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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

Contributing Editor:

Keith Oliver

Peters & Peters Solicitors LLP

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I 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 BVI Courts continue to be at the leading edge of significant and high-profile disputes, particularly in the crypto space. In doing so, they have continued to show their innovation and adaptability in the face of novel and complex issues. The BVI Courts and the financial services industry have also had to grapple with increasingly severe sanction regimes against Russian-related entities. These have had a significant impact on the ability of sanctioned entities to continue to operate in the BVI, including to continue litigation.

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 ECSC Civil Procedure Rules were updated by the Revised Edition 2023, which came into effect on 31 July 2023, making extensive changes to the existing 2000 rules. The Commercial Division still 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. Part 49 of the EC CPR 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, and the Commercial Division has a well-established and effective Certificate of Urgency procedure for dealing with urgent cases.

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, often as part of enforcement action or 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*” proviso 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 a commonly used 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 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 preservation and 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 in 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). The BVI Court has emphasised the flexibility of the *Norwich Pharmacal* jurisdiction, not only allowing prospective claimants to uncover the identity of an unknown wrongdoer, but also to obtain disclosure of information necessary to bring a claim or a “missing piece of the jigsaw”. 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, there is a real risk of dissipation of assets against which a judgment may be enforced and it is just and convenient to do so.

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 two years 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 several years to be determined, particularly where appeals against interlocutory orders are, commonly, 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. Until the recent revision of the EC CPR, permission was required from the BVI Court 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). The revisions made to Part 7 now provide that permission to serve out is not required for matters which fall within the gateways set out under Part 7.3 of the EC CPR, and the claimant now simply files a certificate for service out of the jurisdiction. Thereafter, the burden falls on the served defendant to seek to set aside service out, which the Court may do on the basis that the claim did not in fact fall within the Part 7.3 gateways, and/or that it otherwise lacks jurisdiction in relation to the matter. Due to the international nature of fraud cases involving multiple jurisdictions, defendants will often seek to set aside service or 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). This is likely to continue, even with the rule changes.

Depending on the location of a defendant, and what service options are permissible in the defendant's jurisdiction, 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. The Court will order alternative service where it is impractical to serve via the "usual" methods. 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. The recent rule changes also reflect greater encouragement towards alternative dispute resolution (ADR), with the introduction of Part 38A and judicial settlement conferences, whereby the judge acts as a facilitator towards settlement. The Part envisages the possibility of a settlement conference ordered by the judge in the case management phase, or with the consent of the parties at a trial or hearing.

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 Eastern Caribbean 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, but expedited trials and appeals are possible in cases of extreme urgency.

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, although, if the appropriate interim remedies are in place from the outset, final enforcement will usually be far less challenging.

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, which is defined broadly to include not only *de jure* directors, but *de facto* and shadow directors as well. Those claims will include 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. In appropriate circumstances, where a BVI regulated entity is involved, the BVI Court may refer the matter to the FSC. In addition, 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 establishment 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 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.



Of course, 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 sense 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. The judgment provides essential guidance on the applicability of the relevant principles to the exercise of the *Mareva* jurisdiction. The Privy Council's analysis was subsequently affirmed by the ECSC Court of Appeal in two BVI appeals: *Multibank FX International Corporation v Von Der Heydt Invest SA* (BVIHCVP2021/0009 (delivered 21 February 2023, unreported)); and *Svirsky and Donin v Oyekeonoc and Tensigma Limited* (BVIHCMAP2021/0040BVIHCMAP2021/0046BVIHCMAP2022/0005 (delivered 8 November 2023)).

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 Livingston & 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 (although it is worth noting that this has become increasingly difficult in Hong Kong SAR). Where available, that recognition 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.

Recognition of a foreign office-holder may be available on a limited basis under the common law, applying the principles of modified universalism. Separately, assistance is available to insolvency office-holders from certain specific countries, under Part XIX of the Insolvency Act. The Court of Appeal has now confirmed that assistance is not available for common law, meaning that office-holders from non-designated countries can only seek common law recognition. 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 consultation continues in relation to bringing these provisions into force.

Interplay between arbitration and insolvency

The Privy Council has effectively changed English law in relation to the consideration of arbitration agreements in an insolvency context as a result of a BVI appeal. In *Sian Participation Corporation (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16, the Privy Council considered an appeal as to whether a company should be wound up where the debt is subject to an arbitration agreement and said to be disputed. Previously, the position had been as established in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, which held that where a debt is subject to an arbitration agreement, the court should exercise its discretion to grant a stay of the winding-up petition in favour of arbitration. However, the Privy Council overturned *Salford Estates* and decided that the correct question was whether or not the debt is genuinely disputed on substantial grounds. Courts in the BVI and England & Wales are therefore not required to exercise their discretion to stay or dismiss a winding-up petition, merely because

the debt is subject to a generally worded arbitration agreement. The decision is a further example of the typically creditor-friendly approach of the BVI as a jurisdiction.

VII 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, including enacting a COVID Emergency Practice Direction to address a number of practical difficulties posed by remote working and hearings. After a short hiatus, the High Court and Commercial Court began operating remotely almost as normal, and for three years conducted all hearings, including urgent injunction hearings and full trials, by video link. In-person hearings have now resumed.

The BVI is a popular jurisdiction for the establishment of digital asset trading firms and exchanges. If those companies are placed into liquidation or are the subject of fraud, creditors and victims of fraud have recourse to the BVI Court's power to appoint

liquidators and receivers. BVI legislation requires at least one liquidator to be licensed to practise and resident in the BVI, and there are many well-known and highly qualified insolvency practitioners' firms based in the BVI. Those firms are employing cutting-edge technical solutions to assist in asset tracing, particularly in the context of digital assets. The BVI Court has granted relief to assist liquidators and receivers in these endeavours, including making disclosure orders and granting wide powers to liquidators to take control of assets.

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

The growth of digital assets has been significant in recent 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, which has led to the establishment of such businesses in the BVI, including several major crypto issuers, exchanges and funds.

The BVI is becoming a major player and ranks highly in terms of the number of initial coin offerings and crypto exchanges and hedge funds. In February 2023, the BVI legislature passed the Virtual Assets Service Providers Act, 2022 (VASP Act), which seeks to ensure the BVI's continued compliance with international standards and to adhere to specific recommendations from the Financial Action Task Force in respect of virtual assets. Whilst the legislation and regulatory



framework is now bedding in, this demonstrates the BVI's commitment to supporting the crypto industry and attracting more virtual asset businesses to the jurisdiction.

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. However, the BVI Court has been dealing with crypto-related matters since at least 2014, when it dealt with issues relating to the fallout from the collapse of MT Gox, which was at the time one of the world's largest Bitcoin exchanges. 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 Insolvency Act. He also granted liquidators sanction to convert the company's crypto assets into USD or Tether (a stablecoin tied to USD) due to the volatility of the cryptocurrency market and the potential adverse effect on the book value of the company.

In *ChainSwap Limited v Persons Unknown*, the BVI Court also granted a freezing order against persons unknown in respect of crypto assets misappropriated from BVI cross-chain bridge, ChainSwap. In that case, hackers had exploited vulnerabilities in ChainSwap's open-source coding to redirect tokens to the hackers' wallets. The freezing order was granted by reference to the owners of those digital wallets. The BVI Court also traced the misappropriated tokens through the "mixer", Tornado Cash.

The BVI Court has also been adaptable in relation to rules of service of proceedings and injunctions, especially when little is known about respondents other than their digital wallet address. For instance, in *AQF v XIO & Ors* (BVIHC(COM) 2023/0239 (delivered 23 November 2023)), the Court granted alternative service by way of sending copies of the application papers by non-fungible token airdrop to the digital wallet addresses of the respondents. In another case, the Court has also allowed service via Telegram Messenger, an instant messaging service used regularly in relation to digital assets.

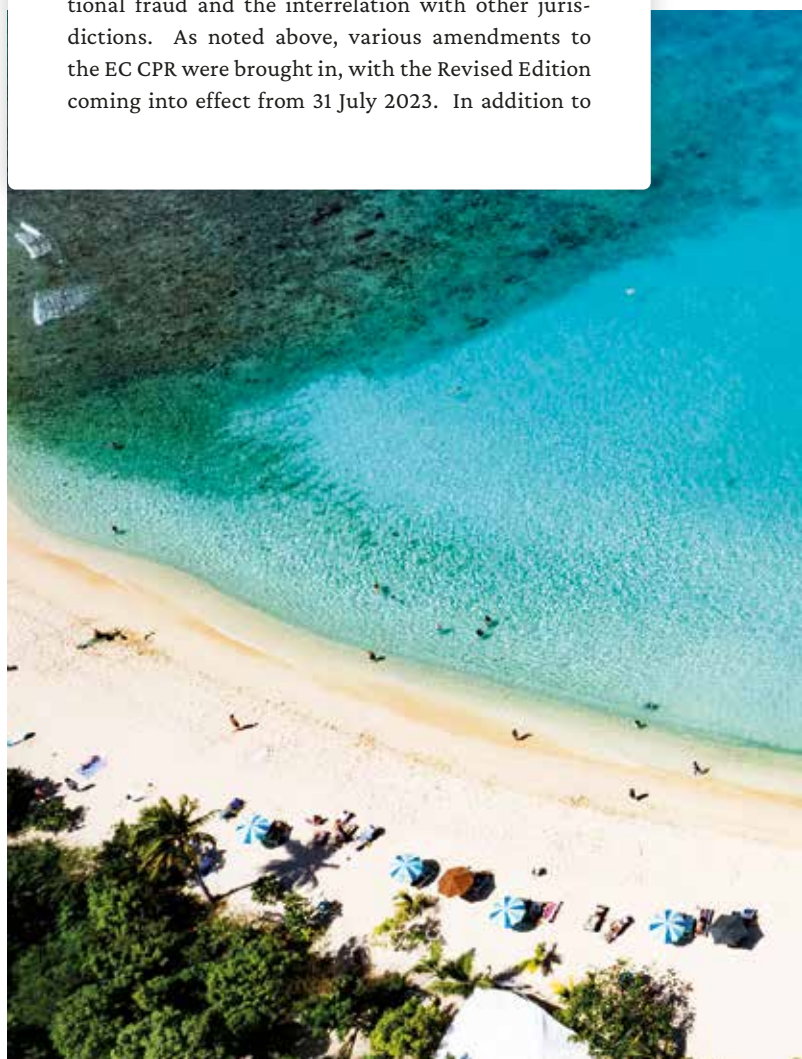
The BVI Court and Eastern Caribbean Court of Appeal have also considered the requirements for compliance with freezing orders where the asset concerned includes digital assets. In *Svirsky and Donin v Oyekeonov* (BVIHCOMAP2023/0013 (delivered 26 July 2024)), the Court of Appeal held that the means of compliance with disclosure provisions in such cases needs to be made clear in the wording of the order and, if appropriate, expert evidence should be obtained to support allegations of breach.

A number of recent high-profile insolvencies have involved BVI entities and the BVI Courts. Several

entities within the FTX Group are incorporated in the BVI and were included as part of the Group's Chapter 11 bankruptcy filing in November 2022. That includes Alameda Research Ltd, a holding company for, as well as being at the centre of, a significant portion of the FTX Group's corporate structure. Separately, in June 2022, the BVI Court appointed liquidators over the major cryptocurrency hedge fund, Three Arrows Capital (based in Singapore but incorporated in the BVI). Numerous 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.

IX 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. As noted above, various amendments to the EC CPR were brought in, with the Revised Edition coming into effect from 31 July 2023. In addition to



the significant change to service out provisions in Part 7 of the EC CPR, and the increased encouragement towards ADR through the introduction of Part 38A of the EC CPR and judicial settlement conferences, both mentioned above, there have also been changes to the Part 62 provisions concerning leave to appeal, as well as other less significant changes.

On 1 January 2023, a number of changes to the BCA came into force. These amendments affect the information publicly available about BVI companies and the information BVI companies need to file, and they contain amendments to certain statutory regimes (voluntary liquidation and continuation) which are designed to prevent their abuse.

As a result of the amendments, BVI companies' lists of incumbent directors are now publicly available. BVI companies must also file an annual return, containing prescribed financial information, although that will not be available for public inspection. The amendments also provide a mechanism for, but do not introduce or implement, a "Register of Persons with Significant Control". The BVI committed to introduce this register by 2023 to comply with an EU directive aimed at ensuring beneficial ownership information is publicly accessible. However, that process was delayed as a result of a judgment of the European Court of Justice in November 2022, which held that the EU directive was invalid and public access to beneficial ownership information constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data. Although not of direct application to the BVI, the BVI government has indicated its intention to ensure that any public access does not infringe human rights.

In changes to the voluntary liquidation regime, all voluntary liquidators must satisfy a new residency requirement. It is hoped that that change will increase accountability for the voluntary liquidation process.

Bearer shares, which have a long and controversial history, have finally been abolished completely. Any remaining bearer shares were automatically converted into registered shares.

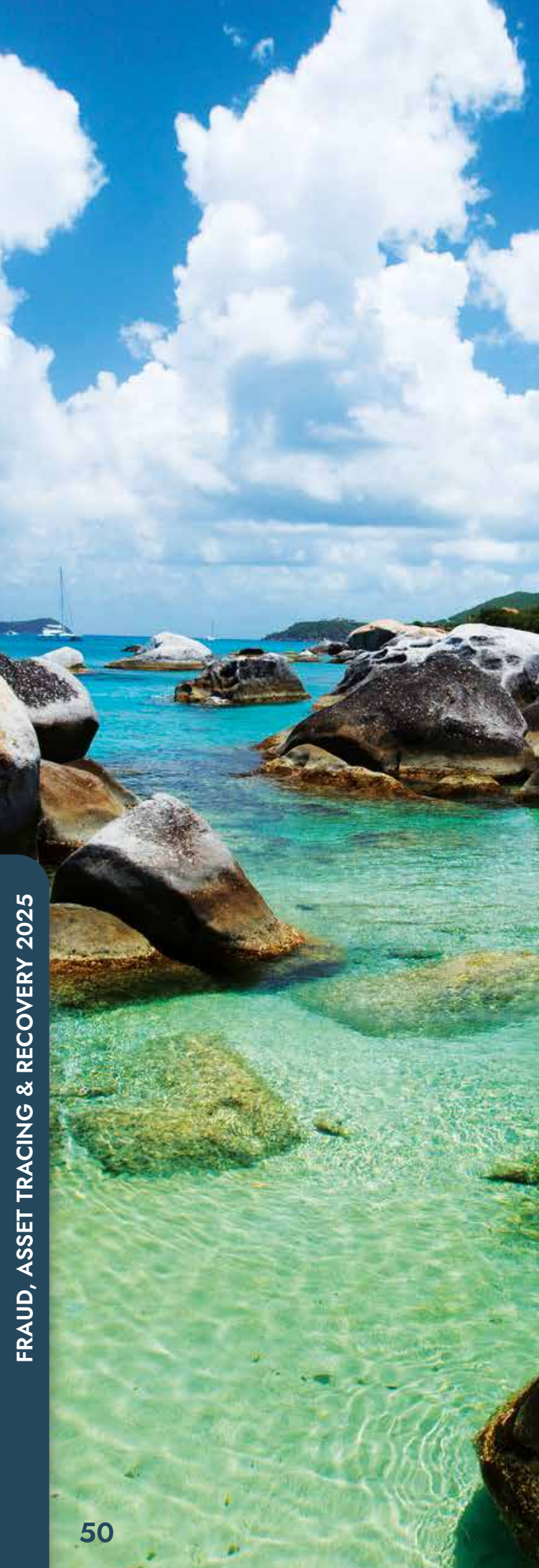
The amendments introduced a requirement to give public notice, via the *BVI Gazette*, of a BVI company's intention to continue out to a foreign jurisdiction. In a number of cases, it has been alleged that the continuation regime has been used to try to avoid liability to creditors. The notice period may make that more difficult.

The amendments to the BCA also made fundamental changes to the rules and process relating to the dissolution of companies. There is no longer a distinction between strike off and dissolution, which now happen simultaneously. The power of the Registrar to restore companies was extended to dissolved companies and (in theory) restoration via this administrative (out of court) process was expanded. However, the court's power to restore dissolved companies was preserved, and in many cases, it is still necessary to make an application to court. One effect of the new rules is that many BVI companies, which had failed to pay annual fees or maintain a registered agent (for instance), were automatically dissolved at the end of June 2023. As such, BVI lawyers are receiving increased requests for assistance from clients who wish to restore BVI companies to the register.

On a related note, in *Svirsky and Donin v Oyekenoc and Tensigma Limited* (see above), the ECSC Court of Appeal recently held that a freezing injunction may be made against and in relation to a dissolved company (which technically does not exist after dissolution) and its assets, so long as there is a realistic prospect of the dissolved company being restored. In that case, the Court accepted that there was a good arguable case that the dissolution of the company and transfers of its assets were part and parcel of a dissipation scheme.

In January 2025, further amendments to the BCA came into force. Companies must now also file their register of members with the Registry, although these will not be publicly available, and access is limited to the company, its registered agent, anyone the company has authorised, a competent authority and law enforcement agencies. Companies must also now file a register of beneficial owners with the Registry, including information on each ultimate beneficial owner (UBO) that has a 10% (or greater) interest in the entity. Information about each UBO that has a 25% (or greater) interest will be publicly accessible, provided: there is a legitimate interest in their details being





accessible, and exceptions can be made if it is not in the public interest; there are data protection concerns; there is a need to protect the person from risk; and/or there is a need to protect a child who lacks legal capacity. In addition to the existing ability to request a list of incumbent directors from the Registry, the Registrar can also now provide a copy of the full register of directors (which will also show historic appointments) to the company or its registered agent, a competent authority and a law enforcement agency.

Separately, consultation continues on the Charging Order Act 2020, a particularly important piece of enforcement legislation for the BVI, and on changes to the Legal Profession Act 2015, which was last revised in 2020. **CDR**

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Alex Hall Taylor KC 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.

Richard has a track record of successfully representing clients before the BVI Commercial Court and the Eastern Caribbean Court of Appeal, and where appropriate negotiating favourable settlements to avoid litigation.

Richard is a member of R3, INSOL, and the Commercial Fraud Lawyers' Association.

Richard gained his higher rights of audience in the English Courts in 2010, and was admitted as a solicitor advocate in the BVI in 2013. Richard was admitted as a registered associate of the Bermuda Bar in 2023.

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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 the BVI's RISA.

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Simon Hall is a partner 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 also has considerable advocacy experience, and regularly appears as lead and junior counsel before the BVI Commercial Court and ECSC Court of Appeal. He has conducted numerous trials in the BVI, as well as interlocutory hearings (on and without notice), in addition to interlocutory and final appeals.

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