

## Recent legal developments in BVI July 2021

Insights - 20/07/2021

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### **Application for interim relief in support of foreign proceedings put on a statutory footing**

The [Eastern Caribbean Supreme Court \(Virgin Islands\) \(Amendment\) Act 2020 \(ECSC \(Amendment\) Act\)](#) came into force **7 January 2021**.

The two areas this amendment affects are (i) interim injunctions and receivership orders and (ii) Norwich Pharmacal Orders.

The background to the legislation is that in a case last year known as Broad Idea International Limited v Convoy Collateral Limited BVICMAP 2019/0026 it was found that s24 of Eastern Caribbean Supreme Court Act (ECSC) was inadequate to provide injunctive relief if it was not in support of ongoing proceedings in the BVI. The result was the formation of a committee to produce a new statute (Nick Brookes and Nick Burkill of Ogier were both members of this committee) because this also affected Norwich Pharmacal relief (a type of disclosure) and a

grant of interim relief in support of foreign proceedings.

Stage one is to consider whether the facts warrant the relief sought, if the substantive proceedings had been brought in the BVI and stage two is, if the answer to that question is yes, then consider whether the fact that the court has no jurisdiction apart from s24 ECSC makes it inexpedient to grant the relief.

The new statute provides for claims that we have been able to bring in the BVI for a while, but puts them on a much more stable footing.

The other part of the ECSC (Amendment) Act deals with Norwich Pharmacal relief. In 1975 England and Wales introduced legislation about obtaining evidence in the course of proceedings in other jurisdictions, to implement its obligations under the Hague Convention (**the 1975 Act**). There were limitations as a result of the UK's reservations under the Convention - where a foreign court was seeking evidence and documents from an English court for the purposes of evidence in foreign proceedings, the UK put various limitations on their ability to obtain this evidence. They prohibited general disclosure as opposed to disclosure of specific documents.

Norwich Pharmacal disclosure is the obligation of an innocent third party caught up in the wrong doing of another to provide information and documents to the victim. There were 2 English decisions which said that you couldn't get that type of disclosure where it was for the purpose of foreign proceedings because we have a regime under the 1975 Act that deals with that. This brought Norwich Pharmacal relief in England for the purposes of foreign proceedings to a halt.

The BVI addressed this in the case of *K&S v Z&Z BVIHCM(COM) 2020/0016*, it said that under the common law the BVI could provide Norwich Pharmacal relief for the purpose of foreign proceedings. As this was a decision which could easily be challenged, the opportunity was taken to put the disclosure obligations on a statutory footing.

Further information can be found in the client briefing has been prepared by Ogier and can be accessed here [BVI Norwich Pharmacal Relief an International problem now addressed by statute.](#)

## **Annual return reporting requirements for all fiduciary services licensees**

The [Financial Services \(Prudential and Statistical Returns\) \(Amendment\) Order 2021](#) came into force on 15 February 2021.

The BVI Financial Services Commission has introduced new annual return reporting requirements for certain categories of licensees, including trust companies, investment managers/investment advisors and fund administrators.

Licenses caught by these new regulatory requirements are now required to prepare and submit an annual return, together with an Anti-Money Laundering and Countering the Financing of Terrorism Return (**AML/CFT Return**) .

Investment managers licensed as "Approved Managers" under the Investment Business (Approved Managers) Regulations 2012 are included amongst regulated entities affected, albeit they do not need to file an Annual Return, however, Approved Managers are required to file a AML/CTF Return.

The deadlines for filing these returns is on or before **31 March** of each year, but in this first year of reporting, covering the reporting period from 1 January 2020 to 31 December 2020, the deadline was originally **15 May 2021** (but was subsequently extended to **15 June 2021**).

Further information can be found in the client briefing prepared by Ogier and can be accessed here: [Annual return reporting requirements for certain BVI licensees | Ogier](#).

### **Extension of economic substance requirements to limited partnerships without a legal personality**

The Economic Substance (Companies and Limited Partnerships) (Amendment) Act 2021 (Economic Substance Amendment), which came into force on **29 June 2021**, extends the economic substance regime under the Economic Substance (Companies and Limited Partnerships) Act, 2018 (**ESA**) to limited partnership without legal personality. Limited partnerships with legal personality were already within the scope of the economic substance provisions by virtue of the ESA.

Following the enactment of the Economic Substance Amendment, there will be a transitional period of 6 months for existing partnerships without a legal personality, being those formed before 1 July 2021, in that the amended ESA will apply to those partnerships for the financial years commencing no later than 1 January 2022. However, limited partnerships without legal personality that are formed on or after 1 July 2021 will be subject to the amended ESA immediately.

The Economic Substance Amendment also includes two other notable additions/changes to the ESA:

- the Economic Substance Amendment adds definitions of "investment fund" and "investment fund business" and expressly excludes investment fund business from being a relevant activity. This is a helpful development in that it removes some element of doubt as to the treatment of investment funds and particularly those all equities funds which might have

otherwise been considered pure equity holding entities. A significant point to note in this regard is that the definition of "investment fund" is broader than the definitions of "mutual fund" and "private investment fund" in the Securities and Investment Business Act, 2010 (SIBA) such that whilst all "mutual funds" and "private investment funds" will fall within the new definition of "investment fund", it is possible for other types of collective investment vehicles which are neither "mutual funds" nor "private investment funds" to be "investment funds" for the purposes of the ESA and so considered to be doing "investment funds business"; and

- the definition of "distribution and service centre business" is amended so as to add clarity to the second limb of the previous definition at Section 2 of the ESA. The change confirms that for an entity to be considered as engaging in a distribution and service centre under limb (b) of the definition, the provision of services to affiliated entities need not be linked to any related purchasing and resale business within the description at limb (a). The change then clarifies that the definition looks at such activities separately (there was some ambiguity in this respect in the previous definition) and states clearly that providing any "consulting or administrative" services to a foreign affiliate may be caught as a relevant activity. It may be worth noting, however, the definition did not previously use the descriptors "consulting or administrative" in respect of services and some thought may be given to whether this might also limit application of the definition (though this may not have been the intent).

## Data protection

The Data Protection Act 2021 (DPA) which came into force on **9 July 2021**.

Prior to the introduction of this new legislation, there was no specific data protection legislation in the British Virgin Islands, though the Computer Misuse and Cybercrime Act 2014 does restrict the publication of illegally obtained confidential data, and common law duties of privacy and confidentiality exist.

The DPA applies to persons who **process** or who have "control over, or authorise, the **processing** of any personal data in respect of **commercial transactions** - therefore all BVI incorporated companies and limited partnerships (unless the limited partnership has elected to have no legal personality – however, these may still be caught under the definition of "established").

The DPA restricts the ability of a **data controller** from processing **personal data** without the **data subject's** express consent (which can be withdrawn at any time); restricts the use of sensitive personal data; and restricts the transfer of personal data outside the BVI unless there are adequate safeguards. There are exceptions to the restrictions, such as (among others) in the context of performing a contract with the data subject or to comply with legal obligations. However, even within those exemptions there are certain overriding principles, such as that personal data processed must not be excessive in relation to the allowed purpose.

Persons who are **private bodies** and who process personal data, will need to make changes to their data processes and procedures to ensure compliance with the DPA. Some of the necessary changes will depend on the nature of a person's business, for example: a BVI investment fund will need to amend its offering documents and/or create new policies on data management.

With regard to implementing the requirements of this legislation, we are taking a common sense approach. For example with regard to historic data, we believe that the consent of the data subject will not be necessary when the data has already been processed.

Further information can be found in the client briefing which can be accessed here: [Data Protection legislation has arrived in the BVI](#)

### **Electronic filing, transactions and transfer of funds**

The [Electronic Filing Act 2021](#), [Electronic Transactions Act 2021](#) and [Electronic Transfer of Funds Act 2021](#) all came into force on **9 July 2021**.

The **Electronic Filing Act 2021** is a part of the BVI government's move to allow for filings to be made and records to be kept in electronic form.

The **Electronic Transactions Act 2021 (ETA)** replaces the Electronic Transactions Act 2001. Both the previous and the new legislation provide for electronic contracts, electronic signatures and, where matters are required to be in writing, that they can be evidenced in electronic form.

The new legislation sets out the features which an electronic signature must have for it to be enforceable. Part IV of the Electronic Transactions Act 2021 is new and allows for the submission of electronically certified documents. Such documents cannot be invalid purely because of the jurisdiction where the certification was applied.

The ETA lists certain transactions where an e-signature will not apply. For example, it will not apply to a deed. However, the new act now states that it does not apply to the conveyance of real or personal property. It is hoped that the reference to personal property is a mistake as this would include a transfer of shares, for example. Interested law firms, led by Ogier, are intending to make a representation to the BVI Attorney General on this point and will request that the ETA be amended, to remove the reference to personal property and, if seen fit, further reduce the categories of instrument that the ETA does not apply to.

The **Electronic Transfer of Funds Act 2021** deals with the regulation of crimes in relation to the transfer of money by electronic means i.e. the theft of a bank card or forgery of a bank card etc.

## **New trust legislation**

The new trust legislation came into force on **9 July 2021**. The various pieces of legislation, which are outlined below, have been drafted to bring the BVI into line with other jurisdictions and to extend powers that already exist in the BVI.

### Trustee (Amendment) Act 2021

The statutory power of a BVI court to amend a trust is being widened and there will no longer be a requirement for the consent of adult beneficiaries to such an amendment. However, this provision is intended to apply only to trusts established after it came into force and where the trust in question has provisions in it to opt in to the no consent (re adult beneficiaries) regime.

In addition, a BVI court now has the power to order that a trust instrument be amended in relation to a mistake in the drafting, this replaces the previous common law.

The BVI courts now have primacy in determining disputes regarding the establishment and validity of a BVI law trust. The scope of the issues which are to be exclusively determined by the BVI courts has been expanded.

The principle that a settlor or named third party can reserve to themselves powers to make decisions regarding the trust and effectively override decisions of the trustee has been widened.

There has been attempted clarification in respect of the starting point of the five year document retention period for trustees and trust documents.

### Probate (Resealing) Act 2021

The shares in a number of BVI companies are held by individuals who may be domiciled outside of the BVI. If they died without a BVI will, then their will in relation to the shares in the BVI company previously needed a grant of probate in the BVI.

This had been achieved in the past by resealing the grant of probate issued in that individual's home jurisdiction. However, the range of jurisdictions where this was an option was limited, essentially only the UK. This list of jurisdictions from which a grant of probate can be resealed in the BVI has now been significantly extended by the Probate Resealing Act 2021. It includes all Commonwealth jurisdictions as well as a significant number of Asian or Asian linked jurisdictions, notably Hong Kong and Singapore.

### Administration of Small Estates (Amendment) Act 2021

The Administration of Small Estates Act (Cap 4) was enacted in July 1944 and provides a simplified procedure for the administration of small estates whose value do not exceed US\$240. The legislation needed updating and the Administration of Small Estates (Amendment) Act 2021

has increased the value of small estates from US\$240 to US\$25,000. In addition, it will now only apply to persons who die whilst domiciled in the BVI.

### Property (Miscellaneous Provisions) (Amendment) Act 2021

The Property (Miscellaneous Provisions) (Amendment) Act 2021 aims to deal with two related matters. Firstly, it abolishes any rule of law or policy which provides that a disposition in favour of an illegitimate child who is not alive when the disposition takes effect is void. The act then goes on to give retrospective effect to this provision.

A client briefing has been prepared by Ogier and can be accessed here: [Upcoming Amendments to BVI Trust and Estate Laws](#)

### **New gaming and betting controls**

The [Gaming and Betting Control Act 2020](#) (the **Gaming Act**) was commenced on **9 July 2021**. This legislation is intended to replace the regulations in relation to gaming and betting in the British Virgin Islands, however, it seems that some provisions of the Criminal Code will still apply.

Pursuant to the terms of the Gaming Act a person conducting any of the following activities has to have a licence from the proposed Gaming and Betting Control Commission (the **Commission**) to do so:

- a. owning or operating a gaming machine location for the purpose of conducting gaming;
- b. performing a specific function in connection with a licensed betting or gaming activity or in relation to a licensed premise;
- c. manufacturing, fabricating, assembling, programming, modifying or repairing equipment;
- d. selling, importing, supplying or distributing a gaming machine or associated equipment;
- e. leasing gaming machines to an owner or operator of a gaming machine location in exchange for remuneration based on earnings in profit from a gaming operation;
- f. manufacturing, selling, supplying, installing and adapting gaming software;
- g. providing facilities for betting of any kind; and
- h. providing or utilising premises for the purpose of gaming or betting.

There is no territorial limit set on where these activities are being conducted, such that the licensing requirements under the Gaming Act might apply to any BVI incorporated company engaged in gaming activities – even where such activities are being carried on wholly outside the Virgin Islands. This point, however, still remains a little unclear.

There are a several categories of licence that can be applied for, as follows:

- a. a Gaming Operators Licence, which shall permit the licensee to operate a gaming machine location for the purpose of conducting gaming;
- b. a Gaming Owners Licence, which shall permit the licensee to own a gaming machine location through such licensee shall not operate such establishment without first having obtained a Gaming Operators Licence;
- c. a Bookmakers Licence, which shall permit the licensee to conduct betting activities other than pool betting;
- d. a Promoters Licence which shall permit a licensee to stage live racing and conduct pool betting (*pari-mutuel*) activities;
- e. a Gaming Machine Operating Licence, which shall permit the licensee to sell or lease gaming machines for use in premises approved by the Commission for the purpose;
- f. a Gaming Machine Distributor Licence which shall permit a licensee to import, supply licensed gaming machines, prescribed gaming components and related equipment;
- g. a Technical Operators Licence which shall permit the licensee to install, maintain or repair licensed gaming machines;
- h. a Premises Licence, which shall permit activities approved by the Commission under an operating licence to be conducted at premises stipulated in the licence;
- i. a Personal Licence, in respect of key employees within a licensed betting or gaming machine location;
- j. a Betting Operators Licence which shall permit the licensee to operate a betting business;  
and
- k. any other licence as the Commission may from time to time stipulate, as it deems necessary.

The categories of licence are helpful as they add detail to the activities that require licensing and the last category shows that the Commission may amend and add to the list as required, so a BVI company involved in gaming activities should assess if they now require a licence following the enactment of the Gaming Act.

The Gaming Act provides further detail on the specifics of who will require licenses within the operation of a gaming business, and on the different aspects of gaming and betting within the gaming industry. The Gaming Act sets out definitions on gaming, gaming establishment, gambling machines and more that go in to some detail and a careful review of the definitions will be required when determining how the Gaming Act may affect businesses acting in that industry.



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