THE FINANCIAL TECHNOLOGY LAW REVIEW

Second Edition

Editor
Thomas A Frick

THE LAWREVIEWS

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SECOND EDITION

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PREFACE

This is already the second edition of *The Financial Technology Law Review*. Concerns about new developments that blockchain, big data and AI will trigger in the finance sector have not disappeared since the first edition. However, the use of IT in the finance sector is not new and many applications that would be labelled today as fintech are already quite old, at least by today's standards. Financial market participants and their legal advisers already have considerable experience in implementing such changes. As far as improved support products are concerned, the general rules of financial regulations can be applied quite easily to new developments.

Some of the recent developments may already have seen their peak, for example, the great number of cryptocurrencies imitating bitcoin. Others, in particular stablecoins and security tokens, but also robo-advisers and the use of big data, AI and other blockchain applications, may still be at an early stage. They may have the potential to disrupt the industry, at least in some of its sectors. Again, there has been more scepticism, not only in a recent report by the Bank for International Settlements but also in management consultant studies such as 'Blockchain's Occam problem', arguing that blockchain is a technology in search of a problem.

Regulators' surprise about the sheer dynamism of these advances – both the speed of the technical developments and the speed with which such new possibilities were implemented – has ebbed and a number of countries have started to draft (or have already implemented) new laws or changes to their current laws to address fintech issues. This is particularly the case in the area of anti-money laundering rules, a prime concern not only of regulators but also of banks and other financial market participants. Unless the industry can be certain that participating in the crypto-economy will not lead to increased anti-money laundering risks, established financial players remain cautious.

The national solutions chosen (and the speed with which regulators are willing to react by providing guidelines to market participants) varies considerably between jurisdictions. This may be a consequence of different regulatory cultures, but in addition, the existing legal systems may pose varying and unplanned obstacles to the some of the new applications. It may, for example, be difficult to transfer rights on the blockchain if the national code prescribes that rights can only be assigned in writing. Therefore, a structured collection of overviews over certain aspects of fintech law and regulation such as the present one continues to be valuable not only for the international practitioner, but also for anyone who looks for inspiration on how to deal with hitherto unaddressed and unthought-of issues under the national law of any country.

The authors of this publication are from the most widely respected law firms in their jurisdictions. They each have a proven record of experience in the field of fintech; they know

both the law and how it is applied. We hope that you will find their experience invaluable and enlightening when dealing with any of the varied issues fintech raises in the legal and regulatory field.

The emphasis of this collection is on the law and practice of each of the jurisdictions, but discussion of emerging or unsettled issues has been provided where appropriate. The views expressed are those of the authors and not of their firms, of the editor or of the publisher. In a fast-changing environment, every effort has been made to provide the latest intelligence on the current status of the law.

Thomas A Frick
Niederer Kraft Frey
Zurich
April 2019

Chapter 6

BRITISH VIRGIN ISLANDS

Stephen Adams[1]

I OVERVIEW

For the first six months of 2018, the British Virgin Islands (BVI) was the top market by volume, as indicated by CoinShares Research CryptoReport: H2 2018 (the Report), narrowly beating out the United States, and making it a substantial jurisdiction when it comes to cryptocurrency. The report was based on 14 of the largest cryptocurrency exchanges. This may be surprising to some; however, the BVI has always been a leading corporate domicile, with forward-looking legislation supported by a legion of skilled professionals based in the main financial centres around the globe.

As set out in the Report, such charting of jurisdictions is an indicator of the perceived legal, regulatory or other government-imposed risk of using certain jurisdictions. Clearly, the BVI is making its place as one of the preferred jurisdictions when looking to establish an enterprise in the fintech, blockchain or digital asset space.

II REGULATION

i Licensing and marketing

Financial services commission

The Financial Services Commission Act 2001 established the British Virgin Islands Financial Services Commission (FSC) as an autonomous regulatory authority responsible for the regulation, supervision and inspection of all financial services in and from within the BVI.

Regulated activities that are considered financial services include: insurance, banking, fiduciary services, trustee business, company management, investment business and insolvency services, as well as the registration of companies, limited partnerships and intellectual property.

While there is no specific regulation relating to fintech, the most likely FSC-regulated activities to be relevant to financial technology businesses are securities investment business, money services business and mutual funds business.

We have set out the basic legislation and principles below, but note that each particular case relies heavily on the specific facts that will be determinant of whether regulation may apply and if so, whether any exemption are available.

Additionally, as financial services regulator, the FSC is responsible for:

a promoting understanding of the financial system and its products;

b policing regulated activities with a view to reducing financial crime; and

c preventing market abuse.

1 Stephen Adams is a managing partner at Collas Crill.

Investment business

Generally, the statute with the most relevance is the Securities and Investment Business Act 2010 (SIBA). SIBA regulates investment business in the BVI and effectively prohibits anyone from carrying on investment business of any kind in or from within the BVI unless that person holds the relevant licence. Alternatively, the person is excluded from requiring a licence or the activity itself is an excluded activity under SIBA.

For the purposes of SIBA, where the activity is carried on by a company incorporated in the BVI, if that company is carrying on investment business, even if the activity takes place entirely outside the BVI, the activity is deemed to be carried on in or from within the BVI, and the statute will apply.

Generally, a person will be engaging in investment business if that person carries out, by way of business, any of the following (among others):

a dealing in investments:
- buying, selling, subscribing for or underwriting investments as an agent; or
- buying, selling, subscribing for or underwriting investments as principal where the person (1) holds himself or herself out as willing, as principal, to enter into transactions of that kind at prices determined by him or her generally and continuously rather than in respect of each particular transaction; (2) holds himself or herself out as engaging in the business of underwriting investments of the kind to which the transaction relates; (3) holds himself or herself out as engaging, as a market maker or dealer, in the business of buying investments of the kind to which the transaction relates with a view to selling them; or (4) regularly solicits members of the public with the purpose of inducing them, whether as principals or agents, to buy, sell, subscribe for or underwrite investments and the transaction is, or is to be entered into, as a result of such person having solicited members of the public in that manner;

b arranging deals in securities: making arrangements with a view to (1) another person (whether as a principal or an agent) buying, selling, subscribing for or underwriting a particular investment, being arrangements which bring about, or would bring about, the transaction in question; or (2) a person who participates in the arrangements buying, selling, subscribing for or underwriting investments;

c managing investments:
- managing investments belonging to another person in circumstances involving the exercise of discretion (other than as manager of a mutual fund); or
- acting as manager of a mutual fund;

d providing investment advice:
- advising a person on investments (other than as the investment adviser of a mutual fund) where the advice is given to the person in his or her capacity as an investor or potential investor, or in his or her capacity as agent for an investor or a potential investor; and concerns the merits of the investor, or a potential investor, doing any of the following (whether as principal or agent): (1) buying, selling, subscribing for or underwriting a particular investment; or (2) exercising any right conferred by an investment to buy, sell, subscribe for, underwrite or convert an investment; and

e acting as the investment adviser of a mutual fund.

All of the above activities relate to or somehow involve an 'investment'. Under SIBA, 'investment' means an asset, right or interest specified in Schedule 1.

The use of the word 'means' in the definition above requires that the investment must be listed in Schedule 1. There is no discretion or flexibility for the regulator to otherwise classify something as an investment unless it is in Schedule 1.

Investment is defined in Schedule 1 to SIBA as including shares, interests in a partnership or fund interests; debentures; instruments giving entitlement to shares, interests or debentures; certificates representing investments; options; futures; contracts for differences; and long-term insurance contracts. Essentially, financial instruments.

To the extent that any proposed activity touches on the concept of investment, as defined in SIBA, it is very likely that the licensing requirements under SIBA will apply.

Financing and money services business

Under the Financing and Money Services Act, 'money services business' is defined as the business of providing any of the following services:

a the dispensing of money, the facilitation of deposits, payments, transfer of money or the reporting of account information via automated teller machines;

b transmission of money in any form, including electronic money, mobile money or payments of money;

c cheque-cashing services;

d currency exchange services; and

e the issuance, sale or redemption or money orders or travellers' cheques.

Under the BVI Interpretation Act, a reference to money in an enactment is a reference to the currency that is legal tender in the BVI, which means United States dollars. There is presently no recognition of virtual currencies (VC) in the BVI as being equivalent to fiat currency. As such, any reference in BVI legislation to 'currency' or 'money' will be interpreted as legal tender and will exclude VC.

Under the Financial Services and Markets Authority (FMSA), 'financing business' has recently been amended to include activities governed by a Class F licence, which are businesses engaged in international financing and lending in the peer-to-peer (P2P) fintech market, including peer-to-business (P2B) and business-to-business (B2B) markets.

To the extent that a financial technology business plans to engage in financing business or money services business, they would first need to apply for and receive the relevant licence under FMSA.

Mutual funds

While not usual for traditional fintech business, if an issuer offers coins or tokens with certain attributes, in particular that they are redeemable, then operators would need to consider whether there is a need to comply with the provisions of SIBA and the Mutual Fund Regulations.

SIBA covers mutual funds in Part III. Section 40 of SIBA defines 'mutual fund' as a company or any other body, a partnership or a unit trust that is incorporated, formed or organised, whether under the laws of the Virgin Islands or the laws of any other country that:

a collects and pools investor funds for the purpose of collective investment; and

b issues fund interests that entitle the holder to receive on demand or within a specified period after demand 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 or other body, partnership or unit trust, as the case may be.

In our experience, it is not unusual for a fintech company to issue a redeemable token or coin. Such a company ought to take specific advice as to whether they will be regarded as a mutual fund and would be required to comply with SIBA.

Public offering in the British Virgin Islands

For completeness, Part II of SIBA deals with issuing securities to the public in BVI and prospectus requirements; however, Part II is not yet in force and it is not anticipated that it will come into force any time soon.

ii Cross-border issues

The BVI does not have a passporting regime specifically designated for regulated or licensed fintech entities to carry on business in the BVI.

Licensees under SIBA or other licensing legislation that have physical operations in the BVI are usually exempted from the requirement to obtain a licence under the Business, Professions and Trade Licenses Act (BPTL). Where a business has a physical operation in the BVI but is not required to be licensed under other legislation, the catch-all licensing statute for business undertaken in the BVI is the BPTL.

BPTL is an older statute and the process for licensing is not as developed as it is under the financial services legislation. There is no specific licence for fintech activity and it is likely that the activity would fall under general commercial activity. The licensing process is straightforward and requires the submission of a simple application form that includes the details of the proposed business and financing. Applications can then be disapproved or approved subject to such terms and conditions as may be established, and the deposit of such sum of money as may be determined where the applicant is not located in the BVI. There are no time limits set out.

III DIGITAL IDENTITY AND ONBOARDING

The Electronic Transactions Act 2001 (ETA) should be considered when preparing and accepting the terms and conditions or purchase agreements relating to a coin or token offering or any other electronic transaction where offer and acceptance is entirely electronic. The ETA generally provides that information, documents and contracts (or any provision thereof) shall not be denied legal effect, validity or enforceability solely because they are in electronic form. Evidence of a contract (or provision thereof) shall not be denied admissibility solely because it is in electronic form, and electronic signatures are also expressly permitted. The ETA provides flexibility for transactional technologies without the requirement for further statute to be adopted. The ETA also provides a framework for the use of electronic signatures.

IV DIGITAL MARKETS, FUNDING AND PAYMENT SERVICES

i Crowdfunding

The recent amendments to the FMSA appear designed to cover crowdfunding, and a Class F licence under FMSA would be required to the extent that the activity constitutes P2P, P2B or B2B lending or finance.

ii Collective investment schemes

As noted above, mutual funds are regulated by the FSC under SIBA and the Mutual Fund Regulations 2010. In general, only open-ended funds are regulated. Closed-ended funds are not required to be registered, although other regulatory aspects (such as anti-money laundering/combating the financing of terrorism (AML/CFT) regulations) will still apply.

While there are three types of funds set out under the SIBA – public funds, private funds and professional funds – private and professional funds are by far the most popular.

A private fund is a fund whose constitutional documents specify that either:

a it will have no more than 50 investors; or

b the making of an invitation to subscribe for interests is to be made on a private basis; in other words, the invitation is made:

- to specified persons (however described) and is not calculated to result in shares becoming available to other persons or to a large number of investors; or
- by reason of a private or business connection between the person making the invitation and the investor.

A professional fund is a fund that is only available to professional investors (i.e., persons (1) whose ordinary business involves, whether for its own account or the account of others, the acquisition or disposal of property of the same kind as a substantial part of the property of the fund; or (2) whose net worth (whether individually or jointly with his or her spouse) exceeds US$1 million and who consents to being treated as a professional investor). A professional investor's initial investment must be at least US$100,000 or its equivalent in another currency.

Both a private fund and a professional fund are very similar from a regulatory and cost perspective. However, a professional fund can prove useful as it may carry on business for up to 21 days prior to being recognised by the FSC, provided that the application for recognition is submitted to the FSC within 14 days of the launch of the fund.

The recognition or registration procedure for funds with the FSC is relatively straightforward, requiring the submission of:

a evidence of the formation of the entity (i.e., copies of the certificate of incorporation and memorandum and articles of association for a company);

b a completed application form and offering document; and

c evidence of the type of fund, for instance, an extract of the subscription agreement showing the professional investor declaration referred to above.

Any private or professional fund that intends to make an offer of its interests or shares must include the prescribed investment warning in a prominent place in the offering document. The subscription agreements must include a written acknowledgement from any new investor that it has received, understood and accepted the investment warning. Professional funds should also include statements in their constitutional documents as to its professional fund status.

A private or professional fund must appoint a manager, an administrator and a custodian (although application may be made to the FSC to exempt a fund from appointing a manager or custodian). Such funds are also required to have two directors, but they need not be resident in BVI and appoint a local authorised representative who will accept service on behalf of the fund in the BVI.

Recently, two newer categories of funds have been introduced and are proving very popular in the start-up and initial fundraising stages. Incubator funds and approved funds were introduced in the BVI under the Securities and Investment Business (Incubator and Approved Funds) Regulations 2015.

An incubator fund has a minimum investment requirement of US$20,000, a cap on net assets of US$20 million and limit of 20 investors. An incubator fund does not need to appoint an administrator, custodian, investment manager or auditor.

An approved fund has a net assets cap of US$100 million and no more than 20 investors are permitted, but with no minimum investment criteria. An approved fund may operate without appointing a custodian, investment manager or auditor, but will need an administrator.

An incubator fund or approved fund can commence business two days from the date of receipt of a completed application by the FSC. An incubator fund has a limited life of two years, which can be extended for up to 12 months. An approved fund has no such limits. An incubator fund can convert to an approved fund, a private or professional fund, or may wind up at the end of its term.

Corporate mutual funds are the most common vehicle and are managed by their directors of which there should be a minimum of two. However, the day-to-day operations of a mutual fund will normally be delegated to other specialist professionals.

Payment services

As noted previously, payment services would fall under the FMSA. Anyone seeking to operate a payment service ought to consider the obligations arising under the FMSA.

V CRYPTOCURRENCIES AND INITIAL COIN OFFERINGS

The BVI has one of the largest cryptocurrency markets in the world, and while there are no initial coin offerings (ICOs) or blockchain-specific rules or guidance, existing legislation is sufficiently flexible to support the continuing number of ICOs launching from the BVI. At present, it is an exercise in applying the existing legislation and regulatory regime described elsewhere in this chapter to each specific situation. In most instances, ICOs would not usually fall within the definition of investment under SIBA, and therefore there should be no need for the issuer to hold an investment business licence. However, there is still a concern that, depending on how they are structured, certain forms of ICOs may fall within the definition of investment and therefore the terms of each need to be carefully considered.

VI INTELLECTUAL PROPERTY AND DATA PROTECTION

The BVI Trademarks Act is the legislation governing the protection of intellectual property in the BVI. A fintech can utilise the process provided via this Act to protect their intellectual property rights.

At present, the BVI has not enacted legislation to regulate data protection. However, it is expected that the BVI will follow international standards in this area and adopt legislation that reflects globally recognised standards. Service providers in the BVI currently operate under common law and contractual duties of confidentiality and privacy. These duties are subject to exceptions most notably in the area of anti-money laundering. Additionally, BVI regulated service provider may have similar duties imposed on them under applicable legislation.

The General Data Protection Regulation (GDPR) that which came into force on 25 May 2018 primarily gives EU citizens control over their personal data, including its collection, processing and storage – wherever it is held, processed or transferred.

However, the GDPR applies to the processing of personal data by a controller or processor established in the EU or outside the EU if their data processing activities relate to the offering of goods or services to individuals in the EU or to the monitoring of such individual's behaviour.

While most businesses in the BVI should not directly be affected, those that collect the personal information of EU Citizens, or those marketing in the EU may be in scope and thus subject to the GDPR. In addition, other service providers may also be caught by the wide ranging scope of the GDPR, and accordingly, investment funds will need to be vigilant and ensure that any delegation of the processing of data by such service provider is being done in compliance with the GDPR.

VII YEAR IN REVIEW

The past years have seen many developments. For instance, the launch of the microbusiness company (MBC), which is aimed at small, non-financial sector businesses anywhere in the world. MBCs are simpler to set up and operate and have lower registration and annual fees. One of the most exciting aspects of the MBC is the use by the FSC of an online platform that enables AML checks and MBC formation to be carried out online.

Building on the use of an online platform, the AML Code of Practice has been amended to allow AML checks to be carried out using the latest electronic innovations, which should improve and speed up know-your-customer processes in the BVI.

The new Limited Partnership Act 2017 came into force, which incorporates the best practices for limited partnerships from other jurisdictions. It is expected that this will dramatically increase the use of BVI limited partnership structures. Similarly, BVI segregated portfolio companies are no longer restricted in their use to funds and insurance companies, opening the ability to use these companies in innovative ways.

Additionally, there have been amendments to the FMSA described above to facilitate P2P, P2B and B2B financing and lending.

VIII OUTLOOK AND CONCLUSIONS

The BVI remains committed to introducing measures and creating an environment where businesses involved in fintech, blockchain and artificial intelligence can thrive. The BVI remains at the forefront of international corporate structuring for cross-border transactions and investing, and provides market-leading expertise and products in areas such as banking and finance. The BVI is building on these strengths as it readies itself to move forward into the digital age.

Appendix 1

ABOUT THE AUTHORS

STEPHEN ADAMS

Collas Crill

Stephen has been practising British Virgin Islands law for close to two decades, advising on a full range of corporate cross-border matters including joint ventures, mergers, acquisition finance, asset and project finance, investment funds, alternative investments, private equity and capital market transactions.

He also has considerable experience in trust and private client matters, having held senior positions in several trust and corporate services businesses.

Stephen joined the firm from Bedell Cristin where he headed up the firm's BVI practice in Asia, having been instrumental in the launch of the Singapore office in 2012. Prior to that, Stephen founded BVI law firm Barker Adams following his role as corporate senior partner at Walkers in the BVI.

Stephen is a member of STEP and the Singapore Institute of Directors. He also acts as non-executive director for a select number of prominent hedge funds.

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