Riegels. There would have been few pleasantries – telephone calls were extremely expensive under the Cable & Wireless monopoly – and Mr Butler got down to explaining the purpose of his call. He was an American corporate lawyer, and there were double taxation treaties between the USA and various “micro-states” in the Caribbean which offered the potential for generous US tax relief. He had been dealing with lawyers in the Netherlands Antilles, but had been having trouble with the language barrier, and he was interested in trying to use the BVI going forward. Mr Riegels said they would be very happy to assist and he would start looking into it right away.

The transaction went well. Undoubtedly issues would have arisen, but nothing which proved insurmountable. The transaction was then followed by another, and then another, until there was a steady stream of US tax related work going through the offices of Harneys. Mr Butler would later remark that he had been rather lucky selecting the BVI and Harneys. Although he had anticipated having to closely supervise inexperienced local lawyers, he had accidentally stumbled across two very able men. Neville Westwood was a Cambridge graduate who, after spending time at the English bar, had worked extensively in industry. Michael Riegels was an Oxford man who had come fifth in the entire country when he sat for the English bar. The relationship between the three men became very warm. Shortly thereafter the two Harneys partners hired

a third man to join them: Richard Peters, a brilliant young tax barrister from London and a former Cambridge organ scholar. The future seemed spectacularly bright at this stage.

But even in the days before Edward Snowden had been born, the all-seeing eye of the American Government fell upon the BVI soon enough. The success of the double tax treaty was causing concern in Washington, and the American authorities summoned a delegation from the BVI to discuss the treaty. The delegation was led by McWelling Todman QC – “Mac” to his friends – a native Tortolan lawyer of exceptional ability. The delegation was not especially successful. Mac Todman would later joke grimly that their meetings had been not so much a case of “negotiation” as “plea-gotiation”. In any event, the Americans unceremoniously cancelled the double taxation treaty in 1982.

The situation looked potentially grim. Up until the mid-1970s the BVI had been something of an economic backwater. There was little infrastructure or industry, but the increasing economic traction that the incorporation work had brought had injected a certain degree of prosperity into the islands. People were anxious that the momentum should continue. The Attorney General of the day was a man named Lewis Hunte. A man of infectious charm and good humour, Mr Hunte was a native of Barbados who had come to the BVI and proved himself a skilled draftsman during the much needed modernisation process which was underway in relation to the BVI’s legislation. Mr Butler suggested that the best way to respond to the cancellation of the double tax treaty was to try and offer a new corporate product in the market. Instead of promoting a structure which would create tax leakage in powerful states such as the USA, the BVI should seek to create a tax-neutral company using up to date legislation which would provide a user friendly flexible modern corporate vehicle for multiple commercial purposes in any country in the world. The idea enjoyed the encouragement and support of Ken Bain, the Financial Secretary of the BVI at that time.

In the end a committee of five people: Paul Butler, Lewis Hunte, Richard Peters, Michael Riegels and Neville Westwood were tasked with developing the legislation to create this new type of corporate vehicle. Paul Butler in New York and Richard Peters, Michael Riegels and Neville Westwood in the British Virgin Islands worked on producing a first draft of the proposed new legislation. This draft was then gone over section by section in minute detail with Lewis Hunte in the Attorney General’s Chambers on a daily basis to work the draft into a suitable legislative format for the BVI. Although later they would sometimes be referred to as the “gang of five” who were responsible for the drafting of the IBC Act, in truth the majority of the work was done by Richard Peters, the youngest member of the group. At the suggestion of Mr Butler, the legislation was based upon Delaware corporation law, which was thought to be the most modern in the world at the time, but incorporating additions from innovative company legislation in other jurisdictions as well. At points this led to some grating jurisprudence – using American legal terminology within an English common law system – but after eighteen months the task was completed and on 15 August 1984 the Legislative Council of the British Virgin Islands passed the new Act into law.

Looking back at the International Business Companies Act now, it is easy to overlook how radical it was at the time. It streamlined the incorporation procedure and removed the requirement of corporate capacity. It abolished the need for corporate benefit, recognised that companies could exist without members, and permitted companies to provide financial

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assistance for the acquisition of their own shares. It provided for true statutory mergers, and created new statutory tools for restructuring and reorganisation. Most of these innovations would not appear in English company law until the Companies Act 1986, and some did not appear until the Companies Act 2006. It is not mere hyperbole to say that the IBC Act was ahead of its time.

However the Government and private sector of the British Virgin Islands were not really concerned with how radical the new statute was. What they were really concerned about was whether accountants and lawyers in other jurisdictions would use these new International Business Companies, or IBCs. So they waited. At first it was slow. Very slow. Very few new companies were incorporated under the Act. People were tempted to write the whole endeavour off as a failure. And then all of a sudden, like a desert after the rains come, it all started to bloom. From about 1989 to about 1997 the incorporation numbers exploded, growing exponentially at the almost unmanageable rate of nearly 50% growth year-on-year. The infrastructure at the Companies Registry struggled to keep pace with the sheer volume of incorporations. Lawyers, accountants and trust companies poured into the sleepy capital of Road Town like miners in the California gold rush. New offices had to be built. House prices surged. Infrastructure was upgraded. For better or worse the BVI experienced rapid economic growth on a scale it had not contemplated at the outset. In 1999, after a study on behalf of the British Government, the accountancy firm KPMG estimated that the BVI had amassed a 41% global market share for offshore vehicles. By 2004 the BVI would have the 12th highest GDP per head of population in the entire world.

During the 1990s it became a popular topic of conversation at business lunches in the BVI to try and identify what had happened to “flip the switch” on the IBC Act. For many years the popular theory was that it was the invasion of Panama by the USA. There was a neat symmetry to the theory. The USA had killed off the first incarnation of the offshore industry, so it was fitting that an American geopolitical event should give birth to the second. The broad premise was that Panama was a leading player in the offshore industry until the Americans invaded Panama in December 1989 to arrest the Panamanian dictator, General Manuel Noriega, on charges of drugs running. The unrest arising from the invasion caused business to flee, and the BVI was one of the main beneficiaries. However, the theory is probably over simplistic. Incorporation numbers had already begun to balloon before the Americans loaded their rifles and boarded their warships. There is nothing about the period immediately following the invasion which shows a particularly large spike as against the year before or the year after, although undeniably the US invasion of Panama was beneficial to the growth of the BVI's financial services industry.

Another popular theory was that much of the popularity of BVI companies can be attributed to just one man: Sir Li Kai-shing, a Hong Kong business magnate and now Asia's wealthiest man. Back in the late 1980s the businessman – then simply known as Mr Li – was reorganising his highly successful shipping business, Hutchison Whampoa. Mr Li made the fateful decision that he would use British Virgin Islands IBCs as the holding companies in his new reorganisation of the group. Such was the regard that Mr Li was held in that other businessmen and young entrepreneurs rapidly followed his example. Whilst the theory regarding Hutchison Whampoa may or may not be more accurate than the Panama theory, there is little doubt that the IBC proved to be extraordinarily popular in Hong Kong. In fact they became so ubiquitous that even today Hong Kong businessmen will often refer to using “a BVI” as a shorthand reference for an offshore company,

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regardless of its jurisdiction of incorporation. Professionals in the BVI used to joke that when a man turns 18 in Hong Kong his father would hand him a mobile phone and a BVI company and tell him to go and make his way in the world.

Whilst both of these events indubitably had an impact, the man who may well have done the most to kick-start the sales of IBCs was an energetic chartered secretary from Liverpool by the name of Ted Powell. Mr Powell is an extremely astute businessman and entrepreneur with a larger than life personality, who never really accepts “no” as a final answer. Living in Hong Kong Mr Powell recognised the talismanic power of the number eight in Chinese culture. Being in the business of selling offshore companies, Mr Powell thought that there would be a huge demand in Hong Kong for companies which had the unfathomably lucky providence of being incorporated on 8 August 1988, or 8/8/88 if you prefer – the luckiest day of the Chinese century. And so he set about trying to organise the incorporation of a large number of IBCs on that day. However there was a serious problem. In the BVI, the first Monday, Tuesday and Wednesday of August are public holidays, celebrating the emancipation of slavery in 1834. All Government offices would be closed on the fateful day, including the Companies Registry. A lesser man may have given up, but not Ted Powell. He enlisted the support of a highly capable local lawyer named Richard Parsons and between them they begged, bullied or cajoled (history does not record which) the Registrar of Companies prepare all of the relevant company incorporations ahead of time, and then briefly to open the Registry for a limited period on that special day to officially incorporate the companies on that date. Those lucky companies proved to be just as popular as Mr Powell had predicted and sold at an incredible rate, and the rest, some might say, is history.

In truth, no one can be certain what caused the rise in popularity of the IBC, or even if there was one single cause of the popularity. It may simply have been a combination of a good product, with good timing, and a decent slice of luck. The IBC Act itself was rarely amended during its lifetime. Most of the effort focused on managing the infrastructure of the Companies Registry to cope with the growth. But there was at least one amendment which was to have notable beneficial reception. In 1991 changes were introduced to create a simple but comprehensive system for registration of security interests created by IBCs. This proved extremely popular with lenders in terms of providing debt financing to BVI companies. The leading international finance lawyer Philip Wood QC once remarked that he thought the BVI security registration system was the “best in the world”, and this was the start which later helped to cement the BVI as a market leader in the structured finance market.

Eventually in the early 2000s the industry in the BVI effectively plateaued. Incorporation numbers were high, but stable. Cynics like to suggest that the end of the period of growth coincided exactly with the creation a new regulator for the industry, the Financial Services Commission. However it is more likely that this was just a coincidence. Like any industry, there is a stage where further growth is not really possible, and the objective is then to consolidate the gains. The new regulator focused on trying to create a regulatory environment which would foster growth in higher value products such as investment funds and captive insurance.

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By this time the IBC Act had been driving the BVI's economy for the better part of two decades. Almost like a quasi-religious text, the statute had rarely been amended. But all around it the world of commerce had moved on. The world where Michael Riegels had a conversation with Paul Butler over newly laid undersea cables had metamorphosed unrecognisably into a world of high speed satellite communications and electronic commerce. The time when lawyers might send carefully typewritten documents to each other by post for review and comment over the course of several weeks had been replaced by electronic versions rebounding back and forth between Blackberries several times a day. At times the IBC Act appeared increasingly out of pace with this new world, almost as if it was trying to send a telex to an e-mail address. Industry practitioners began to realise that it was time to replace the model.

There was also external pressure on the BVI to change its model company legislation. The IBC Act had been predicated on "ring fencing". Broadly speaking, so long as the company did not conduct any business in the BVI, then it was treated as tax exempt for BVI purposes. This was seen as creating "unfair tax competition" by the OECD and other international bodies. Voices which grumbled that the OECD had never seen any tax competition which it did regard as fair were largely ignored. The process of replacing the IBC Act with a modern statute began. After two years of work, this would eventually come to fruition in the form of a ponderously named new statute, the BVI Business Companies Act, which was passed into law on 24 December 2004. Some well-meaning but overpaid consultant advised that the name of the new statute would cause the resulting companies to become known as "BVIBCs" which would create some form of brand recognition with the existing "IBCs", but in the end it proved to be too much of a mouthful and lacked the simple elegance of its predecessor.

Because of the vast numbers of companies incorporated under the IBC Act, it was necessary to impose a transitional period to allow the migration of the existing companies from one corporate regime to another. Although no new companies could be formed under the older statute from 1 January 2006, the IBC Act itself was not actually repealed until 31 December 2006. However before it was repealed, Richard Parsons – the same man who was involved in the 8/8/88 incorporations - made an unusual request of the Companies Registry. He asked if he could submit a request for the incorporation of an IBC on behalf of a client, a leading Hong Kong trust company. But his special request was that the Registry staff might please wait until the very end of the day before processing the incorporation. The name of that company was, fittingly, "The Last IBC Limited".

Looking back on the transformative changes brought about in the BVI by a single piece of legislation gives rise to mixed feelings. In many ways it all seems so recent, although much of the history occurred nearly 40 years ago. In other ways it all seems so impossibly far away. The tall steel and glass offices in modern Road Town seem a million miles away from the old offices with ceiling fans and telexes chattering in the background. A generation of lawyers is now growing up in the BVI who have never seen an incorporation under the IBC Act. Although the BVI is still a small place and Tortola still has a small island feel, the prosperity brought about by the Act is evident everywhere. Mac Todman and Neville Westwood have sadly passed on, but other key players from the early days of the IBC Act are still with us, although most of them are enjoying well earned retirements. You have to wonder when those five men sat down in the Attorney General's chambers and one of them picked up a pen, whether they really had any idea at all that what they were about to do would transform the economic status of a nation.