

THE ASSET TRACING
AND RECOVERY
REVIEW

EIGHTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

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PREFACE

As Warren Buffet famously said, ‘only when the tide goes out do you discover who has been swimming naked’. The coronavirus pandemic has offered the global economy another opportunity to prove him right. Not only are new frauds being discovered, but the growing recession will challenge the budgets of victims, regulators and criminal enforcement bodies to bring those responsible to justice and to retrieve the proceeds. Remote interpersonal dealings are increasing the distance between business counterparties in a way that the internet did, and the growth of cryptocurrency transactions continues to do.

It is not possible to predict the trajectory of these developments. While it is now a cliché to speak of the ‘new normal’, nobody can be actually sure what that normal will be. Some even dispute that it is useful to speak of a normal at all. Nassim Taleb has argued that the financial world is more frequently and radically affected by extreme and unpredictable occurrences (which he calls ‘Sigma’ or ‘Black Swan’ events) than we acknowledge. According to Taleb, we live in ‘extremistan’ and not ‘mediocristan’. He has suggested that it is part of our makeup to blind ourselves to the influence of what we cannot predict.

Taleb may be right. For my part, I rather think that he is. But amid all the unpredictability, there are nevertheless some certainties. Society depends upon trust, and there will always be some people who abuse it. So some people will always commit fraud. Globalisation has ensured that major fraud will usually have an international element. Fraud lawyers will therefore have to be internationally minded.

Perhaps most of all, the growing international and technical complexity of fraud will continue to outstrip the ability of any one person to understand or remedy it. One of the heartening things about the legal profession over the past 25 years or so is the growth of an international community of lawyers specialising in fraud and asset tracing work who share knowledge and experience with each other about the events in their fields. This book continues to be a useful contribution to that community.

Robert Hunter

Robert Hunter Consultants

August 2020

BRITISH VIRGIN ISLANDS

Peter Tyers-Smith, Timothy P de Swardt and Merrick Ricardo Watson¹

I OVERVIEW

i Legal system in the BVI

The British Virgin Islands (BVI) is a British overseas territory in the Caribbean that has a common law system deriving from English law.² English common law was extended to the BVI by the Common Law (Declaration of Application) Act.³ Much of the legislation in the BVI is modelled on (and in some cases directly imports) English statutes. There is a growing body of domestic common law and, where there are gaps, the common law of England and other Commonwealth jurisdictions is considered persuasive.

The BVI has a similar court structure to England, and the Commercial Court – as a division of the Supreme Court (also known as the High Court) – handles disputes arising from trade or commerce. Normally, a case is suitable for determination in the Commercial Court if it is one arising out of a transaction of trade or commerce. The minimum value for a claim to be brought in the Commercial Court is US\$500,000.⁴ The discretion to include cases outside these qualifying criteria is exercised on the basis of a claim still being of a commercial nature and one that warrants being in the commercial list.⁵

The BVI is a member of the Eastern Caribbean Supreme Court (ECSC), and the ECSC Civil Procedure Rules (CPR) are the binding procedural rules used in the Supreme Court. The CPR are based on the original Civil Procedure Rules of England and Wales, with certain critical differences. Under the latest rules,⁶ all new Commercial Court matters as at 12 November 2018 have to be initiated in accordance with the electronic filing and service procedure. The new e-litigation system facilitates electronic filing, electronic payments and electronic case management. Appeals from the Supreme Court are to the ECSC Court of Appeal, which sits three times a year in the BVI. Appeals from the ECSC Court of Appeal are to the Judicial Committee of the Privy Council.

Civil asset recovery litigation above a value of US\$500,000 will usually proceed in the Commercial Court, whereas cases of this kind not reaching that threshold will be heard by

1 Peter Tyers-Smith, Timothy P de Swardt and Merrick Ricardo Watson are lawyers at Kobre & Kim.

2 The common law of England was extended to the BVI pursuant to the Common Law (Declaration of Application) Act 1705.

3 Common Law (Declaration of Application) Act, Cap 13.

4 www.bvi.gov.vg/supreme-court-high-court.

5 *Trident Trust Company (South Dakota) Inc v. Spinstar Holdings Ltd & anor*, BVIHCV 2018/0091.

6 Rule 3(3) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Statutory Instrument No. 87.

the civil division of the Supreme Court. If criminal proceedings are brought, these will usually be commenced in the Magistrate Court initially and, in the case of indictable offences, will then be remitted to the criminal division of the Supreme Court by way of a paper committal.

BVI statutes of potential relevance include the BVI Business Companies Act 2004 (BCA), the BVI Insolvency Act 2003 (Insolvency Act), the Proceeds of Crime Act 1997 (as amended) and the BVI Evidence Act 2006 (Evidence Act). In the asset-recovery context, it is worth noting that the Privy Council (hearing a Cayman Islands appeal in 2005) concluded that Section 122 of the Bankruptcy Act 1914 – which requires courts in former colonial or Commonwealth territories to assist each other in bankruptcy matters – was still in force in British Overseas Territories despite its repeal in England.⁷ The BVI courts are very familiar with asset recovery matters and have historically issued a number of pro-creditor decisions. The recent reversal by the Court of Appeal of the *Black Swan* decision⁸ bucks that trend but, as discussed later, is itself a questionable decision.

ii Publicly available information

In common with other territories with a similar constitutional relationship with the United Kingdom, beneficial owners of BVI companies and other entities, such as limited partnerships, can now be accessed by governmental and regulatory authorities. In the BVI, specifically, this has been via the Beneficial Ownership Secure Search System Act 2017 (BOSS Act). The Act enables the creation of a new beneficial ownership secure search system (BOSS). This information is not available to the general public, but only to specific government bodies identified under the Act. Beneficial owners will not be informed when a search is made via BOSS. This is because of concerns about tipping off a beneficial owner. There is no equivalent ‘sideways’ route to this information via a Freedom of Information-type Act as in the United Kingdom,⁹ and that may itself drive business to the BVI.

The BOSS Act requires registered agents for BVI entities to make certain information on the beneficial owners of all BVI companies and limited partnerships accessible by a secure government search system. The Act applies to corporate and legal entities, which, for the purposes of the Act, means companies incorporated or existing under the laws of the BVI. The Act, which entered into force on 30 June 2017, implemented the agreement the governments of the BVI and the United Kingdom entered into on 8 April 2016. A number of other overseas territories entered into similar agreements, which provide for a fundamental change to the amount of information that can be obtained by government entities about the ownership of offshore entities. It provides the legal framework for recording accurate beneficial ownership information and the disclosure of that information to law enforcement authorities in jurisdictions with which the BVI has entered into bilateral agreements similar to the UK exchange of notes.

The BOSS Act requires that registered agents maintain a database of the corporate and legal entities for whom they act as a registered agent (RA Database). The RA Database is private. It will, however, be searchable by certain BVI governmental bodies via BOSS, which enables an electronic secure search of each RA Database. At the moment, only UK

7 *Al Sabab and Another v. Grupo Torras SA* [2005] UKPC 1.

8 *Black Swan Investment ISA v. Harvest View Limited et al*, BVIHCV 2009/399, recently found to have been wrongly decided by the Court of Appeal in *Broad Idea International Limited v. Convoy Collateral Limited*, BVIHCMAP 2019/026 (29 May 2020).

9 See *Dawson-Damer v. Taylor Wessing LLP* [2017] EWCA 74 in the English/Bahamas trustee context.

authorities can request BVI authorities to provide beneficial ownership information that will be accessible through the BOSS system. The information accessible through BOSS will be the name, residential address, date of birth and nationality of each BVI company's beneficial owner.

In respect of each beneficial owner to whom the BOSS Act applies, registered agents will be required to retain the following information: name;¹⁰ residential address;¹¹ date of birth;¹² and nationality.¹³

The only authorities entitled to request that a search of the RA Database be carried out are:

- a* the BVI Financial Investigation Agency (FIA);¹⁴
- b* the BVI Financial Services Commission;¹⁵
- c* the BVI International Tax Authority;¹⁶ and
- d* the BVI Attorney General's Chambers.¹⁷

Information held by registered agents will be retained for five years following the dissolution, or other cessation, of a corporate and legal entity.¹⁸

In addition, the BVI has several tax information and exchange agreements with other countries and has implemented both the US and UK Foreign Account Tax Compliance Acts.

Typical information available to the general public includes the following:

- a* company information from the BVI Companies Registry, including:
 - the present and historical status of a BVI company;
 - the identity of the registered agent;
 - the place of its registered office;
 - the date when it was incorporated;
 - certificates of good standing (available to any member of the public for a BVI company);
 - the contents of its memorandum and articles of association; and
 - registered charges (if any);
- b* a list of entities regulated by the BVI Financial Services Commission;
- c* court documents and judgments;
- d* land registry information – the land registry can provide certain details, including confirmation of the owner of BVI land or real estate upon application;
- e* BVI ship registry information – the BVI ship registry can provide certain information regarding vessels registered under a BVI flag; and
- f* a list of disqualified directors.

10 The Act, Section 10(3)(b)(i).

11 The Act, Section 10(3)(b)(ii).

12 The Act, Section 10(3)(b)(iii).

13 The Act, Section 10(3)(b)(iv).

14 The Act, Section 13(6)(a).

15 The Act, Section 13(6)(b).

16 The Act, Section 13(6)(c).

17 The Act, Section 13(6)(d).

18 The Act, Section 11.

iii Regulation and law enforcement

The legislative agenda of the BVI continues to reflect current global initiatives in terms of finance-related legislation and proceeds of crime:

- a* Financial Investigation Agency Act 2003 (as amended) (FIA Act). The FIA Act establishes the Financial Investigations Agency (FIA) as an autonomous law enforcement institution with a mandate to receive, obtain, investigate, analyse and disseminate information that may relate to criminal offences, financial offences and requests for legal assistance from the appropriate authorities in a foreign jurisdiction. As part of its mandate, the FIA also shares information with the Commissioner of Police relating to the commission of criminal and financial offences.
- b* Criminal Justice (International Cooperation) Act 1993 (as amended) (CJIC Act) and the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order 2017 (CJIC Order).¹⁹ The CJIC Act creates a comprehensive regime that enables the BVI to cooperate with other countries in matters pertaining to criminal investigations and proceedings. The CJIC Order complements the Act and outlines the process for obtaining assistance in matters concerning the enforcement of confiscation orders as well as applications for restraint and charging orders. A country or territory is no longer required to be designated by a statutory instrument before an order made by the courts of that country or territory can be enforced in the BVI.
- c* Drug Trafficking Offences Act 1992 (as amended) (DTO Act). The DTO Act gives effect to the provisions of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. It establishes a legal framework for the recovery of the proceeds of drug trafficking and creates a regime of international cooperation on drug trafficking. The DTO Act establishes machinery for the registration by the Supreme Court of external confiscation orders made by the courts of a requesting country.
- d* Proceeds of Criminal Conduct Act 1997 (as amended) (POCCA) and the Proceeds of Criminal Conduct (Enforcement of External Confiscation Orders) 2017 (PCC Order). The POCCA and PCC Order provide for the recovery of the proceeds of crime and provides for the registration and enforcement of external confiscation orders made by the courts in a requesting country. Under the latest revisions in the PCC Order, like the CJIC Order, any country may be a requesting country: there is no requirement for pre-designation. The POCCA and PCC Order allow the Supreme Court to make a restraint or charging order to protect specified assets being dissipated.
- e* The Anti-Money Laundering Regulations 2018 and the Anti-Money Laundering and Terrorist Financing Code of Practice regulate, in particular, registered agents of BVI companies and limited partnerships. Among other things, they impose strict know your customer requirements, notably with respect to beneficial ownership, and provide the BVI framework for suspicious activity reports.

The financial services industry in the BVI is regulated by the BVI Financial Services Commission (FSC). The FSC is an autonomous body that reports to the Premier, the BVI Cabinet and the House of Assembly. Intelligence concerning financial crimes is controlled by the FIA, which was established under the Financial Investigation Agency Act 2003. The powers of the FIA were enhanced under the Financial Investigation Agency (Amendment)

¹⁹ Criminal Justice (International Cooperation) Act 1993.

Act 2017,²⁰ giving greater discretion and an enhanced role. The FIA has a number of statutory powers to assist it with collecting evidence and liaising with national and overseas authorities to prevent financial crime. The Financial Investigation Unit (FIU) is the specialist unit within the BVI police force responsible for investigating financial crime. The FIU works in tandem with the FSC and FIA to investigate and prevent financial crimes.

II LEGAL RIGHTS AND REMEDIES

i Civil claims

Claims against persons who committed a fraud

In this area, the BVI has many of the rights and remedies that would be available to a victim of fraud in England and Wales.

Clawback claims

If the individual who committed a fraud has personally appropriated the assets in question, clawback claims may be initiated against him or her. These are considered further below.

Restitutionary claims

The potential grounds for a claim of unjust enrichment are numerous,²¹ but those relevant to asset recovery include illegality, duress, lack of consent, mistake, failure of basis or free acceptance. The BVI would grant restitution, being either a personal money judgment or proprietary relief.

Damages claims

Common damages claims may include breach of contract, misrepresentation or deceit. Claims may also be available for breach of fiduciary duty or breach of trust. These claims are commonly brought against directors of BVI-domiciled asset-holding companies and may be made against joint venture partners as well.²²

Director claims may be made under statute or common law. Under BVI statute, directors owe fiduciary duties to act in good faith, honestly and in the best interests of the company, as well as to use their powers for a proper purpose.²³

20 Examples of important changes are as follows:

- a The replacement of Section 4(2)(f) with: '(f) may, subject to this Act and to such conditions as may be determined by the Director, provide information to the Commissioner of Police where such information may relate to the commission of a criminal offence, including a financial offence'.
- b The replacement of Section 4(8) with: '(8) Where in the performance of its functions, the Agency becomes aware of evidence that a criminal offence, including a financial offence, has or may have been committed in the Territory, the Agency shall report the matter to an appropriate officer of the Police Force, and that officer or such other officer as the Commissioner may designate shall from time to time take over the investigation.'
- c The repeal of Section 4(9) – which previously meant the FCA had no further role in investigations.

21 See Goff and Jones: *The Law of Unjust Enrichment* (8th edition), Chapters 8 to 26.

22 The BVI would likely follow English case law allowing claims for breach of fiduciary duty to be made against an individual principal of a corporate joint venture partner: *Ross River Ltd v. Waverley Commercial Ltd* [2013] EWCA Civ 910.

23 Business Companies Act 2004 (BCA 2004), Sections 120–121.

Simple derivative actions are allowed in the BVI with the court's permission.²⁴ Whether double derivative actions are allowed (i.e., actions brought in the name of another company that is, in turn, owned by the BVI company) is determined by the *lex fori* of the proposed action.²⁵ These actions are not permitted in the BVI itself.²⁶

Constructive and resulting trusts

A claimant may seek constructive or resulting trusts over misappropriated assets. The former may arise when it is unconscionable for the owner of property to retain a beneficial interest in the property over that of the claimant. By contrast, resulting trusts arise from an intention by the individual transferring the trust property that he or she should retain his or her beneficial interest in it. The Quistclose (or purpose) trust is a special form of resulting trust that arises where the person transferring trust property does so with an intention that it be used for a specific purpose.

Claims against persons assisting a fraud

Dishonest assistance is a recognised cause of action in the BVI. The test for dishonesty in the BVI is whether the party's state of mind, intelligence and knowledge at the relevant time would be deemed dishonest by objective ordinary standards.²⁷ Remedies can be personal (typically a money judgment reflecting compensation for loss or an account of profits) or proprietary (typically a declaration of constructive trust).

Claims against directors of a BVI company that has been used as a vehicle for fraud may also be possible, even if the directors were not themselves involved or complicit in the fraud. Claims may be made for breach of a director's duty of skill and care (i.e., negligence and breach of fiduciary duty).²⁸

The liquidators of an insolvent BVI company may also bring claims against directors for misfeasance, fraudulent trading (making transfers of company assets with the intent to defraud creditors) or insolvent trading (making transfers of company assets at the time a company was, in fact, insolvent).²⁹

Claims against third parties receiving the funds

Knowing receipt

A claim can be made when a third party receives assets in breach of trust or in breach of fiduciary duty, when that third party knows the assets, in fact, belonged to the claimant and were disbursed in breach of trust or fiduciary duty. Remedies may include personal remedies (compensation) or proprietary ones (such as tracing or a constructive trust).

24 BCA 2004, Section 184C(1)(a).

25 *Microsoft Corporation v. Vadem Ltd* BVIHC VAP 2013/0007 at [14].

26 *ibid.* at [13].

27 *Akai Holdings (in liquidation) v. Brimlow Investments* BVIHC V 2006/0134.

28 Section 122 of the BCA 2004. However, it is common for the articles and memorandum of association to contain exculpatory provisions limiting or excluding liability for directors, or indemnifying them, or both.

29 Recent case law confirms that an unliquidated damages claim does not count as a loss or liability that would make a BVI company insolvent for the purposes of insolvent trading: *Mackellar v. Khoo Kin Yong et al.*, BVIHC MAP 2013/0008.

Fraudulent conveyance

The BVI has incorporated historic legislation from England that allows a claimant to void a transfer of assets made with the intention to defraud creditors.³⁰ Although there have been few published fraudulent conveyance cases in the BVI itself, the law is based on Section 172 of England's Law of Property Act 1925, and the voluminous English case law concerning that provision will have persuasive application in the BVI.³¹ A recent decision also concluded that the historic Statute of Elizabeth remained in force in the BVI.³²

Insolvent distribution

A company can claw back distributions to members made when it was insolvent either at the time of or immediately after the distribution.³³ The court will order the distribution to be returned to the company. Alternatively, a personal claim may be made against a director for the value of the loss not recovered from the member.³⁴

Unfair preference

Unfair preference claims may be brought to recover disbursements made within the two-year period prior to the appointment of liquidators of an insolvent BVI company if the receiving party is connected to the company, and made within six months otherwise.³⁵ The disbursement must put the receiving party in a better position than if he or she were a creditor in the insolvency proceedings.

Undervalue transaction

Undervalue transaction claims may be brought when a BVI company is insolvent and has made disbursements for no consideration or insignificant consideration.³⁶

Other types of third-party claims

Conspiracy to injure by unlawful means

Third parties who have conspired with a defendant to dissipate assets in breach of a freezing order can be liable for damages for conspiracy to injure by unlawful means. The claimant may claim damages from a third party who conspired with the defendant to put assets available to satisfy the debt out of the claimant's reach. It will need to be shown that the asset dissipation

30 Section 81 of the Conveyancing and Law of Property Act 1961.

31 There are some differences, however. In particular, the definitions of conveyance and property are more limited in the BVI Act than the English Act. In the BVI Act, the definitions of these (and other) terms is not qualified by the words 'unless the context otherwise requires'. This has two immediate complications: the definition of property in the BVI Act does not include money, and further, a conveyance must be in writing.

32 *VTB Bank (PJSC) v. Micros Group Limited & anor* (23 January 2020) at [48].

33 BCA 2004, Section 58.

34 BCA 2004, Section 58(2).

35 Insolvency Act 2003, Section 245.

36 Insolvency Act 2003, Section 246.

was committed by the defendant in contempt of court, with the assistance and common intention of the third party, and was intended to put the defendant's assets beyond the reach of the claimant.³⁷ Although an English case, it is likely to be highly persuasive in the BVI.

Assisting asset stripping

A creditor may also be able to claim damages against third parties who procure non-payment of a judgment debt by assisting the defendant with asset stripping. The English court recently rejected a motion to dismiss such a claim.³⁸ The claim is based on the principle that a third party should not procure or induce non-payment of a contractual debt, but extends it to cases concerning non-payment of judgment debts.

ii Defences to fraud claims

The defences to the claims above are usually factual, that is to say, that some element of the claim has not been made out on the evidence. Often, this element is dishonesty.

In addition, there are safe harbour defences of good faith, lack of notice of intention to defraud or good consideration to most of the clawback and equitable claims outlined above. Third-party claims may also be defended on the grounds of change of position by the party receiving the misappropriated assets.

There is no statutory bar on civil proceedings progressing in parallel with, or in advance of, criminal proceedings concerning the same subject matter, but rather discretion to stay (i.e., suspend) the civil proceedings. The CPR restrict the use of documents disclosed in civil proceedings being used by the parties outside those civil proceedings. However, it is likely that the BVI courts would follow the position in England³⁹ where defendants facing concurrent civil and criminal proceedings (the civil proceedings taking place in England) are given the protection of the civil proceedings being ring-fenced, such that nothing in those civil proceedings can be used against the defendants in the criminal context.

iii Limitation periods

Cause-of-action limitation periods are governed by statute and broadly follow the English framework. The limitation periods for most of these claims is six years from the date on which the cause of action accrued or, in respect of claims made in insolvency, six years from the date of the appointment of the liquidators. Thus, the statute of limitation will differ depending on the cause of action, as set out in the Limitation Act (Chapter 43). For example, the relevant limitation period for claims based in tort or contract is six years. A 12-year limitation period applies for the enforcement of a judgment debt or an award.

Applicable limitation with respect to claims against trustees differs by reference to the way in which a claim is characterised and whether the trust on which the claimant relies pre-exists the conduct relied on, so as to found the cause of action. When a breach of fiduciary duty, in the absence of deliberate concealment, is based on the same facts as a claim sounded either in contract or in tort, then the same six-year period will apply. However, when the fiduciary has deliberately concealed facts relevant to the cause of action, then the limitation

37 *JSC BTA Bank v. Khrapunov* [2018] UKPC 19.

38 *Marex Financial Limited v. Carlos Sevilleja Garcia* [2017] EWHC 918 (Comm).

39 See *Jefferson Ltd v. Bhetcha* [1979] 1 WLR 898 at 904; *Attorney General of Zambia v. Meer Care & Desai* [2006] EWCA Civ 390; and *Swallow v. Commissioners for Revenue and Customs* [2010] UKFTT 481 (TC).

will not apply (for example, an undisclosed interest in a transaction), but defences such as laches (unjustified delay causing prejudice to the defendant in defence of a claim) may still be applicable in the adjudication of a claim. When fraud is involved, the limitation period will not begin to run until the plaintiff has discovered the fraud or could have, with reasonable diligence, have discovered it.⁴⁰

iv Criminal remedies

While the BVI has a well-developed criminal asset forfeiture regime, primarily through the POCCA, in practice there are few criminal asset forfeiture cases. There have been no large-scale or widely publicised criminal prosecutions for offences under the POCCA, nor have there been any significant recoveries of assets through criminal proceedings, in recent times. This could possibly change in the future since the definition of a requesting country in the POCCA has recently been expanded from a closed list to include any country or territory outside of the BVI.⁴¹

The POCCA allows the BVI court to compensate a victim of a crime out of the tainted funds the state recovered as proceeds of crime.⁴²

There is no equivalent of the United Kingdom's Fraud Act 2006 at present in the BVI. Many fraudulent offences – for example, directors or officers obtaining property by deception, obtaining a pecuniary advantage by deception, making false accounting and making false statements with the intent to deceive shareholders or creditors – are contained within the Criminal Code 1997.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Freezing orders

The BVI court may grant a freezing order on a domestic or, in suitable cases, a worldwide basis, in aid of domestic proceedings in the BVI.

These are granted if:

- a* the applicant has a good, arguable case;
- b* there is a risk of the defendant dissipating his or her assets so that the judgment or award in favour of the claimant would go unsatisfied; and
- c* it is just and convenient for the injunction to be granted.

These orders are often coupled with a disclosure order regarding the defendant's assets to ensure that the freezing order is effective (i.e., by which to police the order). Orders can be granted *ex parte*, but cannot exceed 28 days. A claimant who successfully obtains an interim freezing order must give an undertaking for damages and costs with the object of compensating the defendants if the claimant should ultimately be unsuccessful at the trial and the court should later find that the defendants have suffered loss as a result of the grant of the order.

40 Limitation Ordinance 1961, Section 25.

41 Schedule 2, Proceeds of Criminal Conduct (Enforcement of External Confiscation Orders) Order, 2017 S.I. No. 3.

42 Proceeds of Criminal Conduct Act 1997, Section 6(4).

The Court of Appeal, however, has demonstrated a reluctance to grant worldwide relief, given the expense and inconvenience to respondents unless there are sufficient safeguards provided for by way of undertakings.⁴³ Jurisdiction of the courts in the BVI is based on Section 24(l) of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1968, and is ordinarily ancillary to the court's substantive jurisdiction. Typically, a freezing order is made personally against the respondent rather than against specific assets.⁴⁴ However, the BVI court can also grant an order for the 'detention, custody, or preservation' of specific assets that are the subject of a proprietary claim.⁴⁵

Freezing orders against third parties are available in the BVI (and are known as *Chabra* injunctions), and the court follows established English and Cayman Islands jurisprudence in this area.⁴⁶

The Court of Appeal has recently overturned *Black Swan Investment*,⁴⁷ in which Justice Edward Bannister QC had found that a freestanding freezing order could be granted in the BVI even when no proceedings were contemplated or pending in the jurisdiction, and that there was no cause of action against the BVI respondent.⁴⁸ The effect of this decision is that freezing orders can only be made in aid of domestic proceedings in the BVI.

The Court of Appeal held that the BVI High Court's jurisdiction under Section 24 of the Supreme Court Act does not, in the absence of enabling legislation, give the High Court jurisdiction to grant freestanding interlocutory injunction in support of foreign proceedings. The Court of Appeal found that Mr Justice Bannister QC fell into error by improperly applying the dissenting judgment of Lord Nicholls in the case of *Mercedes Benz AG v. Leiduck*.⁴⁹

The decision is currently being appealed to the Privy Council, and it appears that there may be a viable ground for appeal. Importantly, on 16 June 2020, Mr Justice Jack handed down the decision in *Commercial Bank Dubai v. 18 Elvaston Place Ltd and Fairmont Grand Holding Ltd*⁵⁰ where he weighed in on the matter. While accepting that he was bound by the Court of Appeal's decision, the learned judge noted that in Australia, the Privy Council held that Australian courts were entitled to develop common law to suit local conditions.⁵¹ The learned judge observed that, should the matter go to the Privy Council, it might well decide that *Black Swan* represented the consensus of opinion of the public, the elected legislature and the judiciary in the BVI. Mr Justice Jack observed correctly that the Court of Appeal did not consider whether Caribbean common law (like Australian common law) had developed differently.

43 *Eastern Caribbean Industrial Corporation Berhad v. Vela Financial Holdings Limited* BVIHCV 2005/046.

44 To give it practical effect, an order may need to be served on the custodian of the assets (such as a bank holding the account) or the entity controlling the transfer of legal title (such as the registrar of ships, or the registered agent in respect of BVI shares). That entity would then be in contempt of court if it assisted transferring title in breach of the order.

45 CPR 17.1(1)(h)(ii).

46 See *Gilfanov & ors v. Polyakov & ors*, BVIHCMAP 2016/0009; and *Algozaibi v. Saad* [2011 (1) CILR 178].

47 See footnote 8.

48 *ibid.*

49 [1995] 3 All ER 929.

50 BVIHC (COM) 2020/0070.

51 *Australian Consolidated Press Ltd v. Uren* [199] 1 AC 590.

It remains to be seen whether the Court of Appeal decision will be overturned, but there is some force in the local conditions argument. In any event, there is currently work afoot in the BVI to pass legislation to circumvent the restrictive effect of the Court of Appeal's decision.

Provisional liquidators

A more drastic option than a freezing order, in which a claimant seeks the ultimate winding-up of a BVI company, would be the appointment of provisional liquidators. Creditors or shareholders can apply, although not persons claiming only a beneficial ownership in a company.⁵²

The applicant must show that the company's assets are being dissipated, and satisfy the court that the appointment of provisional liquidators is either necessary to preserve the value of the company's assets or necessary in the public interest.

Interim receivers

The court can appoint a receiver to preserve assets that are liable to dissipation pending the outcome of a claim. However, an applicant must demonstrate to the court that it ought to exercise its discretion to make the appropriate order and that the assets in the respondent's control would be liable to enforcement if the applicant is successful at trial.⁵³

There are four requirements for appointment:

- a* there must be sufficient evidence to show a good, arguable case;
- b* there must be peril to the property to be preserved, and the court must be satisfied that the applicant will be in a worse situation if the appointment of a receiver is delayed;
- c* the claim or the application would not be frivolous or vexatious, and the claimant must show that the appointment is appropriate because other, less invasive remedies would be inadequate;⁵⁴ and
- d* it must be just and convenient.

The appointment of a receiver is often regarded as a remedy of last resort, and the receiver is usually appointed *ex parte* when the court is faced with allegations of fraud and immediate action is needed to prevent the court's orders from being rendered futile. Recently, in *Vinogradova v. Vinogradova*,⁵⁵ the Court of Appeal expressed concern that there has been an increasing number of applications for the appointment of interim receivers when the grant of less draconian and intrusive relief would provide sufficient protection. The Court of Appeal admonished the lower courts to be more vigilant to ensure that the court's jurisdiction to appoint interim receivers is exercised only when it is truly just and convenient to do so. It should be expected that the lower courts will heed the Court of Appeal's warning and exercise more vigilance with respect to applications to appoint interim receivers. In the BVI, this could very well result in the court rejecting applications that are not based on sufficiently cogent evidence demonstrating that the applicant has exhausted other remedies and the appointment of an interim receiver is indeed a remedy of last resort.

52 *In the Matter of Global Convertible Megatrend Ltd and FE Global Undervalued Investments Ltd* BVIHC 2006/246, [2006] 12 JBVIC 0501.

53 *Yukos CIS Investments Limited & Ors v. Yukos Hydrocarbons Investments Ltd & Ors* HCVAP 2010/028.

54 *Norgulf Holdings Limited et al v. Michael Wilson & Partners Limited*, Civil Appeal No. 8 of 2007.

55 BVICMAP2018/052 (30 July 2019).

ii Obtaining evidence

Evidence and information can be obtained in the BVI both at the pre-action stage and during the proceedings themselves. The regime for first-party discovery – that is, discovery from the defendant him or herself – is wider than third-party discovery; indeed, the CPR does not contain any provisions for third-party discovery similar to those in England and Wales. In broad terms, in civil cases, the law of evidence of England and Wales has been adopted in the BVI. The primary test is one of relevance; that is, evidence is admissible ‘if it were accepted, could it rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings’.⁵⁶

Preserving evidence

The BVI court will grant a search order if an applicant demonstrates an extremely strong prima facie case, potential or actual serious damage and clear evidence that the respondent has the items in his or her possession, and that there is a real possibility that the respondent may destroy that material.⁵⁷

Pre-action disclosure

There is no pre-action disclosure in the BVI.⁵⁸ However, the rules on interim injunctions may provide some relief through *Norwich Pharmacal* jurisdiction (described below). Disclosure can be ordered ancillary to a freezing order made before or at the outset of proceedings for information on which assets the freezing order ‘bites’, so as to police the order.

Disclosure in the course of proceedings

The BVI follows English procedure and practice in respect of first-party disclosure.⁵⁹ Documents can be withheld on the grounds of privilege. This can be either litigation privilege (documents prepared for the dominant purpose of providing professional legal services in relation to actual or contemplated legal proceedings, or documents prepared for the dominant purpose of preparing for or conducting the proceedings) or legal professional privilege generally (documents prepared for the dominant purpose of giving a client legal advice).

Privilege can be defeated by fraud. That does not mean that, if a privileged document discusses or relates to fraud, the privilege is overcome: the document must itself be used in furtherance of the fraud to defeat privilege.

56 Section 63 of the Evidence Act 2006.

57 CPR 17.1(1)(l). This is also known as an *Anton Piller* order.

58 The CPR has no protocol for pre-action disclosure of documents or other evidence, and there have been no published cases in which such disclosure has been permitted. There is no equivalent legislation in the BVI to Section 33 of the Senior Courts Act 1981 in the United Kingdom, which confers a power to order pre-action disclosure on the High Court. Even though the BVI can ‘import’ procedural law from England and Wales (West Indies (Associated States) Supreme Court Act 1967, Section 11), there must be a preexisting jurisdiction for that procedural law to govern (*Veda Doyle v. Agnes Deane*: HCVAP2011/20). In the case of pre-action disclosure, there is not.

59 CPR Part 28.

Third-party disclosure

There is no statutory basis for third-party disclosure or pre-action disclosure as is possible under English procedural law. The remnant of the old equitable bill of discovery, the *Norwich Pharmacal* order, is possible in the BVI. This is discussed further below.

Disclosure orders can also be made ancillary to a regular freezing order in the BVI (as in England and Wales). If a freezing order is made in support of arbitral proceedings, the BVI court is able to order disclosure.⁶⁰ In light of the Court of Appeal's decision overturning *Black Swa*, in *A Foreign Representative in Foreign Insolvency Proceedings v. Five Registered Agents*,⁶¹ Mr Justice Jack recently considered whether the court's jurisdiction to grant *Norwich Pharmacal* relief in support of contemplated foreign proceedings survived the expunging of *Black Swan* from the BVI's common law. The learned judge held that the *Norwich Pharmacal* jurisdiction survived, since the jurisdiction is only deployed against persons against whom no substantive cause of action lies.

Evidence at trial

Evidence for use at trial is governed by the Evidence Act 2006 (Evidence Act). Evidence is admissible if it is relevant (which distinguishes the test for admissibility from the test for disclosure). Evidence-in-chief is provided by way of witness statements that are prepared and circulated in advance of trial. Parties do not normally take depositions of an adverse party's witnesses before trial.

Sections 67–79 of the Evidence Act make admissible (in prescribed circumstances):

- a hearsay documentary evidence;
- b the statement of an unavailable witness who previously made an out-of-court statement;
- c the out-of-court statement of an available witness while testifying;
- d expert reports; and
- e oral opinion evidence.

Norwich Pharmacal orders

One of the most widely used tools for obtaining information is the *Norwich Pharmacal* order.⁶² This order permits a victim of a wrong to seek information from a third party, or from the wrongdoer himself or herself, which is necessary to assert or vindicate the victim's legal rights. It is most often obtained when persons, through no fault of their own, have become involved in the tortious acts of another and facilitate his or her wrongdoing. This gives rise to a duty to assist the person who has been wronged by giving them full information, including as to the location of assets,⁶³ and disclosing the identity of the wrongdoers. This is subject to the usual provisos in respect of *Norwich Pharmacal* relief (including that it be relevant and necessary to enable the assertion of rights, it is not simply a mechanism for accelerating

60 *Koshigi Limited & anor v. Donna Union Foundation* BVIHCMAPP2018/0043 and 0050.

61 The decision is posted to the ECSC website in redacted form as *A Foreign Representative in Foreign Insolvency Proceedings v. Five Registered Agents* BVIHC (COM) [REDACTED] (15 June 2020). See <https://www.eccourts.org/a-foreign-representative-in-foreign-insolvency-proceedings-v-five-registered-agents/> (last accessed 9 July 2020).

62 So named after the House of Lords case *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1973] UKHL 6.

63 See *Al-Rushaid Petroleum Investment Company et al v. TSJ Engineering Consulting Company Limited*, BVIHCV(Com) 37/2010.

standard disclosure, and that it follows the mere witness rule). *Norwich Pharmacal* orders have been made in the BVI in support of foreign proceedings and against the registered agents of respondent companies incorporated in the BVI.⁶⁴ The BVI court has recently squarely determined that it can make *Norwich Pharmacal* orders in aid of foreign proceedings.⁶⁵ As an equitable remedy, the grant of *Norwich Pharmacal* relief is subject to the exercise of discretion.

The BVI court has also granted *Norwich Pharmacal* relief against registered agents of BVI companies in aid of post-judgment enforcement, but it appears that the relief will not be granted unless the applicant is able to show that the relevant BVI companies have been used in some way to evade enforcement of a judgment debt.⁶⁶ The BVI court has also refused to follow the restrictive interpretation of the *Norwich Pharmacal* jurisdiction that currently prevails in England. In *K and S v. Z and Z*,⁶⁷ Mr Justice Wallbank considered the English decision of *Ramilos Trading Ltd v. Buyanovsk*,⁶⁸ where Flaux J held that the English equivalent of the BVI Evidence (Proceedings in Foreign Jurisdictions) Act 1988 prevented the obtaining of evidence for foreign proceedings otherwise than in accordance with the procedure under the Act. Mr Justice Wallbank rejected this approach as unworkable and not representing the common law of the BVI.

Bankers trust orders

These are orders made against financial institutions to disclose information allowing an applicant to trace misappropriated funds.

Information gathering by liquidators

The Insolvency Act 2003 gives liquidators the power to obtain information from parties involved in the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of a company. These powers, however, do not extend to obtaining information from third parties that simply received funds from a company. Further, the liquidators of a BVI company may apply to the court for an order requiring any person holding documents belonging to the company to deliver them forthwith to the liquidators.

Obtaining evidence from other jurisdictions

Information may be obtained through courts in other jurisdictions to assist in civil proceedings.

The BVI is a signatory to the 1970 Convention on Taking Evidence Abroad in Civil or Commercial Matters, and it is pursuant to this Convention that letters rogatory requests are usually pursued. The proceeding must be civil or commercial in nature and in respect of actual or contemplated proceedings in the BVI. The permissible breadth of such questions would obviously require input from legal practitioners in the receiving state. Typically, when there are asset-dissipation issues, such requests are not appropriate because of the notice of these provided to the target of the request.

64 See, e.g., *JSC BTA Bank v. Fidelity Corporate Services Limited et al*, HCVAP 2010/035; and *Jeremy Outen et al v. Mukhtar Ablyazov*, HCVAP 2011/30.

65 *K and S v. Z and Z*, BVIHCM 2020/0016 (10 March 2020).

66 *UVW v. XYZ*, Claim No. BVI HC (COM) 108 of 2016.

67 BVIHCM 2020/0016 (10 March 2020).

68 [2016] EWHC 3175 (Comm).

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

As the BVI does not have any bank confidentiality legislation and does not have a large banking sector, money laundering has not been as prominent issue in the BVI's banking industry as it has in some other offshore jurisdictions. The BVI's anti-money laundering regime applies more to the trust company and fiduciary services sector than the banking sector. Sanctions under the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (as amended) can be imposed by the court through proceedings brought by the BVI Director of Public Prosecutions.

The level of transparency in beneficial ownership has been one of the most contentious issues facing the government in recent times. As they currently stand, the Anti-Money Laundering Regulations, which have been updated numerous times since they were first passed in 2008, require that registered agents maintain particulars of the beneficial owners of BVI companies themselves or are able to retrieve this information from a third-party 'introducer' – who introduced the particular client to the registered agent – without delay. This information is accessible to the BVI regulator, either on its own initiative or at the request of a foreign regulator. The BOSS Act also sets out specific obligations on registered agents. Under the BOSS Act, registered agents are required to take reasonable steps to identify and collect information about beneficial owners of each entity for which they act as a registered agent.⁶⁹ The BOSS Act provides that a registered agent who take steps to identify and verify the identity of beneficial owners in accordance with its obligations under the Anti-Money Laundering legislation shall be deemed to have taken all reasonable steps in accordance with the BOSS Act, and it expressly states that nothing in the BOSS Act affects the separate obligation on each registered agent to obtain and verify beneficial ownership information under the applicable anti-money laundering legislation.⁷⁰ The BOSS Act places an obligation on registered agents to establish and maintain an RA database containing the particulars of each corporate entity for which they act as a registered agent and the particulars of beneficial owners of those corporate entities.⁷¹

ii Insolvency

The Insolvency Act makes comprehensive provision for the liquidation of companies. The insolvency regime is designed to be simple and efficient. For example, members of a BVI company have the power to place it into insolvent liquidation without the need for a court application.⁷² This can save a significant degree of time and money.

Part XVIII of the Insolvency Act governs the recognition of foreign office holders, but is not yet in force. Foreign office holders must therefore seek assistance in the BVI via other channels – these may include common law assistance or ad hoc assistance for specific orders under Part XIX of the 2003 Act.⁷³ Orders under Part XIX can only be made on a case-by-

69 Section 9(1) of the BOSS Act.

70 Section 9(4) and (5) of the BOSS Act.

71 Section 10 of the BOSS Act.

72 BCA 2004, Section 199.

73 Part XIX has only been extended so far to Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States.

case basis; there is no general recognition.⁷⁴ Currently, only office holders from the following designated countries can seek Part XIX assistance: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the US.⁷⁵

iii Arbitration

The BVI enacted the Arbitration Act 2013 (Arbitration Act), which represents modern arbitration legislation based largely on the UNCITRAL Model Law, to which the BVI is a signatory.⁷⁶ The Arbitration Act creates a simplified process for the registration of arbitral awards made under the New York Convention in the BVI, subject to the standard New York Convention defences in Article V. The BVI court has generally taken a pro-enforcement stance on enforcement.⁷⁷

In addition, the BVI has sought to promote itself as a centre for domestic arbitration with the creation of the BVI International Arbitration Centre. The Board of the Arbitration Centre was appointed on 7 September 2015 under Section 95 of the Arbitration Act. Immediately following its establishment, the Arbitration Centre applied the UNCITRAL Model Rules, but it has since created its own rules of arbitration, which came into force on 16 November 2016.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

The choice of law position also follows English common law, whereby issues of substantive law are governed by the *lex causae* and procedural matters governed by the *lex fori*. When it is necessary to decide a question of foreign law, the BVI court will do so on the basis of the expert evidence of foreign lawyers. Where no expert evidence on foreign law is pleaded and proved, as a general rule the BVI court is entitled to treat the law of the foreign jurisdiction as being the same as BVI law.⁷⁸

ii Collection of evidence in support of proceedings abroad

The BVI court will act on letters of request (letters rogatory) for evidence in support of foreign proceedings under its procedural rules. The Evidence (Proceedings in Foreign Jurisdictions) Ordinance⁷⁹ applies the Hague Evidence Convention in the BVI. Letters of request can, therefore, be made to the High Court by overseas courts to request assistance in the collection of evidence. As discussed above, *Norwich Pharmacal* orders can also be made in aid of foreign proceedings.

Additionally, the BVI court is expected to follow the Privy Council ruling in *Singularis Holdings Limited v. PricewaterhouseCoopers*⁸⁰ so that foreign liquidators applying to the BVI

74 *Irving H Picard v. Bernard L Madoff Investment Securities LLC* BVIHCV 2010/0140.

75 See also *In Re C (A Bankrupt)*, Claim No. BVIHC (Com) 0880 of 2013.

76 Arbitration Act 2013.

77 *Hualon Corporation v. Marty Limited* BVIHC (COM) 2014/0090; *IPOC International Growth Fund v. LV Finance*, Civil Appeal No. 30 of 2006 at [53]; *UVW v. XYZ* BVIHC(COM) 2018/108 at [36]; and *Cukurova Holding AS v. Sonera Holding BV* [2014] UKPC 15 at [34].

78 *Buzzmaker LLC v. Lindsay Fitz-Patrick Grant*, Claim No. SKBHCV 2015/0280.

79 Cap 24.

80 *Singularis Holdings Limited v. PricewaterhouseCoopers* [2014] UKPC 36.

court for discovery assistance at common law will have to show that they are not exceeding the powers available to them in a domestic insolvency of the originating jurisdiction, and that there is no other way for them to obtain the information or material sought.⁸¹

iii Seizure of assets or proceeds of fraud in support of the victim of fraud

With the overruling of *Black Swan*, the BVI court is now constrained to issue a freezing order against a BVI-domiciled company that has assets in the jurisdiction liable to be seized in execution of an (anticipated) foreign judgment only if a substantive cause of action lies against that company within the BVI or if the company is amenable as a non-cause of action defendant under the *Chabra* jurisdiction.⁸²

iv Enforcement of judgments granted abroad in relation to fraud claims

The BVI has tended to be a pro-enforcement jurisdiction. Foreign money judgments are enforceable at common law as an action on a judgment. The usual route is to apply for default judgment (if the BVI action is not defended) or summary judgment (if it is) on the debt created by the foreign judgment. Normally, there will not be a merits review of the foreign judgment. Judgments from certain Commonwealth countries can also be registered under statute.⁸³ Non-money judgments appear to be enforceable at common law.⁸⁴

Enforcement of a foreign judgment can be resisted on the grounds that:

- a it violates public policy;⁸⁵
- b it was obtained by fraud;
- c it was obtained in breach of natural justice (e.g., the defendant was not afforded an adequate opportunity to present his or her case);
- d the foreign court lacked personal jurisdiction over the defendant (as determined by BVI rules);
- e it is not for a liquidated sum; or
- f the judgment is not final and conclusive.

Registration can be resisted on broadly similar grounds, although a foreign judgment subject to appeal is not registrable under statute, whereas it is considered final and conclusive under the common law route.⁸⁶ Additionally, there is an overarching requirement that it is just and convenient to register the foreign judgment, but this is not a separate defence to registration in itself.⁸⁷ There is a one-year time period to register a foreign judgment under statute and a 12-year limitation period for a common law action on a judgment.

81 *Singularis*, see footnote 80, at [24].

82 *TSB Private Bank International v. Chabra* [1992] 1 WLR 231.

83 Reciprocal Enforcement of Judgments Act 1922.

84 See *Pattni v. Ali and Another* [2006] UKPC 51; *Miller v. Gianne Redwood Hotel Investment Corporation* [2007] CILR 18; *Pro Swing Inc v. Elta Golf Inc* [2006] 2 S.C.R. 612.

85 For example, it is a judgment to enforce, directly or indirectly, a foreign revenue or penal law. One specific issue is that the Trustee Act 1961 specifically provides – at s 83A(19) – that a foreign judgment contrary to the provisions of the 1961 Act relating to BVI trusts should be regarded as against public policy and should not be enforced in the BVI. This was recently confirmed in *Lucita Walton et al v. Leonard George de la Haye* BVIHCVP2014/0004.

86 The BVI court has ruled that an outstanding appeal to the European Court of Human Rights is not an appeal for the purposes of the 1922 Act: *JSC BTA Bank v. Mukhtar Ablyazov* [2013] 5 JBVIC 0201.

87 *JSC BTA Bank v. Mukhtar Ablyazov* [2013] 5 JBVIC 0201.

A foreign judgment can also be indirectly enforced through the initiation of insolvency proceedings in the same manner as an unsatisfied arbitral award.⁸⁸ This route is not used regularly, but has real advantages:

- a* assuming there is no defence to enforcement, the debtor has to pay to avoid insolvency, even if it not actually insolvent; and
- b* it is cheaper than issuing enforcement or registration proceedings, which can take several months and several hearings; issuance of the statutory demand itself does not require a court hearing, and the application for the appointment of liquidators is typically dealt with in a single hearing.

v Fraud as a defence to enforcement of judgments granted abroad

When a claimant tries to enforce an overseas judgment in the BVI, a defendant may argue that the judgment was obtained by fraud. The court will not allow the enforcement of a judgment gained through fraud when the fraud was perpetrated by either the claimant or the foreign court.

vi International agreements

By virtue of its status as a British overseas territory, a number of international agreements concerning mutual legal assistance have been extended to the BVI. Requests for cooperation can be made under the US–UK and Cayman Islands Treaty on Mutual Assistance in Criminal Matters, the Vienna Convention, the United Nations Convention Against Corruption and the UN Convention against Transnational Organised Crime, which are variously given effect in the POCCA, CJIC Act, DTO Act, FIA Act and subsidiary legislation.⁸⁹ In the BVI, the possibility also exists for the Financial Investigations Unit (FIU) to informally share information under the Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units 2013. Sections 22 to 27 of the Egmont Principles establish broad principles of cooperation to which a financial intelligence unit should adhere in the interest of reciprocity. The BVI'S FIU has publicly stated that it will provide informal assistance to other FIUs in relation to financial crime.

VI CURRENT DEVELOPMENTS

On 1 January 2019, the Economic Substance (Companies and Limited Partnerships) Act 2018 came into force in the BVI (ESA). The ESA is supplemented by the draft International Tax Authority Economic Substance Code issued on 22 April 2019. The ESA addresses the concerns of the EU Code of Conduct Group for Business Taxation concerning the economic substance of entities in the BVI and similar jurisdictions with low or no corporate taxation. In passing the ESA, the BVI has demonstrated its commitment to meeting international best practice. The ESA introduces certain reporting and economic substance requirements for legal entities conducting relevant activities. Legal entities mean companies and limited partnerships (as defined under the ESA). Relevant activities are activities related to:

- a* banking;
- b* insurance;

88 *Vendort Traders Inc v. Eurostroy Grupp LLC* [2014] ECSC J0526-3.

89 See www.gov.uk/government/publications/international-mutual-legal-assistance-agreements.

- c* shipping;
- d* fund management;
- e* financing and leasing;
- f* headquarters;
- g* distribution and service centres;
- h* holding companies; and
- i* intellectual property.

Under the ESA, economic substance will be measured by reference to reporting periods that are not longer than one year. The ESA mandates legal entities carrying out relevant activities (other than pure equity holding entities) to manage and direct the relevant activity in the BVI and conduct core income-generating activity. They must also show that they have an adequate level of employees and expenditure in the BVI and appropriate physical offices or premises for the core income-generating activity.

As stated earlier, the oft-deployed *Black Swan* jurisdiction no longer exists, at least in the interim, until the Privy Council weighs in or the current draft legislation in the BVI is promulgated into law.

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