When the tide goes out

大潮退去时

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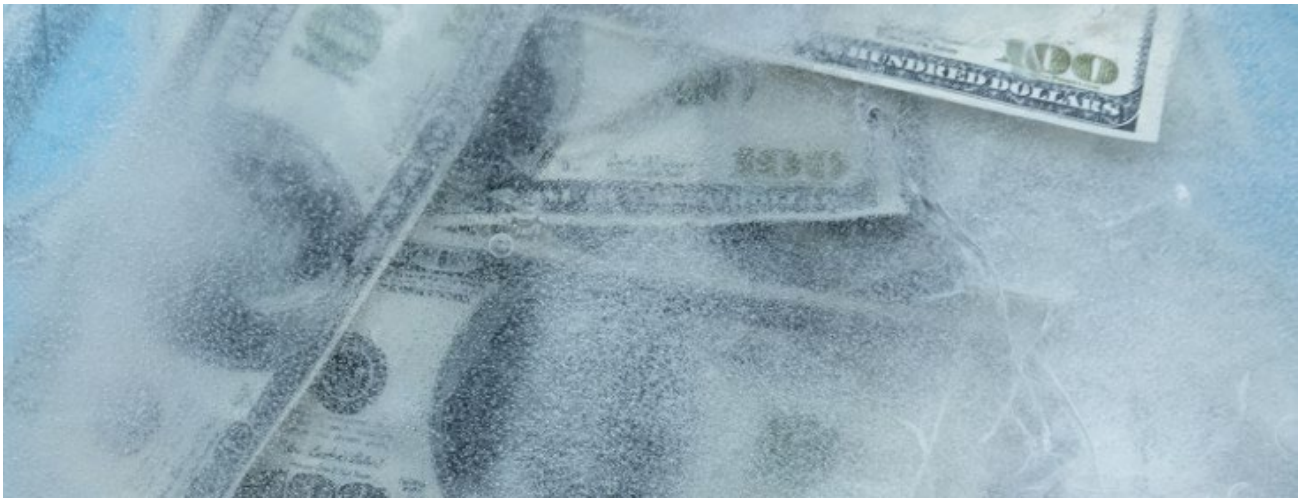

Richard Evans and Alecia Johns of Conyers provide a BVI litigation toolkit for asset tracing and recovery.

In the wake of the economic downturn resulting from the global pandemic, a significant increase in fraud cases can unfortunately be expected. There are two principal reasons. Firstly, the seismic changes brought about by the pandemic, including increased reliance on remote working and systems, generally create ripe opportunities for fraudsters. Second, pre-existing or historic frauds are easier to detect when the proverbial tide goes out. History has firmly established this pattern – the discovery of Bernard Madoff's Ponzi scheme occurred during the 2008 global financial crisis. This article therefore offers a timely synopsis of some of the interim remedies available in the British Virgin Islands (BVI) in order to trace, preserve and recover assets which have been misappropriated as a result of fraud or otherwise.

DISCLOSURE AND INFORMATION GATHERING TOOLS

While there is no dedicated provision for pre-action disclosure in the BVI Civil Procedure Rules (CPR), useful information may be obtained for the asset recovery process by way of *Norwich Pharmacal* and *Bankers Trust* orders.

The *Norwich Pharmacal* jurisdiction (*Norwich Pharmacal Co and Others v Customs* [1974]) may be used to obtain information from a third party who may be mixed up in the wrongdoing of another (whether innocently or otherwise) and who possesses information which the litigant needs to pursue a claim

康德明律师事务所的理查德 • 埃文斯（Richard Evans）和阿莱西亚 • 约翰斯（Alecia Johns）提供了用于资产追踪与追回的 BVI 诉讼工具包。

随着全球大流行病导致全球经济衰退，欺诈案件因此大幅增加。这也是预料之中的事。有两个主要原因。第一，大流行病带来的震荡变化，包括人们不断依赖远程工作和系统，这通常为欺诈者创造了有利机会。第二，既存的或历史性的欺诈行为在俗话说的大潮退去时更易发现。历史已牢不可破地确立了这种模式 – 伯纳德 • 马多夫（Bernard Madoff）的庞氏骗局就是在 2008 年全球金融危机期间发现的。因此，本文适时简述了可在英属维尔京群岛（BVI）使用的一些临时补救措施，用于追踪、保留和追回由于欺诈或其他原因而被侵吞的资产。

披露和信息收集工具

虽然 BVI 民事诉讼规则（CPR）中没有关于诉讼前披露的专项规定，但通过*第三方披露*令和*美国信孚银行*令，即可获得关于资产追回程序的有用信息。

*第三方披露*管辖权（*Norwich Pharmacal Co 等诉海关*[1974 年]）可用于从第三方获取信息，该第三方可能与他人的不法行为有牵连（无论有意还是无意）并且拥有诉讼人对不法行为人提出索赔所需的信息。BVI 公司的注册代理人被认为是第三方披露令的潜在主体，因为其在向 BVI 公司提供企业管理

against the wrongdoers. The registered agents of BVI companies have been held to be the potential subjects of Norwich Pharmacal orders on account of their role in providing corporate management services to BVI companies, which renders them to be involved in the activities of those companies, albeit innocently, and therefore not 'mere onlookers' (*JSC BTA Bank v Fidelity Corporate Services Limited*). This is particularly the case where, for example, it can be asserted that the subject BVI company was established solely for the purpose either of carrying out the fraud, or for channeling or secreting its proceeds.

服务方面的职责，使其参与了这些公司的活动，这些活动属于合法，因此并非“单纯的旁观者”（*JSC BTA Bank 诉 Fidelity Corporate Services Limited*）。例如，可以断言主体 BVI 公司的设立纯粹是为了实施欺诈，或者是为了引导或隐瞒其收益，情况尤其如此。

The threshold criteria to be fulfilled for obtaining *Norwich Pharmacal* relief are that a good arguable case that a wrong has been committed against the applicant and that the respondent became mixed up in the wrongdoing. After these thresholds are met, the court will consider as a discretionary factor whether the information is necessary to establish that a wrong has been committed or to identify the wrongdoers.

获得 *Norwich Pharmacal* 救济所需满足的门槛标准是：具有针对被申请人的充分的可争辩理据，证明申请人受到了不法行为的侵害，而且被申请人与不法行为有牵连。在满足这些门槛后，法院将作为一个自由裁量的因素，考虑该信息是否是确定已发生的不法行为或确定不法行为人的必要条件。

Bankers Trust orders (*Bankers Trust v Shapira* [1980]) may be obtained against third parties, such as financial institutions, in instances where there is a *prima facie* case of fraud or breach of trust, and information is required to preserve assets which are the subject of a proprietary claim. This remedy is not available where the applicant has no proprietary interest in the assets in question.

如发生以下情况，则可获得针对第三方（如金融机构）的美国信孚银行令（*Bankers Trust 诉 Shapira* [1980 年]）：如有*初步证据*表明存在欺诈或违反信托，并且需要信息来保全属于所有权索赔的资产。如果申请人对有关资产不具所有人权益，则不提供该补救措施。

The BVI Court of Appeal has emphasized that, while often conflated, the *Bankers Trust* and *Norwich Pharmacal* jurisdictions are separate forms of relief and so too are the criteria for obtaining each. In order to obtain a *Bankers Trust* order, the applicant must satisfy the court of the following: there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of his assets, there is good reason to believe that the assets held by the third-party institution belong to the applicant, delay may lead to dissipation of the assets, there is a real prospect that the disclosure sought may lead to the location or preservation of the assets, and the information disclosed will be used only for tracing the applicant's assets (*ABCD v E*).

BVI 上诉法院强调，虽然常被混为一谈，但*美国信孚银行*和*第三方披露*管辖权是不同的救济形式，获得每种救济的标准也是如此。为了获得*美国信孚银行*令，申请人必须让法院相信以下几点：有令人信服的证据表明申请人被诈骗或以其他方式被错误地剥夺了资产；有充分的理由相信第三方机构持有的资产属于申请人；拖延可能导致资产耗散；寻求披露确实有可能导致资产的下落或保全；以及披露的信息将仅用于追踪申请人的资产（*ABCD 诉 E*）。。

Search orders (also referred to as *Anton Pillar* orders) may also be obtained requiring the respondent to admit another party to premises for the purpose of preserving evidence. The applicant must establish a strong *prima facie* case against the respondent and that there is a real risk that the respondent may destroy relevant evidence in his possession if the order is not made. In practice, *Anton Pillar* orders are rarely, if ever, sought or granted in the BVI.

也可获得搜查令（也被称为*容许查察*令），出于保全证据要求被申请人允许另一方进入办公场所。申请人必须建立一个针对被申请人的强有力的*初步证据*，如果不发出命令，被申请人确实会销毁其掌握的相关证据。BVI 实际上很少（如有）寻求或批准容许查察令。

ASSET PRESERVATION AND RECOVERY

资产保全与追回

A freezing order (also referred to as a *Mareva* injunction), prevents the respondent against whom it is made from disposing of or otherwise dealing with specified assets (but not assets to which the applicant

冻结令（也被称为*玛瑞瓦*禁令），在实质性诉讼未有结果之前，阻止被申请人处置或以其他方式处理特定资产（但不包括申请人提出任何所有权索赔的资产）。

makes any proprietary claim) pending the outcome of the substantive proceedings.

In order to obtain a freezing order, the applicant must establish that: there is a good arguable case against the respondent on the merits of the substantive claim; there is a real risk of dissipation of assets if the freezing order is not granted; and it is just and convenient in all of the circumstances for the injunction to be granted. A good arguable case has been described as one which is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success" (*Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft* [1983]).

为了获得冻结令，申请人必须证明：根据实质性索赔的案情，具有针对被申请人的充分的可争辩理据；如果不授予冻结令，则有资产耗散的真正风险；授予禁令在任何情况下即公正又方便。具有针对被申请人的充分的可争辩理据被描述为"不仅仅是勉强能够进行认真的论证，但未必是法官认为胜算超过 50% 的案件"（*Ninemia Maritime Corporation 诉 Trave Schiffahrtsgesellschaft*［1983 年］）。

The applicant for a freezing order is generally required to give a cross-undertaking in damages, which is intended to compensate the respondent if the court later finds that the order should not have been granted and the respondent has suffered loss as a result. The court may also order that the applicant provide fortification of that cross-undertaking by payment of a sum of money into court (or equivalent) in support of the undertaking.

冻结令的申请者通常需要作出损害赔偿的交叉承诺，以便法院其后发现不应批准冻结令并且被申请人因此而遭受损失的情况下对被申请人进行补偿。法院还可命令申请人通过向法院支付一笔款项（或同等金额）来保障该交叉承诺。

It is customary for freezing orders to also require the respondent to disclose information about its assets in order to police the injunction. These disclosure provisions are important ingredients which constitute part and parcel of the 'injunction' itself (*Emmerson International v Renova* [2019]).

按照惯例，冻结令还要求被申请人披露有关其资产的信息，以便对禁令进行监督。这些披露条款是构成"禁令"的重要成分（*Emmerson International 诉 Renova*［2019 年］）。

In circumstances where the claimant has a proprietary claim to the assets in question, there is no requirement to establish a risk of dissipation of the assets. A proprietary injunction in order to preserve such assets may be obtained if the following criteria are met: there is a serious issue to be tried, damages would not be an adequate remedy, the balance of convenience lies in favour of the applicant, and in all the circumstances it is just and convenient to grant the injunction.

如果申请人拥有有关资产的所有权索赔，则无需证明这些资产存在耗散的风险。如果符合以下标准，即可获得保全这些资产的所有权禁令：正在审理严重问题，损害赔偿不是适当的补救措施，便利平衡有利于申请人，而且授予禁令在所有情况下既公正又方便 。

Chabra injunctions are freezing orders made against non-cause of action defendants, against whom the applicant has no cause of action but who have been joined as defendants for the sole purpose of preserving their assets pending the determination of the claim against the main defendant (*TSB Private Bank International v Chabra* [1992]). Chabra injunctions are granted in circumstances where the applicant establishes that there is a good arguable case that the third party or non-cause of action defendant possesses assets to which the claimant may ultimately have recourse in order to satisfy a judgment against the main defendant.

第三方资产冻结令是针对无案由被告发出的冻结令，申请人对其没有案由，但将其列为被告的唯一目的是在对主要被告提出的索赔作出裁决之前保全其资产（*TSB Private Bank International 诉 Chabra*［1992 年］）。如果申请人具有针对被申请人的充分的可争辩理据，则会授予第三方资产冻结令。在这种情况下，申请人必须有充分的理由证明第三方或无案由被告拥有这些资产，而申请人最终可以利用追索权来满足对主要被告的判决。

Chabra injunctions are generally available against BVI defendants against whom the court has personal jurisdiction, once it can be established that there is sufficient nexus between enforcement of the judgment against the main defendant and the assets held by the non-cause of action defendant (*Gilfanov et al v*

一旦能够确定针对执行主要被告的判决与无案由被告所持有的资产之间存在着明显关系，通常会向法院对其具有"个人管辖权"的 BVI 被告发出第三方资产冻结令（*Gilfanov et al 诉 Polyakov et al* 以及 *Renova Industries Limited et al 诉 Emmerson International*）说明获得针对外籍被告的第三方资

Polyakov et al and *Renova Industries Limited et al v Emmerson International*) on the difficulties in obtaining Chabra orders against foreign defendants).

产冻结令存在难度。

The BVI court also possesses the jurisdiction, under section 24 of WI Supreme Court Act, to appoint receivers in order to preserve assets on an interim basis pending the outcome of the substantive claim. The applicant for such an order must establish: a good arguable case against the respondent, a real risk of a dissipation of assets, and that it is "just and convenient" to appoint a receiver (*Norgulf Holdings Limited v Michael Wilson*).

根据《威斯康星州最高法院法》第 24 条，BVI 法院还拥有任命接管人的管辖权，以便在实质性索赔未有结果之前临时保全资产。该命令的申请人必须确定：具有针对被申请人的充分的可争辩理据，存在资产耗散的真实风险，以及指定一名接管人即"公正又方便"（*Norgulf Holdings Limited 诉 Michael Wilson*）。

Given that an interim receivership order is considered a very intrusive remedy, the BVI Court of Appeal has held that the evidential threshold for establishing whether there is a "good arguable case" is higher on a receivership application than it would be for a freezing order (*Vinogradova v Vinogradova*). Further, in determining whether it is just or convenient to grant the order, the court will assess whether any less draconian remedy is sufficient (such as a freezing order) and if it is, a receiver will not be appointed.

鉴于临时接管令被认为是一种非常具有侵扰性的补救措施，BVI 上诉法院认为，确定是否"具有针对被申请人的充分的可争辩理据"的证据门槛在接管申请中比在冻结令申请中要高（*Vinogradova 诉 Vinogradova*）。此外，在确定授予命令是否即公正又方便时，法院将评估任何不太苛刻的补救措施是否充足（如冻结令）。如果充足，则不会指定接管人。

AVAILABILITY OF EX PARTE AND/OR URGENT RELIEF

提供单方面及/或紧急救济

All of the interim remedies outlined above may be sought on an *ex parte* basis, that is, without notice to the respondent. In order to obtain these remedies *ex parte*, the applicant must satisfy the court of at least one of the following: urgency dictated that no notice was possible or to give notice would defeat the purpose of the application (*National Commercial Bank Jamaica Ltd v Olint* [2009]).

上述所有临时救济均可*单方面*寻求，即无需向被申请人发出通知。为了获得*单方面*救济，申请人必须让法院相信至少有以下情况之一：不会在紧急情况下命令发出通知，或者发出通知有损申请目的（*National Commercial Bank Jamaica Ltd 诉 Olint［2009 年］*）。

Any such order made *ex parte* should not last for more than 28 days. On granting the order the court must fix a date for further consideration of the application. The respondent to such an order is entitled to apply to have the order set aside at the further hearing (or subject to the terms of the order, sooner if urgency can be demonstrated). Applicants for *ex parte* relief are under a strict duty of full and frank disclosure. Failure to adhere to this requirement can result in the discharge of any order obtained.

任何*单方面*作出的此类命令不应持续超过 28 天。在批准命令时，法院必须商定一个后续审议该申请的日期。该命令的被申请人有权在后续听证会上申请撤销该命令（或者根据该命令的条款，如能证明有紧迫性，则可更早撤销该命令）。*单方*救济的申请人负有充分和坦诚披露的严格义务。如未能遵守这一要求，获得的任何命令将被解除。

These interim remedies may also be sought on an urgent basis, including before the filing of a substantive claim in the BVI. In order to grant an interim remedy before the filing of a claim, the court will need to be satisfied that the matter is urgent or it is otherwise necessary to do so in the interests of justice. The BVI court also has the jurisdiction to permit the service of such interim orders on respondents outside of the jurisdiction before the claim form is issued (*Thelma Paraskevaides et al v Citco Trust Corporation Limited*).

这些临时救济也可以在紧急情况下寻求，包括在向 BVI 提出实质性索赔之前。为了在提出索赔之前批准临时救济，法院必须确信该事项非常紧迫，或者出于司法利益必须批准临时救济。BVI 的法院也具管辖权，获准在发出索赔表之前向司法管辖区以外的被申请人送达此类临时命令（*Thelma Paraskevaides et al 诉 Citco Trust Corporation Limited*）。

INTERIM RELIEF IN AID OF FOREIGN PROCEEDINGS

协助涉外诉讼的临时救济

The availability of interim relief in support of

在疫情期间，无法确定是否可以提供临时救济以支持正在

proceedings that are taking (or will take place) outside the jurisdiction is a fluid one at this precise time. For many years, the BVI had adopted that approach that by reason of the decision in *Black Swan Investment ISA v Harvest View Limited et al* there was a common law jurisdiction to grant so-called 'freestanding' injunctions in the BVI in support of foreign proceedings.

（或将要）在管辖范围之外进行的诉讼程序。多年来，BVI 一直采取这种做法，即根据 *Black Swan Investment ISA 诉 Harvest View Limited et al* 一案的裁决，BVI 有普通法管辖权，获准颁发所谓的“独立”禁令以支持涉外诉讼。

However in *Broad Idea International Limited v Convoy Collateral Limited*, the Court of Appeal determined that *Black Swan* had been wrongly decided. The decision created shockwaves amongst BVI commercial practitioners, and efforts are afoot to enact legislation in order to put the jurisdiction to grant injunctions in aid of foreign proceedings on a statutory footing. At this time, there remain various options available to achieve a like result, depending on the particular fact pattern in question.

然而，在 *Broad Idea International Limited 诉 Convoy Collateral Limited* 一案中，上诉法院裁定对 *Black Swan* 错误裁决。这一裁决在 BVI 的商业从业人员中引起了轰动，并且正在努力制定法律，以便将授予禁令以帮助涉外诉讼的管辖权置于法定地位。此时，仍有各种可供选择的方法来实现相同的结果，这取决于有关的特定事实模式。

The court's power to award interim remedies in aid of foreign arbitral proceedings is firmly established by statute in section 43 of the Arbitration Act, 2013. In *Koshigi Limited et al v Donna Union Foundation*, the BVI Court of Appeal upheld a worldwide freezing order and an interim receivership order made in aid of arbitral proceedings before the **London Court of International Arbitration** (LCIA). The court held that there was no need for assets to be in the BVI in order for the court to be able to grant interim measures pursuant to section 43.

2013 年《仲裁法》第 43 条明确规定了法院为帮助外国仲裁程序而颁布临时救济的权力。在 *Koshigi Limited et al 诉 Donna Union Foundation* 一案中，BVI 上诉法院维持了为帮助**伦敦国际仲裁院**（LCIA）的仲裁程序而发出的全球冻结令和临时接管令。法院认为，资产无需位于 BVI，法院即可根据第 43 条授予临时措施。

While not a comprehensive list, we hope this is a useful summary of the most commonly used legal options available to those seeking to trace and recover assets in the BVI.

虽然这不是一份完整清单，但我们希望它能全面总结最常用的法律选择，寻求在 BVI 追踪和追回资产的人可将其作为参考。

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