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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery 2022

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Executive summary

The British Virgin Islands (BVI) are a major offshore financial centre, particularly specialising in the formation of group parent companies, asset-holding special purpose vehicles and investment funds. The BVI's recognisable English law origins and progressive legal framework governing the administration of trusts have made it a popular jurisdiction for international private wealth structures. As described further below, the BVI is a truly international jurisdiction and its relationship to fraud, asset tracing and recovery must be seen in this context.

The key developments and challenges relate specifically to this internationalism. In early 2021, the BVI legislature introduced legislation expressly providing the BVI Court with jurisdiction to grant injunctions in support of foreign proceedings, a move triggered by the Eastern Caribbean Supreme Court (ECSC) Court of Appeal, which found that the Court did not have such jurisdiction.

The recent Privy Council decision in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 was the culmination of the appeal on that question, and the first time in decades that the Privy Council (or UK Supreme Court) had considered the basis of the *Mareva* jurisdiction.

The fact that such important cases are emanating from the BVI Court serves as a demonstration of the jurisdiction's continued vibrancy and importance as an offshore financial and litigation centre.

The same new legislation also confirmed the

Court's jurisdiction to grant "*Norwich Pharmacal*" orders in support of foreign proceedings, with doubt having been cast on that jurisdiction as a result of English authority which the BVI Court had, in fact, declined to follow.

The BVI Court has also grappled with challenges posed by the COVID-19 pandemic and the legal and practical questions arising from the fast-evolving world of cryptocurrencies.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

As a self-governing British Overseas Territory, the BVI's legal system is rooted in English common law and equitable principles supplemented by legislation passed by the BVI's legislature and certain statutes and instruments passed by the UK Parliament and extended to the Territory by Order in Council.

The BVI has a sophisticated High Court with a dedicated Commercial Division. There is a strong local appeal court in the ECSC Court of Appeal, which is based in St Lucia and sits regularly in the BVI three times a year. It will also sit for urgent or heavyweight appeals outside of those scheduled sittings. The final court of appeal is the Judicial Committee of the Privy Council, which sits in London and consists of justices of the UK Supreme Court.

The legal rights and remedies available in relation to fraud, asset tracing and recovery are broad and powerful, in a similar manner to other developed common law jurisdictions. The key BVI legislation regulating company law is principally the Business Companies Act 2004 (BCA), the Insolvency Act 2003 (Insolvency Act) and related enactments. The BVI Court can also rely on provisions of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Supreme Court Act) to incorporate historic powers of the English Court, as it has done in relation to the Court's ability to grant charging orders over shares in BVI companies.

The BVI Court has also recently enforced English law applicable on the settlement of the islands including, specifically, the Fraudulent Conveyances Act 1571, the Statute of Elizabeth. The Commercial Division has its own modified set of rules (from the base ECSC Civil Procedure Rules 2000 (EC CPR)) and its own Practice Direction, as well as a series of Practice Notes. A Commercial Court Guide remains under consideration.

Injunctions and receivers

As a predominantly holding company jurisdiction, the preservation and protection of assets is vital, as is the ability for litigants and creditors to enforce against them. At the early stages of a dispute, often a party suspects illegitimate dealings in the shares of BVI companies. EC CPR 49 allows any person claiming to be beneficially entitled to stock (shares) to apply for a Stop Notice or a Stop Order. A Stop Notice is a useful interim tool, requiring a party on whom it is served to give notice of any proposed dealings with specified shares, and a Stop Order prevents certain steps from being taken with respect to shares and/or monies held in court. These are often used but only take matters so far. The need for further protection means that injunctions are an important and regular part of BVI legal practice.

The BVI courts exercise a statutory jurisdiction pursuant to section 24 of the Supreme Court Act to grant injunctive relief where it is just and convenient to do so. This gives the BVI Court a broad and flexible jurisdiction similar to relief available in other common law jurisdictions. The BVI Court may therefore, for example, grant freezing ("*Mareva*"), prohibitory, mandatory or proprietary injunctive relief on an interim or final basis. In appropriate circumstances, injunctions may be obtained on an *ex parte* and urgent basis.

In a welcome statutory development in early 2021, an amendment was made to the Supreme Court Act (incorporated as section 24A) to confirm that the BVI Court also has jurisdiction to grant injunctive relief in support of foreign

proceedings, including against non-cause of action defendants (the so-called *Black Swan* jurisdiction, see further below).

The BVI Court may also grant injunctive relief in relation to any arbitral proceedings which have been or are to be commenced in or outside of the BVI pursuant to section 43 of the BVI Arbitration Act 2013. Indeed, relief in support of foreign arbitrations and the enforcement of arbitration awards is a major part of BVI litigation, and the BVI is generally a pro-arbitration jurisdiction.

For an additional level of protection, a claimant may also apply to court for the appointment of a receiver. A receiver is a professional person (such as a qualified accountant or insolvency practitioner) appointed by the BVI Court to receive and deal with certain assets, usually in support of and in order to "police" a freezing injunction. The ECSC Court of Appeal has emphasised that receivers should only be appointed when it is just and convenient, and should not be ordered when the freezing injunction provides adequate protection. (*Alexandra Vinogradova v (1) Elena Vinogradova, (2) Sergey Vinogradov* [2018] BVIHCMAP 052.)

It is standard practice for the BVI Court to order a respondent to disclose information about its assets when it makes a freezing injunction or a receivership order, in order to allow the claimants and/or the receiver to police the orders.

As such, BVI injunctions have some teeth. A defendant may be found in contempt of court if they are in breach, which may have grave consequences for the defence of a BVI claim, but only goes so far. If an individual defendant, or the director of a BVI company, is out of the jurisdiction, a BVI Court ordering committal may be of little concern, although such orders are, and have recently been, made.

Further, and similarly, BVI injunctions and receivership orders may technically have "worldwide" effect, but the BVI Court does not seek to impose exorbitant, extra-territorial jurisdiction on persons not before the Court and regarding property abroad. The BVI Court has adopted the same "*Babanaft*" provisos in its injunction orders as the English Commercial Court (*Babanaft International Co v Bassatne* [1990] Ch. 13 at 44), out of respect for judicial comity. Steps may therefore be required in the local courts before a BVI order becomes fully effective abroad.

Third-party disclosure orders and letters of request

The BVI has long followed the equitable common law jurisdiction to grant disclosure orders. A *Norwich Pharmacal* order allows an applicant to obtain disclosure from a third party who is likely to have the relevant documents or information and who has become mixed up in wrongdoing committed against the applicant. Letters of request to foreign courts to obtain evidence in support of BVI proceedings, and to the BVI courts in support of foreign proceedings, are also an option in line with the Hague Evidence Convention.

Potential claims

As in the UK and other common law jurisdictions, there is no specific civil cause of action in "fraud" in the BVI. However, various claims are available in contract, tort, equity or otherwise depending on the circumstances, such as deceit, fraudulent misrepresentation, conspiracy, dishonest assistance, knowing receipt, breach of fiduciary duty, restitution, bribery and secret commissions. The legal and equitable remedies of tracing and following are also available to claimants in order to seek the return of property and assets.

Various statutory claims may also be available. For example, to set aside transactions intended to defraud creditors, as mentioned, the Fraudulent Conveyances Act 1571 may be invoked, as well as section 81 the BVI's own Conveyancing and Law of Property Act 1961. In an insolvency context, various provisions of the Insolvency Act permit the challenge of transactions at or around the insolvency of a company, including transactions to connected persons and transactions at an undervalue. In the corporate context, section 184I of the BCA allows a shareholder of a company to apply to the BVI Court for relief

from unfairly prejudicial conduct towards them in their capacity as a shareholder.

The Court has broad powers to make such orders "as it thinks fit", such as a share buyout, orders regulating the future conduct of the company, the payment of compensation, or even the appointment of a liquidator in extreme circumstances.

Remedies and enforcement

Wide remedies are available in the BVI, including damages, equitable compensation, mandatory and prohibitive injunctions, proprietary injunctions and property preservation orders, restitution and rectification remedies, declarations and other orders including as to status or transfer of ownership, valuation orders, property or share transfer or buyout orders, and those relating to the management of companies and personal or corporate insolvency proceedings or receiverships.

Modes of enforcement include charging orders, attachment orders, injunctions, a judgment summons, orders for seizure and sale of goods or property, and appointment of liquidators or receivers. However, as discussed below, fully remedial enforcement will often require action abroad.

Insolvency regime

It is also common for claimants to take advantage of the BVI's corporate insolvency legislation as part of an asset recovery strategy in fraud cases. The BVI's Insolvency Act includes a suite of powers and remedies available to liquidators of a BVI company, which can provide a very powerful basis to investigate and recover assets, both within the BVI and internationally. There are a number of BVI insolvency practitioners who are very experienced in international asset tracing matters. As discussed below, co-operation with foreign courts and insolvency practitioners is vital.

III Case Triage: main stages of fraud, asset tracing and recovery cases

Fraud in general

The main stages of BVI fraud, asset tracing and recovery cases will be familiar to civil litigators worldwide. Commonly, BVI scenarios are of a corporate nature; for example, where one shareholder has sought to exclude the other from the business/venture or where one stakeholder in a BVI company structure has transferred away valuable assets to the detriment of other stakeholders. In short, often a party will allege that he or she used to own, or have an interest, an asset, that he or she has been wronged by a fraudster, and that urgent BVI legal action is required to ensure that justice prevails and the asset is returned.

There may be various options available. The BVI's insolvency regime may provide a solution (see below). But first we consider the usual course of action, by way of proceedings under the EC CPR.

Pre-action – gathering the evidence

The initial stage for a BVI legal practitioner is to consider forensic, ethical and practical issues. As noted above, "fraud" claims may include a multitude of actions, all with different tests, different mental states, and different defences. What is the background and commercial rationale of a business relationship going back years? What is the evidence of wrongdoing? Is there enough evidence to plead dishonesty? These questions require a lot of fact finding and careful analysis. One must have solid evidence to plead fraud.

Much of this initial work is often carried out with the assistance of foreign lawyers and representatives. The ultimate client will almost certainly live abroad, and may not speak English. It is common for BVI company structures to have subsidiary companies in other jurisdictions (such as Cyprus), and the underlying asset will often be located elsewhere (a Chinese power station, or Russian coal mine, for instance). Legal steps may have already been taken and proceedings instigated in other jurisdictions, so questions as to the appropriate forum and avoiding parallel proceedings may arise early on.

At this juncture, it may be necessary to apply for a *Norwich Pharmacal* order, especially if fraud is suspected but there is currently not enough evidence. For instance, it is common to seek a disclosure order against the "registered agent" of a BVI company in order to obtain information about the beneficial ownership, shareholding, directors, management and (to some extent) business of companies which appear to be involved in a fraud (see *UVW v XYZ* BVIHC (COM) [2016] 108). Such disclosure, in particular identifying wrongs and wrongdoers, can help form the case for fraud claims and injunctions in the BVI, and also assist with substantive legal proceedings in other jurisdictions.

Where *Norwich Pharmacal* relief is sought, consideration is also given to other potential avenues by which documents may be obtained, for example, by: obtaining a letter of request from a foreign court which is seized of the dispute; or obtaining disclosure of documents

which a person is entitled to by virtue of their position within a BVI company, i.e. as director or shareholder.

Injunctions

If proceedings are afoot in other jurisdictions, it may be appropriate to apply for injunctive relief in support of foreign proceedings. The BVI Court will first consider whether the applicable test is met (as if the proceedings had been commenced in the BVI) and, second, whether it is expedient to grant the relief sought. In doing so, the BVI Court will consider whether the injunction would have some utility which is related to – and ancillary to – the foreign proceedings. It will also take into account the question of whether the BVI Court has power to enforce its order if disobeyed abroad.

If substantive proceedings are required in the BVI, then the next step is to plead the claims, issue the claim and then apply for an injunction in support of those proceedings (either before or after service, depending on the risk of tipping off). The principles applicable to the granting of an injunction will be familiar to most common law jurisdictions. The Court will grant a freezing injunction where the applicant has a good arguable case on the merits of its underlying claim and there is a real risk of dissipation of assets against which a judgment may be enforced.

Slightly different equitable principles apply in the context of "proprietary" freezing injunctions, where the applicant claims an ownership right over assets in the hands of the respondent, but the BVI courts will be swift to grant such relief in appropriate circumstances, and such injunctions can be a particularly effective remedy in trust disputes. As noted above, disclosure orders and the appointment of receivers may help to police such injunctions.

The steps to trial

At this stage, relevant assets may be relatively well secured. However, often in cases of fraud and asset tracing a lot more work is required to achieve justice.

The BVI legal system is relatively quick and efficient. Most trials are held within a year of issuing proceedings, and some claims may be "expedited" to trial in a shorter time period, determined on narrowed "preliminary issues", or determined summarily if the defence has no prospect of success. However, fraud claims are often complicated and involve voluminous documents and the resolution of conflicting evidence. They are rarely concluded on an expedited basis. Indeed, high-value cases with numerous parties and interlocutory applications, such as multi-billion-dollar oligarch battles, may take years to be determined, particularly where appeals against interlocutory orders are pursued to the highest level. This is a key challenge in the BVI, as in other jurisdictions.

Interlocutory battles

Various interlocutory battles are often fought before the parties get to trial. Permission from the BVI Court is required to serve claims and injunctions on foreign defendants (Part 7 of the

EC CPR, and *Nilon Ltd & Another v Royal Westminster Investments SA and others* [2011] UKPC 6). Due to the international nature of fraud cases involving multiple jurisdictions, often defendants will seek to set aside service and challenge jurisdiction on the basis that the BVI is not the appropriate forum for the trial of the claim (on the basis of the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; see further below).

Depending on the location of a defendant, service may need to be effected under the Hague Service Convention via diplomatic channels, which takes time. Further, some defendants try to evade service. These delays are often unavoidable when dealing with fraudsters outside the jurisdiction, and it may be necessary to seek alternate service. In exceptional circumstances, orders dispensing with service may also be made.

Assuming that the claim proceeds, statements of case are exchanged by the parties, disclosure takes place, and witness statements from witnesses of fact are exchanged, as are expert reports (on matters of foreign law, or forgery, for instance). Various hearings may take place prior to trial, dealing with issues such as specific disclosure applications, directions, and even contempt of court if injunctions are breached. It is unusual for fraud cases to proceed to trial without various skirmishes along the way, including appeals of certain interlocutory issues. However, certain interim applications may bring proceedings to an early conclusion if they are not complied with, for example an application for security for costs, for payment into court or for specific disclosure.

Trial and enforcement

Trial takes place in the ordinary adversarial manner, overseen by a single judge. The trial may take days or weeks depending on the number of documents, legal issues, witnesses and experts. The judge will then make a decision on the facts and the law and deliver judgment. On substantive disputes, a full written judgment setting out the court's reasons for its decision will be given. Rights to appeal may lie to the Court of Appeal and, in turn, to the Judicial Committee of the Privy Council. Final determination of the claim can take several years until rights of appeal are exhausted.

At the end of a fraud trial, the ultimate remedy may be simple. For instance, in the case of a dispute over ownership of shares, rectification of the register of members of a BVI company under section 43 of the BCA allows the name of the true owner of shares to be entered. That may be enough. However, in many cases, following a money judgment, a whole new battle begins, i.e. seeking enforcement of the judgment abroad, seeking payment of damages, appointing liquidators, tracing and following assets into other jurisdictions, and initiating further proceedings abroad. These further steps and difficulties are often unavoidable when the underlying assets and wrongdoers are located elsewhere.

The Insolvency Act – liquidation

There can, on occasion, be a quicker route. As noted above, rather than pursuing fraud claims in the BVI Court, it may be possible to utilise the BVI's insolvency regime. In the fraud and asset tracing context, the starting point is to identify a BVI company which is indebted to the claimant, for example pursuant to an unsatisfied debt, judgment or arbitral award. That will often provide a basis to appoint a liquidator on insolvency grounds, provided that the debt is not disputed on substantive grounds. Where there has been serious fraud or mismanagement in the conduct of a company's affairs, that may be a freestanding basis to wind up a company on just and equitable grounds, regardless of solvency.

Once appointed, the liquidator assumes control of the company and its assets, and has broad powers under the Insolvency Act to investigate the company's affairs, and to collect and take control of the company's assets. As such, if the company holds valuable assets, such as real property, shares, or high-value moveable assets such as aeroplanes or yachts, the liquidator will be able to take control of those assets and sell them.

The Insolvency Act gives liquidators strong powers of investigation, and crucially, a liquidator can pursue a wide range of claims, either in

their own name or in the name of the company, in order to seek to recover assets for distribution to creditors.

These claims fall into the following broad categories. First, claims vesting in the company, for example the right to recover sums due from debtors, or any other cause of action (for example in contract or tort). Second, claims against former directors, including claims for misfeasance, insolvent trading, and fraudulent trading. Third, claims in relation to voidable transactions, including claims relating to unfair preferences and transactions at an undervalue.

Such claims can be particularly effective in an asset tracing context where a company has transferred assets prior to liquidation in an attempt to render itself judgment-proof, as the BVI Court has a broad discretion as to the relief it may order.

In cases of urgency, for example if the company's assets are in jeopardy, a creditor can apply on an urgent, *ex parte* basis for the appointment of a provisional liquidator. This enables the immediate appointment of provisional liquidators pending the final determination of an application for full liquidators, who can take control of the company and take steps to prevent the dissipation of assets.

IV Parallel proceedings: a combined civil and criminal approach

It is incredibly rare for the BVI criminal courts to be involved in the same matters as the BVI civil courts by way of parallel proceedings or otherwise. This is largely because those most interested in pursuing proceedings are usually more interested in available civil recoveries and remedies, and generally the relevant frauds are international, any criminal offences take place abroad, the wrongdoers are resident abroad, and the relevant assets are located abroad.

Further, the BVI civil courts have extensive powers akin to criminal sanction, such as powers in relation to contempt of court for breaches of their orders such as freezing injunctions, including sequestration and committal orders in extreme cases.

In theory, a private party wronged by a fraud can initiate a private prosecution in the BVI, and then the Director of Public Prosecution will consider whether to take over and continue such a prosecution as a public prosecution. However, for the reasons given above, in most cases a private party would be better off initiating BVI civil proceedings, or liaising with BVI legal practitioners to work with foreign lawyers and obtain justice elsewhere, particularly where the criminal courts of another jurisdiction may increase available remedies or recoveries.

Further, as in most jurisdictions, there is a danger that if parallel civil and criminal proceedings are instigated, the civil claim may be stayed pending the outcome of the criminal claim, and the claimant would face a lengthy delay and also the prospect of losing control of the case. There is also the potential risk of criminal proceedings failing due to the higher standard of proof applicable, and that outcome then being used to stymie civil action.

That said, it is important to note that the BVI is a highly regulated offshore financial centre, overseen by agencies such as the Financial Investigation Agency (FIA) and the Financial Services Commission (FSC). The FIA has responsibility for the investigation and receipt of disclosures made in relation to money laundering. Further, the FSC investigates contraventions of the BVI's FSC Act by all regulated entities in the BVI, along with monitoring international financial sanctions measures. Accordingly, in cases of serious fraud, money laundering and sanctions, BVI legal practitioners may be obliged to liaise with the FSC and FIA, and potentially other international agencies.

V Key challenges

As Lord MacNaughten once put it in the English courts, "*Fraud is infinite in variety*" (*Reddaway v Banham* [1896]). This quote pre-dated the estab-

lishment of the BVI as an offshore financial centre by nearly a century, but the challenges remain the same. Further, the boundless ability of dishonest people to perpetrate fraud is complicated further by globalisation and company structures involving various jurisdictions.

The BVI is a highly regulated financial centre, but it is inherently international. The key challenges therefore come out of internationalism and multi-jurisdictional relationships, along with, of course, technological advances, which can be used by fraudsters to their advantage, or against them. The need for effective cross-jurisdictional mechanisms is especially topical in the BVI at the moment.

VI Coping with COVID-19

Prior to the availability of vaccines, the BVI took a severely protective approach to the pandemic: closing the borders; introducing quarantine; imposing a long and complete lockdown, initially for 24 hours a day; followed by strong curfew measures that have gradually loosened over time and are no longer maintained (at least at the time of writing). This effectively closed off the BVI from the pandemic and the world, and allowed a degree of normal life to return within the Territory after the initial months. Travel restrictions remained significant, making the BVI even more insular and isolated than usual.

With the arrival of the vaccine, take-up was regrettably low, but the BVI government then felt able to re-open the borders, initially with certain testing and quarantine restrictions, which have again been gradually loosened over time. There was (and remains) strong adherence in the community to personal protection and anti-transmission measures such as hand sanitising and mask wearing, but social distancing has reduced and is not consistently observed.

The practical consequences of this approach for lawyers were that working from home became normal during the initial period, but then the protective cut-off approach enabled a return to office working with limited impact. After a very short hiatus in which only urgent matters were dealt with, the Commercial Court went – and remains – fully virtual, utilising Zoom for all hearings and relying more heavily on email and the e-litigation portal for the filing of documents and administration of cases. A COVID-19 protocol was adopted to allow for, amongst other things, electronic service as the norm, thus reducing the need for physical contact between firms.

The disruption to court business was minimal, and remains so. There have been significant advantages in operating virtual hearings in terms of the attendances of witnesses from other jurisdictions, and in reducing the cost of attendance by counsel from England and elsewhere. Clients and foreign lawyers have also been able to participate more extensively in the progress of cases and in hearings. There is no sign at present of a return to in-person hearings as the norm, although that seems likely to occur once greater levels of normality set in. Even then, we suspect that the advantages found during this period of reliance on technology will be maintained through greater use of virtual hearings.

In the world of fraud, asset tracing and recovery, the pandemic has had little impact on the techniques, technology and routes used by lawyers in either pursuing or defending such actions, save perhaps to increase the time involved in effecting service out of the jurisdiction. Otherwise, as is common in times of economic downturn and when fraudsters are restricted in their movements, in attendance at offices, and in the opportunities to cover up their actions, there does appear to have been an upturn in the detection of fraud and in proceedings relating to it. Similarly, a related increase in default and economic constraints has tended to result in more attempts to move and protect assets, and therefore to recover them.

VII Cross-jurisdictional mechanisms: issues and solutions in recent times

Black Swan jurisdiction

The BVI Commercial Court's decision in *Black Swan Investments v Harvest View* [2010] was seen as a welcome development by many in the BVI. In that decision, the BVI Court sought to fill a legislative void to establish the Court's jurisdiction to grant injunctive relief in support of foreign proceedings. The *Black Swan* jurisdiction, as it came to be known, was applied on numerous occasions by the BVI Court for many years, until the Court of Appeal's decision in *Broad Idea International Ltd & Anr Convoy Collateral Ltd* in May 2020. In that judgment, the Court of Appeal overturned the reasoning in *Black Swan*, finding that, absent statutory provision, the BVI Court had no jurisdiction to grant injunctive relief in the absence of substantive proceedings in the BVI.

Obviously, for an offshore jurisdiction such as the BVI, the Court of Appeal's decision in *Broad Idea* caused a certain degree of concern, particularly for those who had developed a certain degree of pride in the judicial ingenuity demonstrated

by the BVI Court in *Black Swan*. Fortunately, it was not long before legislative proposals were made and, in January 2021, the BVI legislature introduced section 24A of the Supreme Court Act granting the BVI Court the necessary jurisdiction on a statutory footing, including against non-cause of action (or "*Chabra*") respondents. The section also includes confirmation of the Court's jurisdiction to grant *Norwich Pharmacal* relief in support of foreign proceedings (which had also been the subject of more recent, but no less welcome, judicial ingenuity).

On 4 October 2021, the Privy Council handed down its much-anticipated decision in *Convoy Collateral Ltd v Broad Idea International Ltd & Anr.* [2021] UKPC 24, in which a seven-member panel reviewed and revisited the existing authorities on the *Mareva* jurisdiction, concluding that the BVI Court did have jurisdiction to grant freezing orders in support of foreign proceedings. Although the judgment may give rise to further debate on a number of issues, it no doubt provides essential guidance on the applicability of the relevant principles to the exercise of the *Mareva* jurisdiction.

Substantive jurisdiction and forum conveniens

The test for *forum conveniens* is often difficult to apply in the context of international fraud committed through offshore companies in multiple jurisdictions. In recent years, there has perhaps been a restrictive approach to jurisdiction taken by the BVI courts at first instance and on appeal. However, the Privy Council handed down judgment in the long-running jurisdiction challenge of *JSC MCC Eurochem & anr v Livingtson & ors* [2020] UKPC 31, where it again re-affirmed the application of the *Spiliada* test. In so doing, it overturned the ECSC Court of Appeal's decision that the BVI Commercial Court did not have jurisdiction to hear a claim against companies, based in the BVI and elsewhere, which had received bribes in the context of an alleged international bribery scheme.

The Court of Appeal's decision had been criticised by some commentators in limiting the BVI Court's ability to address cross-border frauds involving BVI entities, especially when the alternative forum (such as Russia) would not allow equivalent tracing or proprietary claims. It will be interesting to see the effect of the Privy Council decision on future forum challenges in the BVI courts.

Cross-border insolvency

Liquidators appointed by the BVI Court are usually able to seek recognition and/or assistance from the courts of other jurisdictions. That can provide a useful basis to co-ordinate a multi-jurisdictional asset recovery exercise, particularly where a BVI company holds assets in other jurisdictions, as is routinely the case. Foreign insolvency office-holders can also apply for assistance from the BVI Court, which may include orders to preserve assets within the jurisdiction or, crucially, provide access to information or documents held in the BVI.

Assistance may be available on a limited basis under the common law, applying the principles of modified universalism, or, to insolvency office holders from certain specific countries, under Part XIX of the Insolvency Act 2003. The statutory remedies available under Part XIX are helpful but not as broad as they might be. Provisions based on the UNCITRAL Model

- Law on Cross-Border Insolvency 1997, allowing increased efficient co-operation between the BVI courts, foreign insolvency office-holders, and designated foreign countries, were incorporated into the Insolvency Act. Although not currently in force, and there is therefore not currently a broader concept of Model Law "recognition" for foreign office-holders in the BVI, industry input is currently being sought in relation to bringing these provisions into force.

VIII Using technology to aid asset recovery

E-litigation and remote trials

As in other sophisticated jurisdictions, BVI legal practitioners, accountants and insolvency practitioners are all focused on using the latest technology to investigate fraud, carry out disclosure exercises and trace assets. Further, the BVI courts have been nimble in recent years to react to disaster and change. Following the devastation of Hurricane Irma in September 2017, the courts quickly moved to temporary electronic filing and remote hearings. Following this success, a sophisticated E-Litigation Portal was brought into play in 2018, essentially replacing all paper filings and introducing online management of cases.

Then in 2020, the BVI was quick to adapt to COVID-19 restrictions with minimal disruptions. After a short hiatus, when anything other than urgent hearings were put off, the High Court and Commercial Court began operating remotely almost as normal, and have since conducted all hearings, including urgent injunction hearings and full trials, by video link, with appearances of counsel and witnesses from within the Territory and outside it.

IX Highlighting the influence of digital currencies: is this a game changer?

The growth of digital assets – in particular, Bitcoin and Ether – has been significant in the past couple of years; for the BVI, as a major economic centre, especially with the prevalence of asset holding companies, digital assets are now an important part of the economy. The BVI regulator, the FSC, has recognised crypto-focused funds and the BVI government has indicated a crypto-friendly approach in the past few years, which has led to the establishment of such businesses in the BVI, including several major crypto exchanges.

The BVI is becoming a major player and ranks highly in terms of the number of initial coin offerings and crypto hedge funds. However, to date, there is no legislation relating to initial coin offerings and initial token offerings, or to cryptocurrency more generally. Such legislation is expected in the future, but in the meantime the existing regulatory framework – relating to legal tender, for instance – has to suffice, having been drafted years ago with no contemplation of cryptocurrency.

The BVI courts have taken a commercial and flexible approach to date, adopting the reasoning adopted by the English courts in recent decisions relating to issues over ownership, situs, etc. of crypto assets. The first reported judgment on the legal status of crypto assets in the BVI was in *Philip Smith and Jason Kardachi (as joint liquidators) v Torque Group Holdings Limited (in liquidation)* [2021] BVIHC(COM) 31. Mr Justice Wallbank held that crypto assets are to be treated as "property" at common law and as "assets" for the purposes of the BVI Insolvency Act. He also granted liquidators sanction to convert the company's crypto assets into USD or Tether (a stable coin tied to USD) due to the volatility of the cryptocurrency market and the potential adverse effect on the book value of the company.

In the past year, various other cases have come before the BVI courts relating to BVI crypto businesses involved in fraud and asset tracing. The courts have not hesitated to order freezing and proprietary injunctions and ancillary disclosure orders in relation to crypto assets when the interests of justice so require. BVI lawyers and insolvency practitioners are also becoming skilled at identifying wallet addresses, linking them to centralised exchanges, and taking steps to prevent the dissipation of digital assets. The growth and influence of digital currencies is indeed a significant change but, to date, the BVI's courts, lawyers and accountants have adapted well.

X Recent developments and other impacting factors

The key recent developments discussed above all relate to the ability of the BVI courts to operate effectively and efficiently in light of increasingly international fraud and the interrelation with other jurisdictions. On that note, various amendments to the EC CPR are under consideration following the establishment of a Rules Review Committee in 2019. Amendments under consideration include third-party disclosure orders and whether to remove the requirement for permission to serve a claim out of the juris-

diction. It may be that this requirement under part 7 of the EC CPR will be dispensed with, subject to the ability of a defendant to apply to set aside such service.

In the past year, the BVI Commercial Court handed down its first reasoned judgment on third-party litigation funding (*In the Matter of Exential Investments Inc (in Liquidation)*). Following this judgment, the BVI appears to be "open for business" to professional funders looking to fund meritorious litigation and liquidations for a commercial return. This is likely to increase the already growing appetite among litigation funders to fund BVI liquidations and litigation, and to encourage creditors, liquidators and litigants to explore funding options. This should be seen as a welcome development for those affected by fraud.

Otherwise, topical issues in the BVI continue to be economic substance, following the BVI Economic Substance (Companies and Partnerships) Act coming into force in 2018, and beneficial ownership registers, following the enactment of the BVI Ownership Secure Search System Act in 2017, which makes certain information regarding BVI companies privately available to UK law enforcement agencies on request. Whether or not a fully public register of beneficial interests of BVI companies should be in place is a live and controversial political and economic issue. CDR

Carey Olsen has one of the largest dispute resolution and litigation teams in the offshore world. We represent clients across the full spectrum of contentious and semi-contentious work.

We are recognised for our expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, restructuring and insolvency, regulatory investigations, employment disputes and advisory work.

From mediation to trial advocacy, we guide our clients through the full range of disputes, from multi-party, cross-jurisdictional corporate litigation to domestic claims before the local courts. We have also represented clients before the Privy Council. Many of our cases have established judicial precedents that are referred to in jurisdictions around the world.

We advise on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey across a global network of nine international offices.

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CAREY OLSEN

Alex Hall Taylor QC is head of Carey Olsen's BVI Dispute Resolution and Insolvency practice. He lives and works in the BVI, appearing regularly in the ECSC Commercial Court. Alex has over 20 years' court experience in commercial litigation and dispute resolution across a broad range of commercial, company, shareholder, trusts, insolvency, restructuring, civil fraud, asset tracing, security enforcement, tax, professional liability and fiduciary claims, arbitrations and mediations. He has extensive case management, interlocutory, trial and appellate advocacy experience, including before the Privy Council. He is a CEDR-accredited mediator. His practice is principally contentious, involving advocacy, tactical advice and strategic expertise in high-value, complex, document-heavy matters that are frequently multi-jurisdictional in nature.

He is a member of the BVI Bar Association, the Recovery and Insolvency Specialists Association (RISA), the Chancery Bar Association, the Financial Services Law Association, and is a Governing Bencher of the Inner Temple.

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Richard Brown is a BVI partner in the Dispute Resolution and Insolvency team, based in London. His practice encompasses all aspects of BVI commercial disputes, but with a focus on insolvency, fraud and asset recovery, shareholder disputes and contentious trust matters. Richard has particular experience of obtaining interlocutory relief such as freezing injunctions and *Norwich Pharmacal* orders, often in support of foreign court proceedings or arbitrations.

He is a Solicitor Advocate and regularly appears in the BVI Commercial Court and ECSC Court of Appeal. Richard is a member of the Insolvency Lawyers Association, R3, INSOL, RISA, and the Commercial Fraud Lawyers' Association.

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Tim Wright is a partner in Carey Olsen's BVI Dispute Resolution and Insolvency team. He rejoined Carey Olsen in December 2020 having been head of litigation at another offshore law firm. Tim advises on a wide range of litigation and insolvency matters, drawing on his broad onshore and offshore experience. He is a Solicitor Advocate and Barrister and regularly appears in court.

Tim's work in the BVI has focused on cross-border fraud and asset tracing, and all forms corporate insolvency work, including liquidation. Tim has particular experience in acting for and against liquidators, in shareholder disputes and unfair prejudice petitions, trust disputes and fraud work, and complex multi-jurisdictional cases emanating especially from Russia/CIS and China. Tim is a member of INSOL and sits on the Board of RISA.

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Simon Hall is counsel in Carey Olsen's BVI Dispute Resolution and Insolvency team. He moved to the BVI in 2015 and has significant BVI litigation experience. His caseload has primarily involved shareholder/director disputes, fraud and asset tracing, contentious trust and probate, and insolvency work. This has also included a wide array of interlocutory work including applications for freezing orders, prohibitory injunctions and the appointment of receivers. Simon has conducted litigation before the BVI Commercial Court, ECSC Court of Appeal and the Privy Council. He has acted for a wide range of clients including large financial institutions, high-net-worth individuals, insolvency practitioners and professional trustees. Simon has considerable advocacy experience and regularly appears as lead and junior counsel before the BVI Commercial Court and ECSC Court of Appeal.

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