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Fraud, Asset Tracing & Recovery

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Bermuda



Mathew Clingerman
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Bermuda is the oldest self-governing British overseas territory with a long history of upholding the rule of law. Its legal system is derived from English common law and unsurprisingly much of the Bermuda legislation is modelled on English statutes.

Bermuda has been a pioneer as an offshore financial centre since the mid-1960s and has an enviable market reputation based on attracting quality international business. Often referred to as the “risk capital of the world”, a significant percentage of the world’s largest reinsurers are based and have operations in Bermuda. Notably, however, its active corporate registrations number is less than 20,000. The local financial regulator, the Bermuda Monetary Authority, also plays a strong role in ensuring the compliance of businesses that carry on regulated activities across the areas of insurance, banking, investment funds, fund administration, investment business, trust, corporate services, money services, and digital assets.

Notwithstanding Bermuda’s focus on quality, inevitably bad actors can make their way into the system as they do in any financial market. When this occurs, it is not uncommon to see negative headlines that contribute to a misguided perception that Bermuda is a jurisdiction cloaked in secrecy that exists only to facilitate money laundering, tax evasion, and to stash ill-gotten gains.

In truth, Bermuda is a jurisdiction that boasts more transparency than most onshore jurisdictions, is known as a first adopter of international standards, has a history of proactive regulation, and is supported by robust judiciary together with a capable and sophisticated local legal profession.

As an offshore financial centre, most frauds or financial crimes that touch Bermuda involve wrongdoers located outside of the jurisdiction. Consequently, most fraud, asset tracing, and recovery exercises have substantial cross-border aspects. Fraudsters rarely use Bermuda simply to stash large bank deposits or other assets. In many cases, the wrongdoers seek to integrate the proceeds of their fraud back into an onshore financial system giving an appearance of legitimacy. The proceeds are also frequently used to fund a fraudster’s lifestyle such as purchases of luxury homes, private planes, yachts, or even expensive private education.

When fraud matters do arise there are wide array of remedies and relief available in Bermuda to victims seeking redress. Time and again, the Bermuda judiciary has demonstrated its commitment in these cases to obtaining justice. The strength of this system is one of the underpinnings that give confidence to investors and financial participants in Bermuda’s market place.



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

Judiciary

The Supreme Court of Bermuda (the “**Bermuda Court**”) has both civil and criminal divisions. It is a court of first instance for all civil disputes concerning a value greater than \$25,000. The commercial court division of the civil division will comprise judges experienced in complex disputes involving, among other areas, trade, commerce, insurance, banking, and financial services. The Bermuda Court is served by a Chief Justice, three puisne judges, and a panel of assistant judges which ensure cases are moved along expeditiously.

The Bermuda Court of Appeal, consisting of a three-judge panel, meets three times a year to hear appeals of the Bermuda Court’s decisions. Further appeals may be heard by the Judicial Committee of the Privy Council in London (“**JCPC**”). Any decisions of the JCPC in relation to the development of common law are binding in Bermuda. Decisions of the English Court of Appeal and House of Lords are normally highly persuasive and reasoned decisions from commonwealth countries can also be considered.

Civil legislation and common law

The laws of Bermuda allow victims of fraud to avail themselves to many of the same rights and remedies that exist in England and Wales. Remedies such as restitution, damages and/or equitable compensation can be sought from wrongdoers under various types of claims including fraud, unjust enrichment, knowing receipt, breach of contract, misrepresentation, deceit, dishonest assistance, breach of fiduciary duty, and/or breach of trust. Most breach of contract and tort claims have a limitation period of six years.

Criminal legislation

There are various sources of legislation in Bermuda that create statutory criminal offences related to fraud. The Proceeds of Crime Act 1997 (the “**Proceeds of Crime Act**”) and the Proceeds of Crime (Designated Countries and Territories) Order 1998 set out money laundering offences and make provision for powers of the Bermuda Court to order confiscation of assets of offenders that are derived from criminal conduct. The Companies Act 1981 (the “**Companies Act**”) sets out a range of criminal offences that may be committed by directors of companies, including, for example, by fraudulently altering documents relating to company

property or affairs, falsifying books or accounts with the intention of defrauding any person, or fraudulently inducing a person to give credit to the company. Other legislation setting out criminal offences relating to fraud include: Criminal Code Act 1907 (“**Criminal Code**”), Banks and Deposit Companies Act 1999, Bribery Act 2016, Investment Business Act 2003, Investment Funds Act 2006, and the Tax Management Act 1976.

Main stages of fraud, asset tracing and recovery cases in Bermuda

No two fraud, asset tracing, or recovery cases are the same. Accordingly, the stages that may be employed in Bermuda (and abroad) will be driven by a strategy that is best suited to the particular factual landscape and based on a practical understanding of legal actions available. Certain situations may call for letters rogatory or the use of bilateral treaties, whilst others may call for private civil action or arbitration in a financial dispute. Insolvency mechanisms might also be used when a claimant seeks an order to appoint a provisional liquidator to secure the remaining assets for the benefit of creditors, particularly in cases where fraud or misconduct is alleged.

Recovering assets for the victims of a cross-border fraud is often far more complex than attempting to recover assets for a simple debt judgment. Fraudsters often attempt to obscure the ultimate destination of funds with the assistance of unethical facilitators. For these reasons, when assessing a case and a potential asset recovery strategy, it is of the utmost importance that careful consideration be given in the early stages to selecting the remedies that have the greatest opportunity to bring in recoveries. It is also critical to ensure the “team” includes respected legal professionals that understand their own local jurisdictions and also the nuances of offshore.

Stages which may be encountered include: investigations and intelligence gathering; disclosure remedies; insolvency; interim relief; recovery actions; and enforcement. The stages are not entirely linear and in some cases, the stages will need to run concurrently and/or be revisited while making necessary adjustments along the way.

Investigations and intelligence gathering

Once it has been determined that a fraud has likely occurred, a priority is the identification of assets controlled by the fraudster so that, to the extent possible, interim actions aimed at immobilising the assets can be taken. If the assets



controlled by the fraudster have been squandered or lost, the investigator should consider if there are other viable targets. At the same time, the investigator may need to obtain additional information related to the fraud to determine its full extent and nature. This will be important in evaluating which recovery actions are ultimately taken.

Although often not the focus, intelligence gathering and fact finding should not ignore potentially relevant information that is publicly available. In Bermuda there are a number of useful sources including:

- **Corporate documents:** Certain corporate documents are available to members of the public through the Registrar of Companies for a fee including the company name, registration number, incorporation dates, certificate of incorporation, memorandum of association, registered office, registered charges that have been filed, winding up notices, share capital increase or reduction notices and prospectus registrations.
- **Directors and Officers Registry:** The Bermuda government maintains a central directory of persons serving as corporate directors and officers that can be searched for free.
- **Shareholder/member information:** A Bermuda company is required to produce a copy the register of members containing the names of shareholders of a Bermuda company (as well as the directors and officers register) to a member of the public upon request being made to the registered office of the company.
- **Court records:** Access to court records should not be overlooked. For cases filed after 1 December 2015, and subject to documents

protected by privacy restrictions, members of the public have a right to seek certain documents from the Registrar. In respect of pending cases, requests can be made for orders filed in the case, for originating process (e.g. writ, petition, summons), or documents referred to in any public judgment or hearing may be requested. Further requests can be made for documents when the case is no longer pending including for copies of transcripts.

- **Shipping and aviation records:** Shipping and aviation registers are capable of being searched and copies taken. Details available include registered owner and mortgages filed.
- **PATI Requests:** Pursuant to the Public Access to Information Act 2010, Bermudians and residents of Bermuda have rights to access records held by public authorities regarding the work they carry out, how and why they make decisions, and how public money is spent. Each public authority must publish an “information statement”. If a document is not presently available, a request can be made for its disclosure subject to certain exceptions. Exceptions include when it is in the public interest or for the protection of the rights of others (such as records that deal with personal information), confidential matters such as national security, commercial information or ministerial responsibilities.

Disclosure Remedies

The typical disclosure options available in Bermuda are similar to those available in England and Wales. Two primary options include Norwich Pharmacal Orders and Bankers Trust Orders.



➔ **Norwich Pharmacal Orders**

A Norwich Pharmacal order is typically pre-action and granted against a third party that has been innocently mixed up in wrongdoing, to compel disclosure of documents or information, which may identify another person (for example, a wrongdoer or a potential beneficiary), or to identify the nature of the wrongdoing, both of which may be the subject of subsequent legal proceedings.

To the extent the disclosure identifies additional wrongdoing by the third party, it may be possible to use those documents but that cannot be the purpose for which they were sought. Moreover, one can, where appropriate, apply for a gagging order, which directs the party not to disclose that they have been ordered to provide information to a third party. This is particularly helpful where the respondent is a bank or a professional who may have duties to give notice to their clients of such matters. However, as in England and Wales, in order to obtain a Norwich Pharmacal order, applicants will need to show:

- that there is a ‘good arguable case’ that a wrongdoing has occurred;
- that the person against whom the disclosure request is sought is involved, albeit possibly innocently, in the wrongdoing as more than a mere witness;
- that the respondent is likely to have the information sought (i.e., it is not a fishing expedition); and
- that the order must be necessary and proportionate, and in the overall interests of justice.

In the context of frauds involving offshore companies, registered agents may well be targets of these types of orders as they have AML/ATF obligations to keep records of beneficial owners.

Such orders normally require that the claimant give an undertaking in damages and to pay expenses resulting from the disclosure sought.

Bankers Trust Orders

Following the principles established in *Bankers Trust v Shapira (1980) 1 WLR 1274*, orders can be sought to compel banks to provide records enabling the assets belonging to the claimant to be traced. Unlike a Norwich Pharmacal order, there is no need to show any involvement in the wrongdoing but a *prima facie* case of fraud or breach of trust needs to be demonstrated. Although there are only four deposit taking banks in Bermuda at present, the reach of these orders has been extended beyond banks to include a defendant against whom a fraud has been alleged.

Similar to Norwich Pharmacal orders, it would be expected that the claimant give an

undertaking in damages and to pay expenses resulting from the disclosure sought.

Insolvency

Sometimes a corporate vehicle may have been a central facility used in perpetrating wrongdoing and/or rendered insolvent following a fraud. In these cases, parties should consider whether the use of insolvency proceedings would be advantageous. Whilst perhaps not foremost in the minds of many, it is a tried and tested method, and can be appropriate for both insolvent and solvent companies.

Routes to a court-supervised insolvency would include an application by the directors of the company or it may be that creditors can make valid statutory demands followed by an application to force a compulsory winding-up. In other cases, where there is a *prima facie* case of fraud carried out by the company, victims may be able to make an *ex parte* application (particularly where there is a risk of dissipation or misuse of the company’s assets) to compel the appointment of a liquidator on a “just and equitable basis”. In such cases, provisional liquidators’ powers can be tailored to fit the circumstances.

If winding up order is made, a liquidator will be tasked with realising the company’s assets, including commencing potential recovery actions, for the benefit of its stakeholders. Typically, a committee of creditors and/or shareholders can be used by the liquidator as a sounding board regarding the development of a recovery strategy. The liquidator will also have a duty to regularly report to the creditors and shareholders, providing further transparency about the progress of the investigations and recoveries. Where a common interest can be identified, it may be possible for the liquidator and the victims of the fraud to coordinate their investigations and recovery actions.

Insolvency proceedings also provide other valuable advantages including broad rights to collect records and to pursue certain types of claims.

Documents and information available to a liquidator

Liquidators typically have wide powers to request and receive information and documents related to the affairs of the company and can seek orders from the Bermuda Court that relevant persons be summoned or required to respond to written interrogatories. Documents capable of being collected by a liquidator would include the company’s banking records, accounting records, historical correspondence, and audit working papers. Directors will also

be under an obligation to prepare a statement of affairs together with a list of creditors and their quantum.

Remedies and claims that can be pursued in an insolvency

Certain types of remedies and claims only arise in an insolvency context, including:

- **Fraudulent preferences:** Dispositions of property within six months of the commencement of a winding-up are void where (1) it was made with the intention to fraudulently prefer one or more of the company's creditors, and (2) at the time the company was unable to pay its debts as they fell due.
- **Avoidance of floating charges:** A floating charge will be invalid if it was created within one year of the commencement of the winding up, unless the company was solvent at the time it was created. An exception is made when the charge is made in exchange for cash consideration (plus interest accrued).
- **Fraudulent trading:** Fraudulent trading is construed as any business carried on by the company with the intent to defraud creditors or for any fraudulent purpose. In these circumstances, a liquidator, creditor, or shareholder may seek that the Bermuda Court make orders that any persons (including directors) who were knowingly parties to the fraudulent trading be made personally liable for all or any of the debts owed by the company.

Parties may wish to consider recent developments in the area of the law following the JCPC decision in *Skandinaviska Enskilda Banken AB v Conway and another (as Joint Official Liquidators of Weaving Macro Fixed Income Fund Limited)* [2019] UKPC 36, where it was held (albeit in a Cayman Islands appeal) that a “dominant intention to prefer” could be inferred in certain circumstances where it was well known that payments to one creditor would mean other creditors could not be paid.

Interim relief

Interim relief to prevent the dissipation of assets by, and to obtain information from, those suspected of involvement in the fraud are available in Bermuda including orders for injunction, preservation of property, sale of perishable property and recovery of property subject to a lien.

Freezing injunction (Mareva)

Freezing injunctions can be sought against assets of a party to prevent dissipation pending further order or a final resolution. If a respondent seeks to move or transfer assets without approval, it may be possible to have a contempt order made.

In determining whether and what orders to make, the Bermuda Court has had regard for the authority set down in *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, C.A. Accordingly, a *prima facie* case should be set out for making the orders sought. The party applying for the order will normally need to provide a cross-undertaking to address potential damages and may need to support the same with security.

Search and Seizure (Anton Piller)

Orders for the search of premises and seizure of evidence that is the subject matter of the dispute can be made without warning to the defendant. Such orders can prevent destruction of relevant evidence, and may be particularly useful in ensuring electronic evidence on computers or mobile devices is preserved.

In determining whether and what orders to make, the Bermuda Court has had regard for the authority set down in *Anton Piller v Manufacturing Processes Ltd* [1976] 2 WLR. Accordingly, it would be necessary to demonstrate:

- that there is *prima facie* evidence of the wrongdoing;
- that the potential or actual damage is very serious;
- that there is clear evidence that the respondent has incriminating evidence in his or her possession; and
- that there is a real possibility the respondent may destroy this material if he or she were to become aware of the application.

Recovery actions

The typical actions considered by civil plaintiffs in Bermuda are, as mentioned earlier, similar to those that exist in England and Wales. Avoidance type actions are also commonly considered, including:

- **Fraudulent conveyances:** The Bermuda Conveyancing Act 1983 contains statutory provisions allowing for dispositions of property to be set aside where they were carried out at undervalue and coupled with a dominant intention of putting property beyond the reach of creditors. The terms “disposition” and “property” are widely defined and interpreted so that their use can be applied to a variety of situations.
- **Undisclosed conflicts of interest:** Conflicts of interest by a director which are not disclosed in relation to contracts entered into by a company and a third party may result in the avoidance of the contract (and recovery of profits) at the instance of the company. Such non-disclosure can also result in the relevant

director being deemed to not to be acting honestly and in good faith.

Claims are normally commenced by issuance of a generally or specially indorsed writ. Issuance of a writ can be done for protective purposes; however, typically they must be served within a period of 12 months. If defendants are located abroad, permission to serve must be sought in advance. Once served, the defendant must enter an appearance failing which a judgment in default of appearance may be sought. Unless the writ is specially indorsed, the plaintiff will be required to serve a statement of claim followed by the defendant's defence.

Following pleadings, the parties must enter into discovery by exchanging a list of documents under their custody, power, or possession and allowing for their inspection. The Bermuda Court will make directions regarding case management and time-table matters such as discovery, interrogatories, witness statements, and expert reports. Strike out and summary judgment orders can be sought throughout the process.

Surviving claims are typically able to reach trial within 18 months from commencement. Hearings are generally matters which are open to the public, but may be held behind closed doors if there is a risk that privileged or confidential information may be disclosed.

Enforcement

There are a variety of options to pursue enforcement in Bermuda. Money judgments create a lien over real property situated in Bermuda that is registered in the judgment debtor's name. A writ of execution against a judgment debtor's assets can be effected through seizure and sale of the assets, or orders made for garnishment or appointment of a receiver. If enforcement requires a defendant to take or refrain from taking some action, it may be possible to obtain orders for sequestration or committal.

The Proceeds of Crime Act provides for the confiscation of assets upon application by the Department of Public Prosecutions or by the Bermuda Court of its motion. Where a victim's assets have been recovered pursuant to a recovery order under the Proceeds of Crime Act, an application can be made to the Bermuda Court for an order declaring the assets as belonging to the victim.

Reporting

Parties involved in a fraud investigation should be mindful of their anti-money laundering obligations under the Proceeds of Crime Act to report suspicious activity to the Financial Intelligence



Agency when their investigations give rise to a suspicion that assets are the proceeds of crime and/or money laundering offences which have or are taking place.

Parallel proceedings: a combined civil and criminal approach

It is possible to advance civil proceedings that are based on the same set of facts as an overlapping criminal complaint; however, the Bermuda Court has discretion to stay the civil proceedings. In determining whether civil proceedings should be stayed, the Bermuda Court has weighed the competing considerations of the parties and considered whether continuation of civil proceedings runs a real risk that the defendant's fair criminal trial rights would be prejudiced. The burden for demonstrating this prejudice lies with the defendant. This issue was recently dealt with in the matter of *Hiscox Services Ltd et al. v Y Abraham* [2018] SC (Bda) 68 Civ (5 October 2018) where the Bermuda Court relied heavily the JCPC decision in *Panton v Financial Institutions Services Ltd* [2003]. In the Hiscox matter, the defendant did not file any evidence in relation to a summary judgment application. In the circumstances, the Bermuda Court found that a summary judgment did not present a real risk that the defendant's fair criminal trial rights would be prejudiced.

Key challenges

Funding and Costs

A challenge for victims of fraud are the ever-increasing costs of funding the investigations



and claims, particularly for victims who have lost significant, and life changing sums. While lawyers are prohibited in general from operating on conditional or contingency fee arrangement, third-party funding has been embraced. In the matter of *Stiftung Salle Modulable and Rütli Stiftung v Butterfield Trust (Bda) Ltd* [2014] Bda LR 13, a third-party funding arrangement was alleged to be champertous and unlawful. However, in its ruling, the Bermuda Court found that such arrangements were valid, supported constitutionally protected rights of access to the court, and should be encouraged. Funders should, of course, exercise professional judgment and caution as third-party cost awards are possible in Bermuda and have been made against funders in the past as was done in *Majuro Investment v Vasile Timis et al* [2016] SC (Bda) 22 Com (10 March 2016).

Reputation

Historical misconceptions and reputational issues concerning offshore jurisdictions can have real world negative impacts that hinder investigations and asset recovery efforts, including when seeking assistance from foreign courts. On at least one occasion, a European authority has rejected a request for assistance from a Bermuda litigant citing reasons including, among others, that the international cooperation would constitute an insurmountable obstacle that would delay proceedings.

Despite the concerns of certain jurisdictions, other independent organisations tasked with assessing the level of international cooperation have in fact praised Bermuda. On 17 January 2020, the Caribbean Financial Action Task Force made

public the results of a mutual evaluation report of Bermuda's systems and framework to combat money laundering and the financing of terrorism and proliferation. These results placed Bermuda in the highest technical compliance out of 75 countries evaluated to date and cited a substantive overall effectiveness of Bermuda's AML and ATF regime including, in the category of "international cooperation activities to provide intelligence and evidence to facilitate action against criminals".

Cross-jurisdictional mechanisms: issues and solutions in recent times

As noted, most fraud, asset tracing and recovery matters touching Bermuda involve parties located outside of the jurisdiction. Consequently, it is not uncommon for there to be foreign litigants that seek assistance from a Bermuda Court and/or for a Bermuda litigant to seek assistance of foreign courts.

Seeking Assistance from Foreign Courts:

Depending on which foreign jurisdiction a Bermuda litigant is seeking assistance from, there are various methods or approaches for requesting international assistance, including: seeking to have Bermuda judgments recognised and enforced abroad; for freezing orders in aid of Bermuda proceedings; or to seek evidence located abroad. Letters rogatory may be needed to request these types of assistance.

Some jurisdictions, such as the United States, allow foreign litigants access to disclosure without the need for letters rogatory. This is highlighted not because it is a Bermuda-specific remedy, but because so many international fraud cases, including those in Bermuda, involve the movement of United States' dollars which necessarily pass through its correspondent banks, many of which are located in New York. As such, records of these transfers can be subpoenaed under section 1782 of title 28 of the US Code so long as the claimant meets the definition of "interested person" and the information sought is for use in a foreign or international tribunal. United States courts have interpreted these provisions broadly so that the foreign proceedings in which the documents might be used do not even need to be pending and may be sufficient that they are merely contemplated. Needless to say, this is a tool used by Bermuda litigants to good effect in fraud and asset tracing cases including recently in *Hiscox Services Ltd. et al v. Montres Journe New York LLC*.

Bermuda liquidators can also seek formal recognition of their appointments and powers by foreign courts enabling them to control assets, →

- ➔ collect additional evidence, and/or commence litigation abroad. In these circumstances, it will often assist the liquidator when the order appointing him or her specifies that they are empowered to seek such recognition and take such actions in a particular jurisdiction.

Assistance that can be obtained from Bermuda Court:

Taking of Evidence

A letters rogatory type process is available under the Bermuda Evidence Act 1905. An *ex parte* application is made seeking the assistance of the Bermuda Court to which the letters of request issued by the foreign court are appended. This process can be used to compel a person to be examined under oath and/or for production of certain documents.

Assistance to Foreign Insolvencies

There is no statutory provision providing for the recognition of foreign insolvency proceedings or their representatives in Bermuda. However, the JCPC held in a Bermuda matter that there is a common law power to assist a foreign winding up so far as the Bermuda Court properly can under established Bermuda legislation, public policy, and within its own statutory and common law powers. This concept of modified universalism was enshrined in the landmark case *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 but also illustrated the limits of such assistance. In the *Singularis* case, the foreign liquidators failed to obtain the assistance sought (disclosure from the company's auditors) on the basis that this was not relief that they enjoyed under their own domestic legislation.

Service of Foreign Proceedings

Bermuda is obliged to assist in the service of foreign process on local defendants pursuant to The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters which has been extended to Bermuda through the United Kingdom.

Injunctions

When the Bermuda Court has jurisdiction over a defendant, interim orders for injunctive relief can be granted in support of foreign proceedings. In such cases, it is necessary to make out a good arguable case for the relief sought in the foreign jurisdiction. In considering whether it is just and convenient to grant an injunction, the Bermuda Court has considered, among other things, whether there is evidence that the foreign court would construe such relief as judicial assistance. These issues were considered by the

Bermuda Court in the matter of *ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30.

Enforcement of Foreign Judgment

It is possible to enforce final foreign money judgments in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958 when they emanate from the following British commonwealth countries: United Kingdom; Australia (including most territories and possessions); Hong Kong; Gibraltar; Jamaica; Barbados; Grenada; Guiana; the Leeward Islands; St. Vincent; Dominica; St. Lucia; and Nigeria. Notably absent from this list are the United States, Canada, and most countries of the European Union.

Alternatively, enforcement of a money judgment can take place at common law by commencing proceedings in the Bermuda Court and applying for summary judgment.

Enforcement of Foreign Arbitration Awards

Foreign arbitration awards made in another contracting state can be enforced pursuant to the New York Convention 1958 and the Bermuda International Conciliation and Arbitration Act 1993. The Bermuda Court has demonstrated a pro-enforcement stance and can make orders in support of non-final arbitration awards. This was demonstrated recently, in the case of *CAT. SA v Priosma Limited* [2019] SC (Bda) 56 Com



(3 September 2019), where the Bermuda Court ordered a stay of enforcement proceedings before it pending the outcome of a final appeal but only on the condition that the defendant provide full security in the amount of the award and costs.

Court to Court Communications

During March 2017, the Bermuda Court became the first court from offshore jurisdictions to issue a new practice direction adopting the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.

Technological advancements and their influence on fraud, asset tracing and recovery

Blockchain and Digital Asset Technology

The government of Bermuda has made no secret that it is committed to working with the fintech industry in seeking to establish Bermuda as a world leader in this space and to add it as a new economic pillar. To that end, Bermuda has passed several key legislative acts including the Virtual Currencies Business Act 2018, the Digital Asset Business Act (DABA) 2018 (“**DAB Act**”), and The Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018. The acts identify certain categories of activities that are subject to gatekeeping approval processes for new entrants, establishes

a framework for operation, and mandates regulation of those engaged in the digital asset business. These laws also create a broad range of new offences which carry steep fines and the potential for imprisonment for offenders.

In keeping with its traditional approach of quality, Bermuda appears to be taking a cautious approach in approving new entrants to operate under the relevant legislation. One aim of the fintech revolution is to increase audibility of transactions which in theory should enhance ability to “trace” assets. Nevertheless, the technology and laws in the virtual currency space are rapidly evolving and, likewise, fraudsters will adapt quickly in seeking to exploit these industries to steal, hide and/or move assets.

Bermuda’s legislation does contain aspects that will guard against offenders and assist future asset recovery professionals. For instance, the DAB Act contains requirements that licensed undertakings must maintain a record of both its client and its own transactions at its head office, which must be located in Bermuda. In addition, licensed undertakings that hold client assets, will need to provide security in the form of surety bond, trust account, or indemnity insurance in such form and amount as acceptable to the Bermuda Monetary Authority.

Judicial Technology

The Bermuda Court is expecting to enhance its technological capability through the Evidence (Audio Visual Link) Act 2018. Although not yet in force, the act will allow evidence to be taken remotely from vulnerable witnesses and/or overseas witnesses and experts. It should also be noted that the Bermuda Court has previously exercised its discretion in favour of receiving evidence remotely in circumstances where no real contention arose between the parties in so doing.

Recent developments and other impacting factors

Economic Substance


Bermuda, like many other major offshore financial centers, has adopted economic substance legislation that will change the landscape for many traditionally so-called “letter box” companies. The Economic Substance Act 2018 (as amended) requires companies engaged in relevant activities to provide evidence of economic substance in Bermuda including: being managed or directed; having adequate and suitably qualified employees; having adequate expenditure, having adequate physical presence; and in conducting core income generating activities. ➔



The impact of this legislation is still cascading through Bermuda's marketplace, but one should expect that local service providers in Bermuda will play an increasingly important role in assisting many Bermuda-domiciled companies to meet their economic substance requirements. Further, the increased activities and presence of these companies means that there will likely be a corresponding increase in information and/or assets located in the jurisdiction, which in turn will be of interest and value to future asset tracing and recovery exercises.

Beneficial Ownership Registers

The Bermuda Monetary Authority maintains a private central beneficial ownership registry of Bermuda companies and partnerships (excluding

certain exempted categories) for which information is collected, including: full name; residential address; nationality; date of birth; and nature and extent of interest in the company or partnership. Despite plans by the UK and EU to implement public beneficial ownership registers and pressure on Bermuda to do the same, there has been no firm commitment by the government to do so. During October 2019, a spokesperson for the Bermuda government is reported to have said "we are committed to implementing any properly adopted international standard for public registers and will continue to work with bodies like the Organisation for Economic Co-operation & Development and the Financial Action Task Force to combat money laundering". 



Mathew Clingerman is the managing director of KRYS Global in Bermuda and has oversight of its forensic technology services. He has over 15 years of professional experience involving cross-border asset recovery investigations and insolvencies. He has acted as an independent expert, court-appointed liquidator, court-appointed receiver, and is a recommended expert by *Who's Who Legal 2019* in the area of restructuring and insolvency advisors. He holds a Bachelor of Science degree in Accounting and is a Fellow of INSOL International, a Chartered Financial Analyst, and a Certified Fraud Examiner. He sits on the Committee for the Restructuring and Insolvency Specialists Association in Bermuda.

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Founded in 2007 in the Cayman Islands, **KRYS Global** is an international asset recovery firm with an expertise in offshore focused fraud investigations, cross-border insolvency and restructurings, and litigation support. The firm has an outstanding team of professionals working from seven offices worldwide, predominantly situated in offshore financial centres. KRYS Global has built an enviable reputation for timely, proactive and innovative solutions, particularly in situations of uncertainty, leveraging the knowledge and experience of our professionals and incorporating practical common sense in ensuring positive outcomes for our clients.

All of our service lines have an ultimate focus on achieving positive outcomes and recoveries for our clients and stakeholders. Whilst many of our professionals hold accountancy qualifications, we do not offer audit or tax advisory services. We prefer to avoid conflicts of interests and we value the independence and free-thinking that empowers.

Although many of our professionals are experienced in dealing with contentious and non-contentious insolvencies and restructurings, we are not a traditional firm of "insolvency practitioners". Our cases often require that we utilise our full suite capabilities and skills to make recoveries for stakeholders.

We also invest heavily in technology ensuring that our people have in-house access to the most cutting edge digital forensic and e-discovery tools. Coupled with the local fraud investigation expertise and knowledge, our clients can rely upon being best placed to get a favourable result.

And, in all that we do, we are relentless in continuously striving to be innovators within our field. We are a unique firm offering sophisticated but practical solutions to complex issues. Our approach and the successful outcomes our clients enjoy are unrivalled.

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