BVI: Lessons in anchor management

Briefing Summary: In the latest episode of the global Ablyazov litigation, the BVI Commercial Court's recent judgment in *Joint Stock Company "BTA Bank" v Timur Sabyrbaev and ors BVIHCM 2021/0171* provides crucial insight into the law applicable to the service of defendants out of jurisdiction and serves as a lesson to claimants seeking to anchor a claim based on BVI incorporated defendants. Carey Olsen acted for one of the successful applicant-defendants.

Service Area: Dispute Resolution and Litigation

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Background

The Claimant ("**BTA**") brought a claim in the BVI Commercial Court against 54 defendants, alleging that it was the victim of a fraudulent scheme involving the issue of high value letters of credit which resulted in a loss of approximately US$230 million. The defendants comprised:

1. Various Kazakh former officers and employees of BTA;
2. Various BVI, Seychelles and Cyprus special purpose vehicles (the 9 BVI SPVs being the "**Anchor Defendants**");
3. Former directors of the special purpose vehicles;
4. Various foreign commodities companies and certain of their current or former employees; and
5. Certain former senior officers of BTA.

Apart from the Anchor Defendants, none of the other defendants were or had ever been resident in the BVI.

On 17 May 2022, BTA obtained an ***ex parte*** order granting it permission to serve some of the foreign defendants out of the jurisdiction (the "**Service Out Order**"). To satisfy the jurisdictional gateways for service out, BTA had alleged:

1. That there was a "*real issue which [was] reasonable for the Court to try*" as between it and the Anchor Defendants and that the various defendants resident overseas were "*necessary and proper parties to the proceedings*" (the "**Necessary or Proper Party Gateway**"); and
2. That its claim concerned the ownership or control of the Anchor Defendants (the "**Company Gateway**").

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Decision

The applicable principles concerning service out of jurisdiction are well established. [1] The Court found that BTA had failed to satisfy both the Necessary or Proper Party and the Company Gateways, that the BVI is not the appropriate forum for the trial of the action, and that BTA had failed in its duty of full and frank disclosure and fair presentation in a non-innocent way. It set aside the Service Out Order and stayed the proceedings.

The real point of contention in respect of the Necessary or Proper Party Gateway, which BTA failed to address, was whether the issues between BTA and the Anchor Defendants were reasonable for the Court to try. The Court clarified that this analysis of reasonableness is an objective one, to be taken in isolation from claims intended to be brought against foreign target defendants, and that a defendant's failure to engage with the claim serves as a strong pointer that it is not reasonable for the Court to try the claim.[2]

The Court considered the following facts concerning the Anchor Defendants, and BTA's attitude towards them, to be of key relevance:[3]

1. Large default judgments had been entered against four of the Anchor Defendants as early as 2009 in Kazakhstan which had never been enforced.
2. BTA had unequivocal contractual rights to repayment against the Anchor Defendants under the letters of credit but had no means of enforcing those rights because those SPVs had no assets.
3. The Anchor Defendants (and any assets they might have owned) were the subject of a very long receivership ordered by the English Court and recognised by the BVI Court. That receivership was discharged some 7-8 years later, presumably because its utility had been exhausted and BTA perceived no further purpose in its continuation.
4. BTA had a judgment debt against Mr Ablyazov of over US$4 billion from the English Court, which had also found that he beneficially owned the SPVs, but made no attempt to appoint receivers by way of equitable execution over those shares.
5. The Anchor Defendants were shell companies, without any real existence other than a technical one, for many years.
6. BTA had been entirely content to allow the Anchor Defendants to be struck off and dissolved and failed to explain why they were being sued ***now*** other than to act as anchor defendants. The claim form was issued days after the order was made to restore the Anchor Defendants.
7. The Anchor Defendants, not being in regulatory good standing or having any directors, had not done anything, would not be able to do anything, and had no intention to do anything in relation to the proceedings.

In one of many highly critical observations of BTA's conduct and strategy, the Court noted that BTA's invocation of the BVI SPVs was "***no more than an artifice. [Their] words to the contrary…as hollow as the corporate husks they briefly resurrected wherewith to accomplish their sole purpose of opening the gates of litigation against their real targets***". Indeed, "***[t]he Court is not obliged… to play along with, nor to affirm, delusions, or far-fetched speculation, nor for that matter with contrived artifices calculated to persuade the Court into allowing its processes and resources (and thus BVI taxpayers' money) to be used to litigate claims which have no genuine utility here***."[4]

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Conclusion

This decision should be of significant interest to litigants seeking to bring claims against foreign defendants in the BVI Court. It illustrates the Court's approach in determining whether the commonly used "necessary and proper party" gateway is satisfied and underscores the importance of providing evidence as to the utility of the claims against 'anchor defendants' and why it would be reasonable for the Court to try such claims. Any strategy involving claims against BVI incorporated defendants to anchor claims against foreign targets must be cautiously and carefully managed.

A copy of the judgment can be found here.

The Carey Olsen team who successfully acted for one of the applicant-defendants comprised of James Noble, Amelia Tan and Joni Khoo.

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[1] The claimant must satisfy the court that there is a serious issue to be tried on the merits, that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, and that the forum is clearly or distinctly the appropriate forum for the trial of the dispute, and in all the circumstances ought to exercise its discretion to permit service of the proceedings out of jurisdiction: as set out in ***Nilon Limited and Anor v Royal Westminster Investments S.A.*** (2015) UKPC 2; at (13) and equally by the Court of Appeal in ***WWRT Ltd v Carosan Trading Ltd*** BVIHCMAP2022/002 (unreported, delivered 20th July 2022) at [16] – [17] (Pereira CJ).

[2] See [162-173] of the Judgment. The Court affirmed and applied the principles in relation to the Necessary and Proper Party Gateway set out in ***Erste Group Bank AG, London Branch v (1) JSC "VMZ Red October"*** [2015] EWCA Civ 379 and ***Gunn v Diaz*** [2017] EWHC 157.

[3] See [97-99] of the Judgment.

[4] See [156] and [213] of the Judgment.