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BUSINESS INSIGHT

DISRUPTION

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BUSINESS INSIGHT

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NOTE FROM THE **CEO**

Embracing Disruption

Many of us may be unwilling to face the reality that world has changed irrevocably. COVID-19 has disrupted the way we live, work, and socialize. It has also been a catalyst to the transition to a digital-first world, with the COVID-19 era witnessing some of the highest growth rates in technological innovation.

In the high-tech world, game-changing technologies have increasingly usurped or disrupted the status quo. TechTarget's Tom Goodwin aptly observed some years ago that with the transformation something interesting was happening: "Uber, the world's largest taxi company, owns no vehicles. Facebook, the world's most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world's largest accommodation provider, owns no real estate."

This phenomenon is not relegated to the tech world; today it has transcended into financial markets where some of the world's largest trades have no real or tangible value. The intrinsic value of a digital asset is ultimately determined simply by the market in which it is held. Twitter founder Jack Dorsey earlier this year became the poster child for trading in digital assets when he sold his first ever tweet, "just setting up my twttr", as a non-fungible token for $2.9 million to a Malaysian-based businessman.

Business savvy entrepreneurs, institutional investors, governments, courts, regulators, and international standard setters are all trying to decipher what this all means, and more importantly, how we can benefit from it.

By being at the cutting-edge of innovation and embracing disruption, the British Virgin Islands (BVI) has always punched above its weight. The contributors in this edition of ***Business Insight*** delve into the complex world of digital disruption and decode the trends in crypto currencies, digital assets, FinTech and RegTech.

In addition, we hear from well-known industry leaders on how the BVI has been able to stay ahead of the competition over many years and maintain its global standing, whilst continuing to develop and attract the highest quality international and local talent pool.

In an engaging roundtable discussion hosted by *Opalesque*, leading practitioners share their learnings across the divide between the fiat currency system, central banks, cyrpto currencies and the types of exchanges the group sees evolving.

Michael Killourhy and David Mathews guide us in future-proofing the BVI by examining the outlook for crypto currencies, tokens and digital assets. Lodewijk Van Setten then reviews digital assets and the financial services framework that underpin these in the BVI, and, elsewhere, Killourhy discusses the opportunities for Special Purpose Acquisition Companies (SPACs).

As the new CEO/Managing Director of the BVI Financial Services Commission, Kenneth Baker shares the lessons he has learnt through his stellar career and outlines his plans for leading the Commission in the new global landscape.

Christian Hidalgo and Simon Gray look at fund innovation and incubators in a digital world, while Bank of Asia's Deon Vanterpool outlines the opportunities for the BVI to become a digital champion in banking and financial services.

Christopher McKenzie examines the innovation in BVI trusts laws and Owen Prew reviews the case for a legal definition of digital assets, while Matt Freeman assesses the increasing litigation in the crypto world, and Van Setten looks at e-signatures and electronic execution.

In our profile feature, Simon Filmer charts his 20-year journey and rise to the top of the financial services industry and looks at the key themes that are shaping the global industry.

Simon Gray and Philip Treleavan look at FinTech, Reg Tech, AI and Big Data, while Ayana Hull examines the BVI Regulatory Sandbox and how it will spur Fintech Innovation in the BVI.

Adenike Sicard reviews what you need to know about the regulation of virtual assets in the BVI, while James Drury discusses how the Crypto Curry Club is providing food for thought on the issue.

Rounding out the issue, Dr. Ricardo Wheatley considers how the BVI can position itself for Asia's post-pandemic recovery. We also hear from an esteemed panel of experts on the impact of proposed global tax reform – in essence brought about by the disruption caused by digitized companies like Google, Facebook and Amazon. The panel including Oliver Cooper, Lisa Penn-Lettsome, Geoff Cook and Mark Pragnell, discuss this and the potential impact of a proposed global corporate minimum tax rate and what this could mean for the BVI and other international finance centres (IFCs).

While changes in digital assets are moving at light speed, the digital transformation is still evolving. One thing is certain is that this new digital paradigm, in varying forms, is here to stay and will be a part of the global post-COVID economic recovery and an integral component of the world's future. Adapting to disruption is rarely easy, but the potential for significant benefits and value creation are there for those who prepare to avail themselves of the opportunities. The BVI is ready to create a best-in-class environment to allow businesses to flourish in this space.

ELISE DONOVAN
Chief Executive Officer

THE GREAT FINTECH DISRUPTION

This article is an extract from the Opalesque roundtable on financial innovation.

Innovation in fintech is driving progress in different areas, from payment systems, blockchain and digital assets, to robo-advisors, lenders, and crowd funding. Whether it's algorithms, hardware or the impact of data, digital disruption is transforming the way the financial sector works.

To explore this ever-growing area, BVI Finance and leading financial publication Opalesque hosted a roundtable discussion with a panel of leading practitioners in the BVI. The panel shared learnings across the divide between the fiat currency system and central banks, the emerging cryptocurrencies, and types of exchanges the group sees evolving.

MONEY OF THE FUTURE – FIAT VERSUS DIGITAL

Matthias Knab: One thing many people struggle with is the big schism, the big divide we have between the fiat currency systems and central banks and then all these emerging crypto pools with Bitcoin obviously being the largest of it.

Ray Dalio, founder of hedge fund firm Bridgewater Associates, said recently "If Bitcoin becomes material, governments won't allow it". What is your view on this? Will the two worlds converge, or will we see conflicts about value and what will be the money of the future? What do you think, how will this play out?

Rik Willard: I have thought about this a lot over the past decade. I was introduced to Bitcoin in 2010 and became active in it by 2011, so I have had some time to reflect.

I see the idea of money bifurcating into at least two distinct forms of value. I think that when you are building a ship or funding, say, the armed forces, that fiat is fine for those kinds of large-scale applications. Different forms of money will arise from this movement — and it is a movement. I think that Bitcoin becomes almost irrelevant in the long-term conversation, but the idea, the philosophy behind it, remains extremely relevant.

As a model, we should remember that multiple currencies are not at all new. In America, like other places around the world, we had 10,000 different currencies in America before the Civil War; regional, local, community, stores, local banks, regional banks… all had their own currencies. This was a usual state of affairs, where the big question was "Why do we want to consolidate all these currencies into one instrument (the 'greenback')?" The question was big enough to almost ignite a second American civil war.

What's interesting now is that it seems we are moving back in time as we move forward technologically. Value is created locally, or in the trader sense, through community, which can be either widespread or hyperlocal. Since we have redefined the concept of global community through the internet, we are also going to look at community currencies rising separately from fiat and that is why we need exchanges. Places like the BVI, or Wyoming for that matter, can have comprehensive exchanges that accept and validate these new value tokens, separate from fiat.

People are talking about the US dollar being completely digitized, which is very much like China's plans. A digital dollar would simply calcify all that is still wrong with fiat without allowing us to fully explore what digital value can offer.

Like all value, a digital USD would reflect the philosophy of the issuer, and I would argue that the philosophy of America is currently in a state of evolution. I would not want the USA social contract further codified into my own wallet, without first understanding what we will — or at least could — be in for coming generations.

In many ways we are going back to the natural human condition of a multiplicity of value systems that converge on exchanges. Summing up, when it comes to fiat versus digital currencies, I don't think it's one or the other; I think both are going to happen, but within different domains and purposes.

BVI CRYPTO SWEET SPOT

Matthias Knab: Rik underlined the vital roles of exchanges, which are only going to become more relevant going forward. What type of exchanges do you see evolving? Any insights from the BVI or Wyoming on digital asset exchanges?

Rebecca Jack: The BVI has a number of digital asset exchanges operating here currently. The BVI's current regulation stipulates that provided that those traded digital assets do not qualify as 'investments' under BVI securities law, such exchanges do not need to be licensed. The definition of 'investments' has much clearer boundaries than, say, the Howey Test in the US, so it's relatively easy for us to work out whether an asset is or is not an investment.

As exchanges start to participate in more complex products, for example, tokenization of securities or derivatives, we are starting to explore licensed models, whether that be through our Sandbox, a full licensing regime or looking to other jurisdictions in our networks.

Lodewijk Van Setten: The BVI has not introduced a specific virtual asset provider law yet, as seen in other jurisdictions. It really is in the sweet spot of the crypto sector at the moment. The BVI is right to be cautious, as the sector and its products are developing very quickly.

The products are becoming more complex and some might be caught by existing regulation. For instance, as the market is maturing, demand for derivatives on crypto reference values develops, in particular cash-settled, not necessarily cash-settled in fiat money. That fits squarely within the definition of a contract for the differences and trading services relating to those contracts may be regulated investment services.

Accordingly, certain contracts are made via a user-to-user matching engine or some other more centralized product that brings parties together and executes a CFD that would probably be a regulated investment service in the BVI. This may not necessarily be expected, as spot trading in simple crypto assets such as Bitcoin is most likely not in scope. So, as the market matures further and firms start to offer centralized pools, we are getting closer and closer to what the traditional product is offering.

Hannah Terhune: The BVI has been viewed as late to the crypto game but in my view, it has played its cards well by waiting it out. Other countries rushed to legislate, and clients are not lining up to rely on or work under those statutes. In my opinion, existing BVI law covers most innovation in the blockchain protocol space.

LIMITED LIABILITY COMPANY

Hannah Terhune: The BVI is one of the fastest and cheapest countries to form an entity. The BVI needs a Limited Liability Company (LLC) Act to stay relevant. A BVI LLC regime that is neither a per se corporation or pass through for corporate, and tax purposes would go very far worldwide. A BVI LLC regime that allows one to elect corporate status is even better since the LLC is not uniformly treated worldwide. An Incubator Fund or an Approved Fund set up as an LLC is an easy purchasing decision for a client.

I think Nevis adopted the entire LLC statute from Delaware. I think the same is said of Anguilla with respect to the BVI, according to legend. You may find it noteworthy that the first state to have the LLC was Wyoming. It wanted to attract capital and created the statute specifically for a Texas oil company and was in essence a private law. If the LLC could be offered as a private outcome, I think that would draw many to the BVI Sandbox.

I also think that the BVI should consider push back against ultimate beneficial ownership (UBO) disclosure. U.S. States that permit anonymous LLCs include Delaware, New Mexico and Wyoming. Only the registered agents know the sponsors. Young innovators only think in terms of "LLC" and the goal is not to go public anymore. The goal may be to be bought as an exit plan.

I am also a business planner, and so I recently found out why, possibly, token offerings have dropped out of sight from law firms but continue very privately. Here is what I have learned from solid players buying coins/tokens in the past few days. The coins/tokens represent what I keep referring to as "real value". By this I mean know-how, show-how, working, commodifiable intellectual property with commercial/shovel ready applications created by those who want to control what happens to it but are not able to contractually protect current and future ownership.

Many lawyers do not know how to protect the "real value" because they barely understand the "real value". There are many tokens available privately and being bought. The belief is if someone is not knee deep in block chain protocol creation and knows of coin/token to buy, it is probably a garbage token/coin. These young clients are drafting their own coin agreements to fall out of the definition of a security as well. No law firm will sign off on that position, so why go to a law firm for help?

Matthias Knab: So, Lodewijk, how should the regulation of a fully decentralized trading and custody look like?

Lodewijk Van Setten: There seems to be a bifurcation between businesses that offer centralized and business that offer Application Programming Interface (APIs), interfaces, Decentralize Exchange (DEX) aggregators and other types of products. The second type of business model often does not require a user contract and consequently the application provider would not know who the users are. The application can be downloaded for free and has some embedded feature that permits payment only when it gets used for instance to create a wallet, make a transfer, and plug into a pool such as Uniswap. At that time, the application operates to take a chip off the block (as compensation) and sends it back to the original developer of the software. So, it's completely anonymous unless you have the ability to dig into the originating block chain address.

There is a question how to operate that business model in the context of the Sandbox. One of the things that will be required is that you know your clients and those whom you transact was in order to comply with anti-money laundering requirements. A similar requirement applies to businesses that are subject to virtual asset service provider laws in other jurisdictions. If the provider offers a service that cannot know who the users are, the answer to that product offering is that you can't be regulated because, at least so far, anti-money laundering regulation cannot be made to work for such business.

I have been struggling to see where such a model would end up. If the decentralised offerings continue to develop on the basis that software is sent out into the world without a contract of any form, but the developer can nevertheless make an earning because its use on a decentralized chain permits an anonymous automatic payment, how is that to be regulated?

THE PHILOSOPHY OF WHAT COMES NEXT

Rik Willard: Again, this is a good opportunity for BVI to jump ahead of the narrative. This is a great example of what I am talking about. Lodewijk, the model you describe is contingent on the evolution of smart contracts, right?

And so if you would want to really make a statement in this space, I would suggest that any government, incubator or Sandbox really puts their focus on the development of smart contracts within the token ecosystem because that's the answer to what you and these developers are talking about and the nature of those smart contracts which at this time are, by and large at this point, not ready.

Lodewijk Van Setten: I am just trying to visualize this, what would be the hook, where do you start? The person who controls the protocol at the time of creation? Where is the entry point, because once it exists, if properly decentralized, it kind of exists in its own right without anyone controlling it?

Rik Willard: Well, at this point, yes, but it doesn't have to be the case moving forward, and that's the real challenge. This is what I talked about earlier when I said that we have to build for a different paradigm, that's really the whole point of it.

Right now, it's very difficult to have this discussion – it's almost like having the discussion in the vacuum because the things

that we need simply do not exist. They must be built around the philosophy of what comes next.

Lodewijk Van Setten: I completely agree because once I realized the sector can make money simply by floating a balloon of software without ever entering a bilateral service or sales relationship, I thought – wow! I think you are right; it is hard to see the correct angle at this point. I admire the BVI's cautious position here, which appears to recognize that much is in flux.

Rik Willard: I will paraphrase the old proverb which suggests that to save the house, we sometimes must let it burn to the ground. We must rethink what we have been doing and what needs to happen moving forward to facilitate this kind of transaction in a safe and secure way. We don't want people getting hurt, but also there is a different answer as to what that means in a peer-to-peer environment.

Lodewijk Van Setten: We will have to see where the service providers' earnings originate ultimately and that probably will drive whatever comes next. ■

Matthias Knab
Founder, Opalesque

Matthias Knab is an internationally recognized expert on hedge funds and alternatives. Mr. Knab has frequently served as chairman of hedge fund conferences around the world. In addition to this, Mattias has moderated/ spoken at panels and lectured on the subjects of hedge funds and the state of the global alternative asset management industry. In 2000 Matthias Knab started to publish a pioneering newsletter "Industry Report" which was focusing on the ascent of Electronic Trading within the online brokerage industry. It was at that time when he started to establish his first links into the hedge fund industry and became aware about the need of a daily, independent and encompassing news service on this thriving sector.

Rik Willard
Founder & Managing Director, Agentic

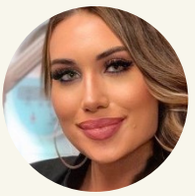
Rik Willard is the Founder and Managing Director of Agentic Group, a federation of over forty blockchain and related companies throughout the world.
Rik is the former Co-Founder and CEO of MintCombine, the world's first think tank dedicated to digital currencies and "value- mining" via blockchains, and has consulted on digital matters for numerous global corporations including MGM Resorts, Calvin Klein, Lucent.
He is a Fellow of the Foreign Policy Association, and a Corporate Roundtable member of the World Conference of Mayors, and has been a keynote speaker for Harvard Business School and Stern School of Business events. He has written for CNN International and has been covered in Forbes magazine.

Rebecca Jack
Senior Associate, Appleby

Rebecca Jack is a Senior Associate within the BVI Corporate department, with particular expertise in venture capital and private equity financing, fintech, crypto-funds and other emerging technologies.
She also advises on a broad range of corporate and financial matters, including financial services regulation, fund establishment, debt capital markets, restructurings and general corporate law.
She sits on the BVI Financial Service Commission's FinTech working group, and BVI Finance's Digital Asset Working Group.

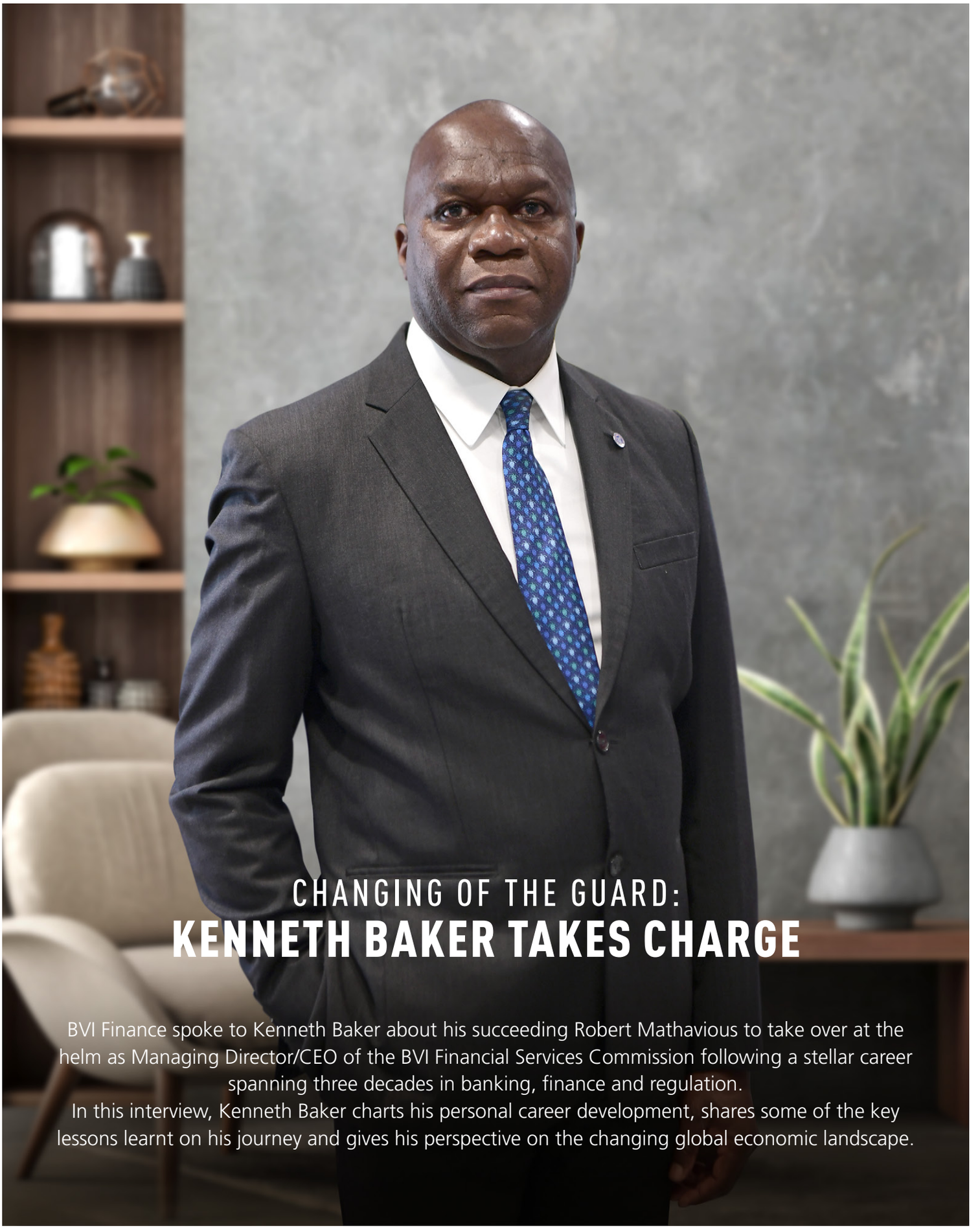
Lodewijk Van Setten
Senior Counsel, Walkers

Having worked in both Europe and Asia, Lodewijk has more than 20 years of experience in financial services regulatory and risk management matters across different markets.
His expertise ranges across the regulatory spectrum from authorisation and regulatory expectations of governance models to anti-money laundering and terrorist financing requirements, sanctions, exchange of tax information (CRS and FATCA), economic substance requirements, reporting of beneficial ownership and data protection regimes.



Hannah Terhune
Chief Legal Officer, Capital Management Law Group

Hannah Terhune is a U.S. lawyer licensed in Wyoming, New Jersey, and the District of Columbia. Based primarily in Jackson Hole, Wyoming, she works closely with Mr. Mark Dubois and ABM Corporate Services Limited, which holds a Class 1 Trust license in the BVI. Hannah focuses on crypto offerings, ICOs and tokenized projects in the block chain protocol space. She also owns Capital Management Services Group, Inc., Capital Management Law Group and Capital Management Administrative Services Group. Hannah is a veteran hedge fund attorney who has been in private practice for more than thirty years and provides advice and professional services to a wide range of clients on six continents.



CHANGING OF THE GUARD:
KENNETH BAKER TAKES CHARGE

BVI Finance spoke to Kenneth Baker about his succeeding Robert Mathavious to take over at the helm as Managing Director/CEO of the BVI Financial Services Commission following a stellar career spanning three decades in banking, finance and regulation.

In this interview, Kenneth Baker charts his personal career development, shares some of the key lessons learnt on his journey and gives his perspective on the changing global economic landscape.

Your career has spanned banking, finance and regulation over 30 years. Can you tell us how you began your career and what that led you to the FSC?

I started working right out of high school. Literally, I started working with Barclays Bank Plc BVI Branch in the week after graduation. In fact, I was one of the two first students from my class to take part in the Government's newly launched job training programme and that's how I started at Barclays.

After three years, I decided to go back into education and enrolled in a business administration degree at City University in New York. Whilst studying, I worked in the Bowery Savings Bank which was at the time, the largest savings bank in New York.

I came back to the BVI in 1990 and re-joined Barclays and then was transferred to the bank's head office in Barbados as part of the management training programme, working across many different areas. In 1998 I came back to the BVI as a manager in the offshore banking division at Barclays and then in early 2000, Robert Mathavious invited me to join the Financial Services Department as Inspector of Banks. The Commission was then formerly established in 2002 and I was appointed as the director of banking and fiduciary services. I was then promoted to the Deputy Managing Director for regulation in 2005 and have worked closely with Robert in that role since then.

How do you encourage new talent coming through in the financial services industry and into regulation?

In recent years the government has been developing a financial services curriculum for the high school. The Commission has contributed and supported this on several levels. We have worked with the local college and also with the Financial Services Institute, which is a unit of the college that helps prepare students for professional qualifications. We have made both monetary contributions in addition to reviewing and developing the syllabuses for the various professional qualifications. We recognise how important this is in nurturing future talent to come into the financial services arena.

What would you say to young regulators starting out in the field?

Supervision has a long history which has evolved and improved over time, usually a following major financial crisis. Supervision is also a challenging and exciting career option which offers tremendous learning and development opportunities. I encourage young regulators to acquire relevant academic qualifications but more importantly, relevant work experience either in the industry or as a supervisor. Volunteering to or accepting nomination to work on new or special projects is an excellent opportunity to gain knowledge and experience to which they would not otherwise be exposed. Be eager to learn and try new things.

You mentioned how Dr. Mathavious brought you into the FSC. What has been his legacy and what have you learnt from him over the years?

Robert is respected around the world. In fact, I said to him on his last day in the office in December last year that his reputation is more widely known outside the BVI than at home. This is certainly something that all the senior management at the Commission can attest to.

Wherever you go, and I have been to every continent except Australia in my time at the FSC, I have always met somebody who has either met Dr. Mathavious or have passed on regards to him.

In terms of learnings, one of the most important attributes has been that Robert has empowered his senior management staff to take ownership of their areas of responsibilities. He has encouraged us to travel, to meet our counterparts and to learn from them so that we can improve our own world-class regulatory regime.

How did you prepare for stepping into such large shoes?

Dr. Mathavious had always empowered the senior team to bring new ideas to the table and to look at new ways of doing business. I aim to follow in his footsteps in that regard. But I also have a clear plan on how I will lead the team to progress the Commission in the coming years so that we remain respected as a world-class regulator the world over.

Can you point to any notable milestones that have shaped the BVI as a global financial centre?

There have been couple of major events over the years that have propelled the jurisdiction in the financial services arena. The first was back in the 1980s during the Regan administration with the ending of the double tax treaty with the US that had previously led to big investment into the BVI's tourism industry. To offset this, the BVI Government at the time began to look at the concept of the international business company as a way of continuing to stimulate investment. The US invasion of Panama was a catalyst for the rise of BVI incorporated business companies. Panama was the investment gateway into Latin America and following the invasion most of the Panamanian law firms moved to the BVI recognising it as a stable jurisdiction. This led to a surge in the number of international business companies being incorporated.

The second big event was later in the 1990s, when the UK announced the hand-over of Hong Kong to China. This created a big demand for international business companies and was the start of a long and successful symbiotic relationship between the BVI and Asia.

The BVI is known for its progressiveness. Was the mission of the FSC at the beginning to create a best in class regulatory environment?

Yes it was. Our ambition right from the start was to be assessed as a top-tier regulator. This was in lockstep to the (BVI) government's own objective not to be

blacklisted and to adopt policies centred around being proactive in addressing the requirements of international standard setters, rather than being forced to adopt them at a later stage.

In fact, the BVI was one of the first jurisdictions to commence the regulation of trust and corporate services providers with the enactment in 1990 of the Banks and Trust Companies Act and the Company Management Act. This was a good example of the BVI's progressiveness.

How important has it been to foster a culture of collaboration between regulator, government and private sector?

It is vitally important. We tend to equate ourselves as akin to a central bank in a developed country, which acts without interference from government and makes impartial decisions. Equally important is collaboration with the industry, because they're the ones who can reflect what is happening on the street and give us that kind of direct insight.

Travel has been a significant part of your role – how have you adapted to the impact of the pandemic over the last year?

Like most of the BVI, we have adapted well. We took the early decision to close at the beginning of March and that proved to be the right decision. We also tested our technology before the pandemic to ensure that we could work remotely. This has always been important, as we have traditionally travelled a lot and needed to work when visiting other countries, so it has served us well during lockdown.

Travel has obviously been impacted. Pre-Covid, we attended between six to eight international conferences a year. A key part of these events was meeting with international colleagues to discuss important developments and learnings that we could then take back to the BVI. The conferences are still happening virtually, but this vital personal ingredient is now missing. The opportunity to interact and engage is not as it was in the past.

I don't see the international conferences coming back until 2022, but the roll out of the vaccines will be a catalyst to this.

How has the FSC adapted to new changing business models – particularly in catering to the rise of fintech businesses?

Last year we introduced regulations to create a new regulatory sandbox and we have now set that regime up. First approval was given in April 2021.

We have always viewed technology as important. We put in place a major technology tool, VIRRGIN, in 2005 to handle all of our incorporation transactions which is viewed as world class. We are adopting and adapting this technology on the regulatory side to make our job more efficient. This is one of our key strategic initiatives for this year.

How do you relax outside of the job?

I enjoy travel, reading and spending time with family and close friends. I also enjoy having deep philosophical discussions, particularly on politics because politics permeates everything. It's stimulating to have discussions on what's happening on an international level and also regionally, so we can reflect and learn from what's happening.

Is there a book that has influenced you?

Yes, I've just read Capitalism's Achilles Heel by Raymond Baker – no relation! This is particularly pertinent when you look at how the concept of capitalism has changed – and how the traditional lines have been blurred between the West and East around capitalism and economic development. China is a good example. Whilst it is still a communist country, China adopted a more capitalist approach to business which has helped write its remarkable economic growth story over the last 15 years. Nowhere in the world can you see that kind of economic growth, except if you go back to the industrial revolution in Europe and North America. So the whole concept of capitalism and how it impacts our lives is something I enjoy reflecting on.

Finally, what will be your legacy as CEO of the Financial Services Commission?

The BVI FSC has come of age in the last 20 years. I see my role now as leader and mentor to the organisation, as a young adult, to guide it into maturity so that it becomes an increasingly productive, important and respected citizen in the world of financial services. ■

Kenneth Baker
Managing Director and Chief Executive Officer, BVI Financial Services Commission (BVIFSC)

Kenneth Baker's experience in the financial services sector spans over 37 years. He joined the Financial Services Department of the Virgin Islands Government in June 2000, as the Inspector of Banks and Trust Companies after his private-sector career in Banking.
Mr. Baker was appointed as Director, Banking and Fiduciary Services following the Commission's establishment in 2002 and later promoted to Deputy Managing Director, Regulation in 2005.

KEEPING A STEADY EYE TO WIN THE FUTURE: CRYPTOCURRENCY, TOKENS AND DIGITAL ASSETS IN THE BRITISH VIRGIN ISLANDS

By **MICHAEL KILLOURHY** and **DAVID MATHEWS**

Offerings of cryptocurrencies, digital tokens and other blockchain based digital assets have raised billions of dollars in recent years. The increasing utility of cryptocurrencies and digital tokens and the creation of digital asset exchanges has also facilitated a valuable secondary market. While the recent meteoric rise in the value of bitcoin has attracted headlines, the value and utility of other digital assets has also risen considerably (resulting in aggregate market value of over US$1 trillion as of January 2021 according to some estimates). This has captured the interest of investors and managers alike and seen the rise of cryptocurrency and digital asset focussed investment funds.

Leading international financial centres (IFCs), such as the British Virgin Islands (BVI), have all sought to become part of the digital asset phenomenon. However, while a number of IFCs have worked hard to position themselves as fintech and digital asset hubs, the BVI has become the jurisdiction of choice for token generation. The BVI's experience in token generation has also helped the jurisdiction attract other digital asset-based activities, including token exchanges and investment funds focussed on cryptocurrency and other digital assets.

ICOs, ITOs AND TOKEN TYPES

Newly minted cryptocurrencies or tokens are first issued through Initial Coin Offerings (ICOs) or Initial Token Offerings (ITOs). An ICO or ITO is, in essence, just another means of accessing third-party capital. Rather than receiving a security whose return or value is derived from the performance of a business or the value of another asset, as in a traditional securities offering, ICO and ITO investors exchange cash or other cryptocurrency for a new digital asset formed and operating on a blockchain network. In most cases this asset takes the form of a credit or token for use in making purchases on, or to gain access to, the digital business platform that the offering proceeds are being used to develop. The internal economy of the platform on which a token is to be used is referred to as its "ecosystem."

The type of digital token described above is referred to as a "utility token" – its value being based on its utilisation within the ecosystem where it functions. Utility tokens can also have an intrinsic investment potential. For example, rather than using tokens within their ecosystem, investors may continue to hold a token in the hope that the success of the ecosystem or the adoption of the token into other ecosystems will result in greater demand, and thus drive an increase in the token's value relative to other token types or currencies.

As the value of a token is determined by the demand for the token itself rather than being more directly linked to some underlying asset or activity, true utility tokens are, generally speaking, not regarded as "investments" or "securities" by a number of jurisdictions and are therefore not subject to laws there regulating those types of assets. As a result, ICOs and ITOs can offer an efficient and cost-effective means of accessing capital for start-up or early stage enterprises or technology entrepreneurs which might not otherwise have access to capital markets.

STRUCTURING

Similar to existing forms of special purpose vehicle capital raising, a typical ICO or ITO structure will feature a newly formed issuer vehicle established and managed by a group of sponsors for the purpose of raising funds for a particular project (i.e. the ecosystem in which the token will be used). Details of the project and token terms will be set out in a business plan relating to the offering - known as the "white paper". The white paper will also set out the fundraising target which the token issuer expects to achieve. The token issuer will then raise funds by issuing the coin or tokens on a blockchain network in exchange for investor cash (which may be in the form of conventional fiat currency or, in some cases, other cryptocurrencies). Once the token issuer has achieved its target fundraising goal, the funds raised will be invested in the project described in the white paper.

ICOs IN THE BVI

Structuring an ICO or ITO through a BVI business company offers a number of advantages which have made the BVI an attractive jurisdiction for offerings and the BVI has seen a number of highly successful launches in recent years. For example, the Settle Network recently selected the BVI as the jurisdiction from which it would issue its Argentine peso- and Brazilian real - backed stablecoins – the first stablecoins issued in each of those jurisdictions.

The use of a BVI business company brings with it all of the standing advantages associated with BVI business companies, including:

- corporate flexibility and efficiency enshrined in the modern and commercially minded BVI Business Companies Act (BCA) and other BVI companies law;
- the absence of capital control and maintenance rules, allowing for the free flow of funds in and out of the company;
- tax neutrality;
- low incorporation and annual company maintenance costs relative to similar jurisdictions
- efficient company maintenance;
- continuing obligations for BVI companies and their officers and owners are commercially progressive and non-onerous, and, for the present at least, most traditional ICO and ITO forms would not be subject to additional securities or public offering regulations under BVI law; and
- "transaction fluency" - as the largest offshore corporate domicile the BVI enjoys the presence of a strong professional services community of lawyers, accountants, and corporate services providers. Transactions are professionally handled, and transaction fluency is optimised.

PROGRESSIVE REGULATORY APPROACH

What significantly distinguishes the BVI from other IFCs however is the approach taken by the BVI Financial Services Commission (FSC) to the regulation of cryptocurrencies, tokens, and other digital assets. Unlike in jurisdictions, where specific regulation in relation to digital assets and related activities has been introduced, the FSC has chosen a more progressive approach for the BVI as outlined in its Guidance on the Regulation of Virtual Assets in the Virgin Islands published in July 2020.[1]

The Guidance takes each major piece of BVI financial services legislation in turn and seeks to clarify how each should be interpreted and applied in relation to cryptocurrencies, tokens and other digital assets, with the result that the regulation of digital assets and related activities in the BVI can be considered on a case by case basis. Therefore, the fact that a particular activity might involve cryptocurrency, tokens or other digital assets does not mean that the activity would be regulated simply by virtue of that fact alone.

In addition to the BVI's progressive regulatory approach, other aspects of BVI legislation help foster the success and attractiveness of the BVI as an ICO jurisdiction. The flexibility and efficiency of the BCA has already been noted, but there are other legislative examples too. Since everything in relation to the launch and conduct of an ICO or ITO will be done on an electronic digital platform, the utility of the provisions of the BVI's Electronic Transactions Act 2001 (ETA) relating to electronic signatures and record keeping requirements is of fundamental importance. In very general terms the ETA underscores that electronic contracts and records will not be denied legal validity in the BVI simply because they are maintained in electronic, as opposed to paper, format and that transactions of all kinds can be executed by electronic exchange. The ETA is also shortly due to be further updated making it even more conducive for today's digital economy.

While the BVI has not as yet introduced any legislation which specifically regulates digital assets, it has introduced legislation aimed at assisting fintech orientated businesses, which could include certain digital asset and other blockchain based businesses, that may be caught by and subject to regulation under SIBA, FMSA or other BVI financial services legislation.[2] The Financial Services (Regulatory Sandbox) Regulations, 2020 (the Sandbox Regulations), which came into effect from 31 August 2020, would be relevant to persons operating or proposing to operate a business that uses "innovative fintech" (which essentially means new technology that creates, enhances or promotes financial products or services) which might otherwise be subject to licencing and regulation under existing BVI financial services legislation. Subject to fulfilling certain criteria set out in the Sandbox Regulations, persons operating such innovative fintech businesses may apply for inclusion in the "regulatory sandbox"

[1] The BVI Financial Services Commission has informed the industry that they will be regulating virtual assets service providers (VASP).

[2] The FSC has announced that it will be shortly regulating VASPs.

created by the Sandbox Regulations, in which they will be temporarily exempted (for a period of 18 months, which may be extended to 24 months) from the otherwise applicable licensing requirements, provided that they operate subject to some limited regulatory oversight, within a clearly defined business plan and with a limited (and set) number of clients. At the end of the sandbox period, the business must then apply for the otherwise applicable licence – but a successful and compliant sandbox participant is likely to looked on favourably in that respect.

Accordingly, even where an activity may be considered to be within the scope of financial regulation, it may be possible to 'sandbox' that activity, such that full compliance with BVI financial services regulation can be delayed while the fintech is tested.

FUTURE CONSIDERATIONS: DAOs AND LAOs

First proposed in 2013, a decentralized autonomous organization (DAO) is a concept of a digitally organised business whose decisions are made electronically by a written computer code or through the vote of its members. In essence it is a system of hard coded rules that define which actions an organization will take. While the two are often considered to be interlinked from genesis, the DAO concept actually predates many blockchain technologies, but it was those technologies that enabled the DAO concept to achieve some form of practical reality. Blockchain technologies introduced the concept of a secure digital ledger, which could track all interactions of its members across the Internet and thus provide a safe and secure environment to build a DAO.

However, while the first generation of DAOs was philosophically and technologically innovative, none had any real clear legal basis, which caused significant issues when some experienced fraudulent attacks or other difficulties, creating knotty legal questions on liability for the loss of funds. As a result, the original DAO concept has progressed into a next generation form, the limited liability autonomous organization (LAO) – which, in essence, is simply a DAO within a corporate wrapper, the first LAOs used Delaware limited liability companies and while these remain the vehicle of choice, some recent LAOs have also used other jurisdictions foundation companies and limited liability companies as wrappers with success.

The flexibility of the existing BVI Business Companies Act is such that the concept could be accommodated without significant legislative change or the introduction of new laws. However, given the existing popularity and qualities of the BVI as a digital asset friendly jurisdiction and the encouragements to fintech related business provided by the Sandbox Regulations, some judicious legislative development to facilitate the LAO concept might make the BVI a leading jurisdiction for the establishment of these organizations.

KEEPING THE BVI AT THE FOREFRONT OF FINTECH

The BVI has, to date, been served well by its wait-and-see approach to the regulation of cryptocurrencies and digital assets. By relying on its book of traditional regulation and only

seeking to regulate digital assets that were closely analogous to real-world regulatable assets, the BVI was able to create an environment in which the digital asset industry was able to thrive. This environment was only enhanced, and the confidence in the jurisdiction of the industry and business advisors increased, when the FSC issued the Guidance, confirming that it would not seek to extend the settled understanding of the regulatory legislation to regulate the industry by the back door.

Nevertheless, the BVI has shown itself to be an adaptable and forward-thinking jurisdiction through the introduction of the Sandbox Regulations, which will enable the BVI to maintain its position at the forefront of the fintech revolution. While we believe the jurisdiction would benefit significantly from further development in the area, in particular in the DAO/LAO sphere as discussed above, the pace of gradual, careful reform that has been taken so far has put the BVI in a better position than many of its competitor jurisdictions to reap the benefits of the global increase in focus on digital assets and fintech. We are confident that, with the right partnership between lawmakers, industry, and local practitioners, the BVI will continue to be a pioneering jurisdiction in the digital sphere. ■

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DIGITAL ASSETS AND THE BVI

By **LODEWIJK VAN SETTEN**

DIGITAL ASSETS AS FINANCIAL ASSETS

Global regulatory frameworks in financial services have developed to manage the issuing, trading, transferring, and holding of currencies, securities, and financial contracts in the form of options, forwards, and swaps. Securities and financial contracts are often referred to collectively as "financial assets", that is, some form of tradeable financing instrument. In the world of traditional financial assets, the question whether the business at hand was regulated as a fund, a broker, a bank, or a payment services provider could have been occasionally vexing. Lately, with the rise of FinTech, decentralised finance, and cryptographic assets, the challenge has increased significantly.

With hindsight, determining the perimeter of traditional financial services regulation can be said to have been relatively straightforward. Not so in the crypto world, which has raised a wide range of complex questions. Is a decentralised network of "nodes" some form of undertaking? Is a "smart contract" deployed on that decentralised network a financial asset? Should the ability of a person to acquire a token (that undeniably has monetary value, but exists only as a script logged on decentralised block chained network that is not controlled by a single operator) be equated to the offering of a financial asset to that person?

Around the world, legislators and regulators have been grappling with these questions. The most far-reaching attempt to date appears to be the European Commission's proposal for a Regulation "on Markets in Crypto-assets", a proposal that seeks to address a variety of applications ranging from simple coins and stable coins, to tokens that reference real world assets. Despite efforts such as this from the EC, significant challenges remain for individual financial centres to manage when it comes to regulating digital assets.

VIRTUAL ASSET SERVICE PROVIDERS LAWS

Digital assets raise significant challenges in an anti-money laundering context. The Financial Action Task Force (FATF), with support from the G20, issued standards in June 2019 aimed at the prevention of the misuse of virtual assets for money laundering and terrorist financing purposes. In FATF's context, the term 'virtual asset' refers to "any digital representation of value that can be digitally traded, transferred or used for payment. It does not include the digital representation of fiat (government-issued) currencies". In response, jurisdictions around the world have implemented the FATF recommendation by way of legislation commonly referred to as Virtual Asset Service Providers (VASP) Laws.

The key question under the VASP laws is whether the entity that handles virtual assets in some form is providing a "virtual asset service" within the meaning of the applicable VASP law. If it is, the provider will need to be registered or licensed with the relevant national competent authority. A "virtual asset service" is typically defined in line with the FATF recommendation as the issuance of virtual assets, the business of fiat-to-crypto or crypto-to-crypto exchange services, crypto custody and administration services, and or services such as asset management or brokerage services that concern virtual assets. To date, the British Virgin Islands has not implemented a VASP law, but it is expected that the FATF's recommendations will be implemented in the BVI fairly soon.

DIGITAL ASSETS AND THE BVI'S TRADITIONAL FINANCIAL SERVICES FRAMEWORK

Anyone conducting business that involves digital assets in or from the BVI may need to consider, separately from any implementation of a VASP law, whether a licence or approval is required under existing primary financial services legislation. Firstly, The Securities and Investment Business Act, 2010 ("SIBA"), which regulates investment business, that is, broker-dealers, investment management and advice, custody and administration, and the operation of an exchange. SIBA provides that, subject to certain exclusions, no person shall carry on, or hold out as carrying on, investment business of any kind in or from within the British Virgin Islands without the requisite licence.

Secondly, The Financing and Money Services Act, 2009 ("FMSA"), which regulates financing and money services business. The FMSA provides that a person shall not carry on, or hold out as carrying on, financing or money services business unless the person is a BVI business company or foreign company and is licensed under the FMSA.

Digital assets do not neatly fit into traditional regulatory definitions of financial assets and this is not different under SIBA and the FMSA. To aid interpretation, the Financial Services Commission ("FSC"), the BVI's principal financial services regulator, published "Guidance on Regulation of Virtual Assets in the Virgin Islands (BVI)" in July 2020. In relation to SIBA, the FSC's guidance clarifies that if a digital asset can be equated to a traditional financial asset, depending on whether the activity involved is an investment activity, that this person may need to be licensed. Simple coins would not normally be equated to traditional financial assets under SIBA, but stable coins may, for instance.

Based on the FSC's guidance, it is also clear that digital asset (price index) futures or other (listed) derivatives, if made on a centralised exchange that matches users, could qualify as traditional financial assets under SIBA. The position in relation to transactions effected via a properly decentralised automated market maker, where the "chain" and not another person is the counterparty, remains to be determined.

The position in relation to the FMSA is more straightforward. The FSC's guidance states that the FMSA does not apply to transfers and exchanges of digital assets. In other words, to constitute money services business within the meaning of the FMSA, that business would need to concern fiat money. Notwithstanding, the FSC also notes in its guidance that "considering the impending launch of the Regulatory Sandbox, the views and guidance of the FSC should first be secured before proceeding with the activity in or from within the Territory".

THE REGULATORY SANDBOX

The need to better regulate digital assets has led to the FSC launching a special regulatory approval category known as the "Regulatory Sandbox". The Regulatory Sandbox, which came into force on 31 August 2020, is designed to offer providers of innovative tech-oriented financial services business models, whether the business is in scope of the existing financial services legislation or not, an option to test that model with the FSC's stamp of approval.

There are five testing categories: FinTech Credit Services, Payments, Investment Management, Securities, and Insure Tech. Applications are open to BVI companies and limited partnerships, foreign companies, BVI licensees, and any other person that the Commission may decide to approve to participate in a Regulatory Sandbox. In each case, the essential criteria is that the applicant is proposing to engage or is engaged in "innovative FinTech".

The FSC has indicated that in assessing and approving an application for a Regulatory Sandbox, its focus will be on the management of the risks associated with the proposed FinTech business model. Accordingly, the Regulatory Sandbox is not intended as an open-ended "incubator" Sandbox but as a testing ground for reasonably well-defined (start-up) business models that will be resourced properly.

Once accepted to the Regulatory Sandbox, the participant is exempted from the provisions of financial services legislation that might otherwise apply (with the exception of the rules and regulations relating to the combatting of money-laundering and terrorist financing). In this manner, participating in the Regulatory Sandbox brings certainty to those businesses that are currently out of scope of the financial services legislation but might be brought in scope, e.g. if the views on what type of crypto assets constitute "investments" or not, or if crypto coins are equated to fiat money for purposes of the financial services legalisation.

DIGITAL ASSETS AND BVI INVESTMENT FUNDS

The Securities and Investment Business Act also regulates the business of open-ended and closed-ended investment funds. FSC approval is required for doing business in the BVI as an open-ended mutual fund or closed ended private investment fund.

In all cases, the key determinant is whether the vehicle "collects and pools investor funds for the purpose of collective investment". Accordingly, the SIBA perimeter for funds is asset class agnostic. Whether or not a vehicle requires recognition or approval as a fund will not depend on the character of the property acquired for purposes of collective investments, and therefore does not necessarily exclude funds that invest in digital assets. Indeed, funds that invest in digital assets have been a staple of the BVI fund world since the crypto sector first took off.

The BVI's fund recognition and approval regime features a number of flexible categories. In the open-ended space, the incubator fund is designed to launch new investment strategies. It offers a two-year licence (with an extension option of up to 12 months) which permits the establishment of a track record. The approved fund permits a private offering to a small group of investors, limited to 50 investors at any one time or be marketed on a private basis only. That means a private fund may be a pragmatic solution for a closed circle crypto sector offering. The professional fund permits offerings to 'professional investors' only, with a minimum initial investment not less than US$100,000.

A BRIGHT FUTURE

The global cryptocurrency market – just one part of digital assets – is forecast to rise from US$750 million in 2019 to US$1.75 billion by 2027. Through its existing well-established regulatory and legislative framework, combined with innovative new concepts such as the Regulatory Sandbox, the BVI is uniquely well-placed to serve this growing market and act as home to the digital asset funds of the future. ■

Lodewijk Van Setten
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Lodewijk's expertise ranges across the regulatory spectrum from authorisation and regulatory expectations of governance models to anti-money laundering and terrorist financing requirements, sanctions, exchange of tax information (CRS and FATCA), economic substance requirements, reporting of beneficial ownership and data protection regimes.

SPACs IN 2021: A NEW MODEL FOR PRIVATE EQUITY

By **MICHAEL KILLOURHY**

Opportunities for the BVI are emerging as Private Equity embraces the Special Purpose Acquisition Company market following a record year.

"Unprecedented" was the much-used word of 2020, describing the many new challenges the world has faced, but also in referencing in a more positive connotation, the rise of the Special Purpose Acquisition Company or SPAC as they have become widely known as. Last year was a record year for SPACs in the United States. According SPAC Insider, one of the industry's leading data sources, nearly $40 billion in gross proceeds were raised from 99 SPAC IPOS in 2020. That compares with $13.6 Billion in gross proceeds from 59 SPAC IPOs in 2019 and $10.8 Billion raised in 2018 from 46 IPOs. That 2018 and 2019 were both seen as bumper years justifies the use of "unprecedented" in describing the surge in the use of SPACs in 2020.

As SPACs enjoyed their record year, a number of Venture Capital (VC) and Private Equity (PE) firms showed increasing interest in incorporating SPACs into their investment and structuring toolkits. The summer of 2020 saw a number of PE backed SPAC launches and announcements of proposed launches, with positive momentum continuing into 2021. If these SPACs prove successful, then the SPAC could become a major part of how PE does business over the next decade.

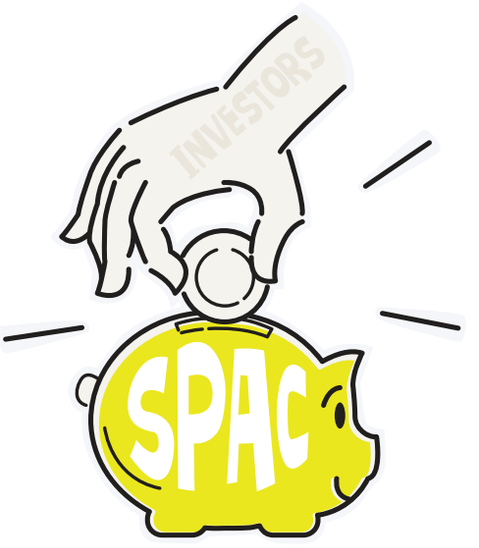
As an already important, favoured jurisdiction for SPAC incorporations, the embrace by PE represents a tremendous opportunity for the British Virgin Islands.

WHAT IS A SPAC?

A SPAC is a derived form of what is known in the US as a "blank-check company" – a company formed with no business purpose or undertaking other than to raise funds for some future undefined object. A SPAC is created by its initial sponsors for the purpose of raising funds through an IPO, which will then be used to buy an existing business. The money raised in the SPAC's IPO must be held in an interest-bearing trust account until a suitable target business is identified, at which point, that money can then only be used to fund the target's acquisition. The SPAC itself has a limited time in which to identify a target and complete its acquisition, usually between 18- and 24-months post IPO. If the SPAC fails to complete an acquisition by the applicable deadline, the funds raised in the IPO are returned to investors with interest. Investors also have the right to redeem their shares and receive back their original investment immediately before an acquisition takes place if they do not want to participate.

SPAC IPOs are structured as sales of "units" comprising both shares and derivative securities (usually warrants exercisable following an acquisition and/or "rights" that automatically convert into bonus shares following an acquisition). The units initially trade as a single security, but later, usually 52 days after the IPO, their component securities are allowed to trade separately.

The majority of SPAC listings have occurred in the US, predominantly NASDAQ, but SPAC activity is not confined to the US and SPACs have also listed on other world exchanges – including Canada and the UK.



UNIQUE OPPORTUNITIES

SPACs offer unique opportunities all round. For Investors (particular those seeking hedging options), the redemption return on pre-acquisition SPAC shares offers a relatively attractive yield with minimal risk (given the security of the trust account and redemption rights). As pre-acquisition SPAC shares typically trade at a discount and carry the right to the accrued interest in the trust account, their pre-acquisition redemption yield is comparable to those of US Treasuries. SPAC units though also carry features that give them clear advantages over Treasuries and similar hedges. As SPAC units will eventually separate into their component securities, this means that an investor may redeem his shares to receive back his investment prior to an acquisition, but still keep his warrants or rights alive – this means, in effect, that units grant a free option to participate in the post-acquisition business, allowing investors both safety and a chance at the upside of any deal.

What has made SPACs particularly popular at present is the opportunity they offer for those on the other side of the SPAC equation – potential targets. While the SPAC might be the purchasing entity, being acquired by a SPAC is actually a form of reverse takeover. Shareholders and management in the target will usually receive shares in the SPAC as part of the purchaser consideration (and in some cases become the majority shareholder group) and a number of members of the target's board will likely join the board of the listed entity. The target will therefore, in effect, reverse into the SPAC's listed status. Being acquired by a SPAC is therefore a real alternative to a traditional IPO for companies seeking to go public – and a number of those companies have actively courted SPACs as a potential conduit to market.

Traditional IPOs are still of course how many companies choose to go public, but that route is an increasingly expensive and time-consuming process. Furthermore, in recent years, some of the pricing and valuation methods employed by bankers and underwriters in traditional IPOs have received adverse scrutiny. Conversely, taking a private company public via the SPAC route can be managed on a faster timeline, for less cost and with more certainty around a company's valuation and equity capital raised.

THE PERFECT STORM

The record levels of SPAC activity seen in 2020 were partly a result of a perfect storm for SPACs in the US. Notwithstanding significant fluctuations during the first half of 2020, US capital markets remained buoyant and many private businesses were still drawn to the opportunities a listing may bring. However, taking on the cost and time burdens of a traditional IPO and the inherent pricing / valuation risk during a pandemic, made it much less appealing. The alternative SPAC route to listing, by contrast, however, is proving much more attractive.

This new effect also comes after two strong years for SPACs in "ordinary times." Increasingly, a number of big name investors are associated with SPACs and a number of significant, high profile acquisitions by SPACs, to include Virgin Galactic, electric vehicle maker Nikola Corp and Luminar (acquired by a Gores Group SPAC at a value of around US$ 3 Billion). The increased level of interest in SPACs as an alternative IPO route has in turn increased overall interest in SPACs, helped cement their improved reputation, and has led to the current IPO boom we are now witnessing.

SPACs AND PRIVATE EQUITY

While some believe that the current popularity of the SPAC is a fleeting new trend, its foundations go back, in the case of this present incarnation, more than three decades.

SPACs first boomed in the 1980s but became mired in a number of financial scandals during the latter years of the decade. A better regulated SPAC market grew in the first decade of the 21st century (with SPACs accounting for almost 25% of all US IPOs in 2007) but this fell victim to the credit crunch and recession of 2008. The current resurgence in SPAC activity started in 2012 and has seen steady year-on-year growth, based primarily on the tangible advantages of SPACs over more traditional investment structures and methodologies.

SPACs can certainly provide general investors access to investments in acquisitions, buy-outs and other types of investment transaction which might otherwise be restricted to PE or VC funds, and it is interesting to note that these funds themselves are now looking to use SPACs in their own strategies. While the philosophy and goals behind a SPAC and typical PE or VC acquisition and management structure are not dissimilar, SPACs arguably have a number of key advantages over some of the traditional structures used by PE and VC firms for investment.

Firstly, SPACs offer limited risk and certainty of return during their pre-acquisition phase. Investors have the security and certainty of the return liquidation from the funds held in the trust account if the SPAC fails to complete an acquisition or the investor does not want to participate in one. Second is greater liquidity. SPAC investors benefit from the liquidity of publicly traded securities and the ability to control the timing of an exit. SPACs also offer high incentivisation, whereby pending an acquisition, there is typically no cash compensation paid to the SPAC's management team. Finally, SPACs offer additional leverage with the inclusion of additional securities, such as warrants in SPAC issued units, which give investors the ability to leverage their initial investment by enabling them to invest more capital at pre-determined price (premium to the IPO price), even if the investor elects to receive back its capital in a pre-business combination redemption or tender offer.

These advantages have led to a number of PE firms now incorporating SPACs in their toolkits. In September 2020, for example, Apollo Global Management (a major PE player with over $400BN assets under management) registered a new SPAC which plans to raise $750M. Apollo's move follows a summer of SPAC related activity by established PE firms, including: RedBird Capital's launch of a SPAC in August 2020 that aims to acquire a professional sports team; Solamere Capital announcement that it plans to raise up to $300 million for a new SPAC; and reports in late August that TPG Capital is planning a pair of SPACs focusing on tech and social impact deals.

BVI SPACs

While most US-listed SPACs are incorporated using Delaware corporations, for non-US sponsors (founders) seeking targets outside the US, a SPAC incorporated outside the US might be an appropriate alternative. These alternatives may offer a more efficient post acquisition structure and remove any additional US tax, legal or regulatory implications that may arise simply as a consequence of using a US vehicle. The SEC, NASDAQ and other relevant US exchanges allow for rules concessions for non-US issuers which qualify as "Foreign Private Issuers," and for foreign entities to follow more flexible home country rules – thus allowing overseas concerns to access the US markets and be listed there, but without being subject to the full panoply of US legal and regulatory strictures.

NASDAQ and other leading exchanges allow listings by SPAC entities formed in most of the leading offshore jurisdictions, including the British Virgin Islands. The BVI is a particular favourite jurisdiction based on several factors, including: the particular suitability of BVI company law to SPACs; limited additional regulatory compliance requirements; tax neutrality; and the close similarity between aspects of BVI and Delaware company law – which allows for an easy translation of existing standard legal forms and investor understandings from one jurisdiction to the other. Notable BVI SPACs of 2020 include East Stone Acquisition Corp.'s $138M IPO and Kismet Acquisition One Corp's $250M IPO in August. East Stone is particularly notable in that it is expected to make an acquisition in the digital assets space – one of the first to do so.

BVI SPACs have also pioneered novel SPAC features such as "rights", "fractional warrants" and the ability to extend SPAC life spans several years ago. The first India-focussed SPAC in recent years was a BVI company, as was the SPAC that resulted in the first ever NASDAQ listed Chinese finance business in 2016, and in 2018 a BVI SPAC, National Energy Services Reunited Corp, completed a unique simultaneous double business combination when it acquired two Middle Eastern oil businesses with a combined value over $1.1BN.

Clearly the appetite for SPACs in 2021 is showing no sign of slowing and the trend for use in Private Equity transactions is a growth opportunity for the BVI as more PE and VC firms realise the advantages and benefits of adopting a BVI SPAC. ■

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Michael is widely recognised as one of the BVI's leading public company experts and its pre-eminent special purpose acquisition company expert. His expertise in this area has been recognised internationally with him being invited to take prominent speaker roles in the SPAC industry's premier international convention, as well as being frequently published in leading capital markets journals.

FUND INNOVATION AND INCUBATORS IN A DIGITAL WORLD

By **CHRISTIAN HIDALGO** and **SIMON GRAY**

In this article, Christian Hidalgo, and Simon Gray revisit these ever-popular funds with hedge fund managers and family offices focusing on their new popularity with crypto and digital investors.

Ever been told you have 20-20 vision? Well what about 20-20-20 foresight?

Innovation is not new to the British Virgin Islands (BVI) – in fact, the jurisdiction is rather used to it – take their Private Investment Fund regime launched in 2020 which brought a new regulatory regime for close-ended funds. This coupled with its welcome 2020 "white-listing" on economic substance by the European Union bodes well for the continued business growth trajectory. Not long ago, the BVI introduced a new regime for Incubator Funds – often known as 20-20-20 funds.

This structure was devised in 2015 before anyone had even heard of a Bitcoin gained full popularity, but fortuitously it provided the perfect set-up for light-touch, short-term crypto vehicles. The BVI incubator fund incorporates a '20- 20-20 criteria' – it allows a maximum of 20 sophisticated investors, each of whom must make a minimum initial investment of USD20,000 but the fund must not exceed a cap of USD20 million in terms of the aggregate value of its investments.

The BVI has one of the largest cryptocurrency markets in the world, featuring in the top five geographical markets by US$ denominated trade volume, as indicated by CoinShares Research CryptoReport.

INNOVATION IS KEY

The crypto hedge fund is a new phenomenon, created by entrepreneurial investment managers looking to take advantage of the huge gains that cryptocurrencies have experienced over the last three years. At present, the sector is still in its fledgling phase. A 2019 report by PwC estimated that there are fewer than 200 active crypto hedge funds collectively being managed today, with only USD1 billion in total assets under management (AUM).

It seems more a sector for plucky managers who see the potential in the asset class for now – the average crypto hedge fund team is seven to eight people, managing just USD21.9 million in AUM according to PwC. That said, the cumulative average investment management experience for crypto funds is 24 years, indicating that an increasing number of experienced investment professionals are moving into the space. The BVI is home to one in six of these crypto hedge funds – in fact it is a top three jurisdiction for such funds, according to PwC. So why are start-up investment teams choosing to domicile their new funds in the BVI and what do we foresee for the future of the asset class?

A GREAT FIT

Indeed, the most popular fund structure that crypto hedge fund managers are choosing in the BVI is the incubator fund. It provides the ability to setup and run a cost-efficient legal entity for trading an investment strategy with limited on-going obligations. This product appeals to the increasing number of pioneer managers who are looking to gain a track record before converting the Incubator Fund to a more sophisticated fund product. It works well for the growing fintech and crypto-asset fund type.

Hedge fund managers are often attracted to this structure as offshore funds are typically subject to significant administration costs and high levels of supervision, whereas the BVI incubator fund minimises initial requirements so as to enable start-up crypto managers to come to market faster and more seamlessly.

TAKING ADVANTAGE OF THE CRYPTO BOUNCE

While many hedge fund managers enjoyed the 2017 highs of crypto assets, the recent months have been more challenging with greater volatility – particularly with Bitcoin. That said, things are looking up once again thanks, in part, to the mainstream acceptance of crypto assets and the spectre of Facebook having launched its own crypto currency, Libra. Longer term the prospect of looming regulation may impact this going forward.

Tesla, the electric car company headed by billionaire Elon Musk, has become the first Fortune 500 corporation to get Bitcoin exposure to its balance sheet as it bought $1.5 billion in Bitcoin. Tesla has become the second corporation to add Bitcoin to its balance sheet, a trend started by the business intelligence company MicroStrategy, which already received a massive return on its Bitcoin investment

To take advantage of this bounce, hedge fund managers will be seeking jurisdictions that do not over-regulate but rather support and encourage the asset class – and the BVI is doing just that and its progressive FinTech and Sandbox regime (which allows businesses to trial new products and services under the supervision of the BVI FSC without the need to apply for a license to conduct financial services business) is testament to this fact.

LIGHT-TOUCH REGULATION

Incubator Funds and Approved Funds were introduced in the British Virgin Islands under the Securities and Investment Business (Incubator and Approved Funds) Regulations, 2015. Both are lightly regulated fund products reflect the Financial Services Commission's awareness of global funds market trends and are designed to meet the needs of the asset management industry reinforcing its commitment to ensuring that the BVI remains a pre-eminent, dynamic and attractive domicile for investment funds products which maintaining best practice in international standards. These funds have answered the call for a recognised need in the market for a lightly regulated investment vehicle that can easily grow along with a first time or start up manager as their business and assets under management grow.

THE NEED FOR SPEED

The new fund structures are designed to facilitate rapid and cost-efficient setup, with reduced requirements as to fund service providers and an accelerated FSC approval process. Incubator and approved funds can be brought to market very quickly. The Regulations provide that the funds can commence business two days after submitting the application to the Commission, provided that the application is complete, and the Commission does not raise any questions in this two-day period. The reduced establishment and operating costs, speed to market and the flexibility to appoint only such service providers as the fund itself requires for commercial reasons, make incubator and approved funds welcome additions to the suite of BVI fund products.

EASE OF OPERATION

An incubator fund does not need to appoint an administrator, custodian, investment manager or auditor providing significant cost advantages. Provided it continues to meet the 20-20-20 criteria, the Incubator Fund can operate for a period of two years (which may, on application to the FSC, be extended by one additional year) before it needs to either convert to a more sophisticated structure, such as an Approved Fund (see below) or a private or professional fund, or wind-up its operations.

An incubator fund is required to provide a written description of its investment strategy and a document containing certain risk warnings to investors, but it is not required to have an offering document. Restricted to sophisticated private investors and so perfect for savvy hedge fund and crypto investors. If an incubator fund exceeds the maximum number of investors or the maximum NAV thresholds over a period of two consecutive months, it is required to submit an application for conversion into a private, professional, or approved fund.

APPROVED FUND

The approved fund is aimed at managers seeking to establish a low-cost, unsupervised fund for the longer term, but on the basis of a more private investor offering. The approved fund is particularly suited to family offices.

An approved fund is suitable for sophisticated private investors and has a net assets cap of US$100M and no more than 20 investors are permitted, but with no minimum investment criteria. An approved fund may operate without appointing a custodian, investment manager, or auditor, but unlike an incubator fund will need an administrator. An "Approved Fund" is similar to a BVI private fund, but is subject to less stringent regulation, has no requirement for an auditor, has lower on-going costs, and targets investment managers originating out of the family office/friends and family market.

An approved fund may, at any time, voluntarily apply to the Commission for recognition as a private or professional fund, and is required to convert into a private or professional fund if it exceeds one of the applicable thresholds over a period of two consecutive months.

CONCLUSION

Hedge fund managers are starting to make a name for themselves using crypto assets, working with great minds to develop smart assets and the BVI is dedicated to ensuring that the managers are not stymied by unnecessary bureaucracy in this process. Its Sandbox regime is testament to this business-friendly approach. Clearly, the BVI is making its place as one of the preferred jurisdictions when looking to establish an enterprise in the fintech, blockchain or digital asset space and continues to make itself the global hub for this exciting type of investment. We look forward to continuing making the BVI the global hub for this exciting type of investment into the future.

In the future we may see such developments come to include areas such as asset preservation and recovery in situations such as fraud, corporate and shareholder disputes in multiple jurisdictions and international arbitral award challenges, recognition and enforcement. ■

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His area of expertise includes banking and finance, advising financial institutions and corporate borrowers, corporate finance, funds compliance, real estate investment funds, advising on legal and regulatory aspects of fund launches and joint ventures, property finance, listing specialised debt and asset-backed securities.

Prior to joining the firm in November 2018, Christian worked for Carey Olsen Jersey in their banking and finance department.

Simon Gray
Head of Business Development and Marketing, BVI Finance

As part of his role, he leads BVI Finance's efforts to promote the territory's international business and finance services locally and overseas.
Prior to joining BVI Finance, he was Special Adviser to the Chief Executive Officer of the BVI Financial Services Commission (FSC)
Gray is an expert in Islamic Finance, a public speaker and published author He has spent much of his working life in the private sector with senior roles at Baring Asset Management and Barclays Wealth.

BANKING ON THE FUTURE

By **DEON VANTERPOOL**

Building on the strength of its financial services and legal system foundation, the British Virgin Islands (BVI) has established itself over the years as the leading International Financial Centre (IFC) with a vast network and variety of registered companies from across the globe. Thus, there is a unique opportunity to become the beacon of the Digital Economy characterized by business innovation and driven by financial technology (FinTech). As the BVI Finance CEO, Ms. Elise Donovan, aptly commented upon receiving the "Best Offshore Financial Services Provider Global 2020" award, the BVI's success "was due to its resilience and constant drive to adapt and innovate to meet the needs of clients in the changing global regulatory landscape."

This jurisdiction is poised to expand the financial services' ecosystem' through modern banking services. The BVI will move to the next level of success by providing banking solutions for the areas of funds, crypto-digital assets, trusts, and a wide range of financial services.

DEVELOPING THE BANKING ECOSYSTEM

The BVI has a unique opportunity to scale its financial services and legal system to become digital champions in the respective industries. Building out the ecosystem will allow the diverse industries to further develop the value chain with vertical integration. Having recently been granted a General Banking License, the Bank of Asia is provided with the opportunity to service both domestic and international clients. As such, the Bank of Asia is partnering with several industry firms to raise the value proposition for client service offerings through vertical and horizontal integration which will provide essential banking and value-added financial services. In line with this value proposition, the Bank of Asia is formulating a recipe to shape tomorrow's global landscape with the BVI financial services community's strength. Imagine a fund operated and managed from the BVI; banking served from the BVI, investors/targets linked to the BVI and delivered by its well-respected legal system.

The Bank of Asia is expanding beyond traditional banking products to offer insurance, wealth management, corporate advisory, and capital structuring services. Banking shortly will represent an ecosystem, a negotiating table unlike any other in the British Virgin Islands.

In the last issue of this magazine, the law firm Carey Olsen highlighted in its article the "Five Things the BVI Must Get Right" regarding FinTech, namely (1) the overall regulatory regime, (2) sandboxing, (3) anti-money laundering, and know your client regimes, (4) physical and digital infrastructure, and (5) data protection and cybersecurity. We fully agree with this analysis, especially as it relates to banking, and would like to add that the BVI is quickly making progress along each of these lines. The BVI, as a leading International Finance Centre, introduced a FinTech Regulatory Sandbox, which provides financial institutions and start-up companies with guidelines and infrastructure to test new products and services.

Many major jurisdictions across the world have successfully used sandbox platforms to conduct proof-of-concept pilots. For instance, sandboxes have been used to spur several significant initiatives on Virtual Bank and Open API Banking, ePayment and eWallet, Digital Ledger applications such as mortgage and trade, AI-based Robo-Advisory, credit scoring and AML, electronic ID for banking, among others. The lessons learned from these initiatives can serve as useful references for financial regulators in the BVI and elsewhere.

FROM ONSHORE/OFFSHORE TO CYBERSHORE

As the saying goes, challenges always bring opportunities. The prevailing COVID-19 pandemic has served as an accelerant for digitalization and has made "work-from-home" or "work-anywhere" a reality. Onshore and offshore notions have begun to merge and evolve into a new "Cybershore Banking" business model, for people are getting used to collaborating effectively remotely over cyberspace. Regulators have also come to terms with the "4th Industrial Revolution" driven by the so-called "ABCD of Innovation," i.e., AI, Blockchain, Cloud, and Data (big and small). We touch on all these trends throughout this article.

CRYPTOCURRENCIES AND DIGITAL ASSETS

The BVI has more recently registered a growing number of companies involving digital assets and currencies. The Financial Services Commission (FSC) is proactively addressing the regulatory framework for crypto businesses, including mining, exchange, custody, and digital assets insurance. When that is entirely in place, the BVI will be champion of a new breed of digital finance and FinTech participants. With no legacy baggage to carry, the BVI is very well-placed to leapfrog directly to digital clearing and settlement services using Stablecoins, e-Payment/e-Wallet infrastructure, and marketplace. Both fiat and digital currencies, a digital exchange platform for Security Token Offering (STO) protected by Blockchain, and global Trademark and Intellectual Property (IP) services enabled by Smart Contracts. On top of the conventional corporate finance arrangements, the BVI can build a digital infrastructure for decentralized finance (DeFi) and invest more resources in Green Finance that is befitting its environmentally friendly image.

LOCAL AND INTERNATIONAL MARKETS

For the local market and perhaps also the greater Caribbean region, Bank of Asia and its payment industry partner are currently in an advanced stage of planning to launch an e-Payment/e-Wallet platform for B2B, B2C, and C2C transactions. The key objective is providing merchants and consumers, both BVI residents and visitors, a more convenient, cost-effective, and secure way to complete purchases of goods and services at Point-of-Sale (POS) outlets or through online shops. Underpinning this initiative, remarkably, is an electronic clearing and settlement network to facilitate the real-time transfer of funds across banks and then the e-Wallets.

The Bank believes such a network, for both fiat USD and its stable coin equivalents, is essential for the BVI to stay ahead of the digital economy in the time ahead.

BOA is fast expanding its product coverage for the offshore markets of a wide range of companies and entities. Besides the all-important operating accounts and demand deposits, the Bank has recently launched a high-yield term deposit product. It is slated to introduce a combined credit-and-debit MasterCard to its customers later in the year. Special attention will be on meeting the needs of corporates and Small and Medium-Sized Enterprises (SMEs). The ultimate beneficiary owners (UBOs) and directors who are mostly High Net Worth Individuals (HNWIs) satisfy their growing demands on wealth appreciation and protection. Accordingly, in addition to the more conventional asset classes like bonds, funds, and structures, the Bank is forming new business partnerships, including with some of its clients, offering digital alternatives such as crypto funds and ETFs, STOs, and utility tokens, as well as for cryptocurrencies primarily regulated coins and stable coins.

LOOKING AHEAD

To deliver the future of banking, financial services must invest heavily in people, processes, technologies and in growing its ecosystem of collaborators and partners in the years to come.

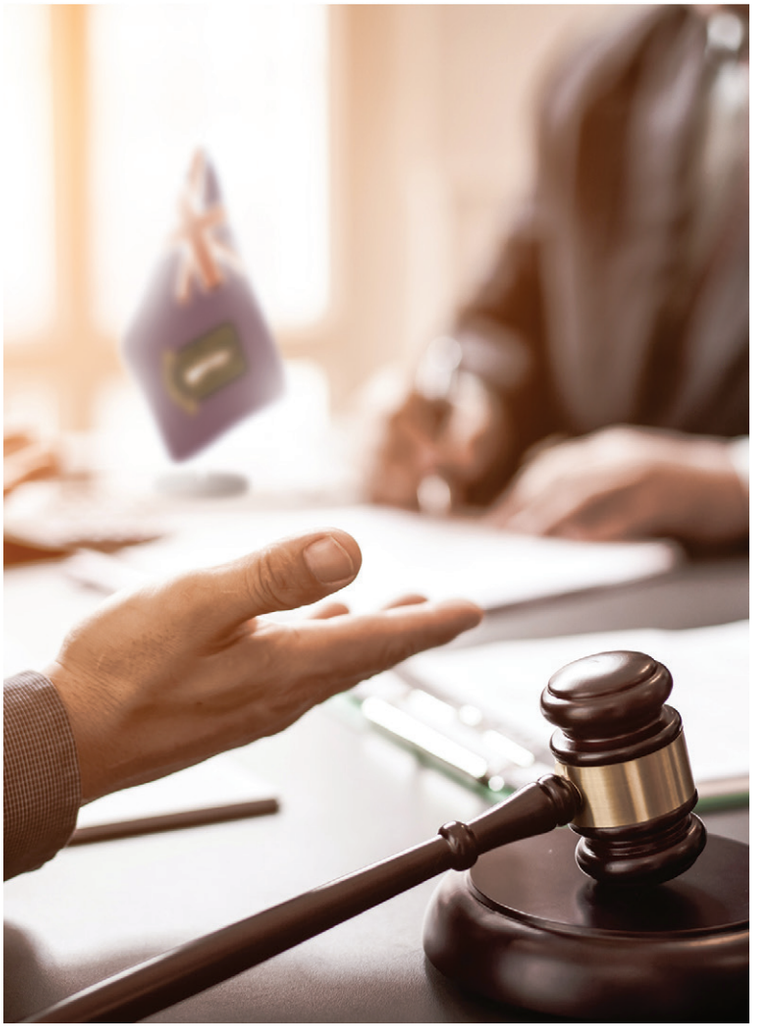
Bank of Asia is confident that, with the pandemic situation slowly but surely coming under control and everyday business activities gradually resume, many of the initiatives and plans will thrive and prosper for the digital economy development of the BVI as a whole in the future. ■

Deon Vanterpool
Vice President, Bank of Asia (BVI)

Deon Vanterpool has over a decade worth of executive success expanding organisations. He specializes in strategic operations as well as generating and managing wealth within international corporations and government agencies. of business development, human resources planning, project management and financial planning. Mr. Vanterpool holds an M.B.A. from Duke University's Fuqua School of Business, a B.A. in Finance from Morehouse and an ICA International Diploma in Governance Risk and Compliance.

MORE TO BVI TRUSTS

By **CHRISTOPHER MCKENZIE**



Over the passage of 20 years, the BVI has taken steps which have made it one of the world's leading trust domiciles.

It is well-known that the BVI is the world's leading corporate domicile, but, over the last 20 years, the Territory has incrementally also become one of the world's premier trust jurisdictions. Its original Trustee Act was first reformed in 1993 in order to make BVI trusts attractive to the jurisdiction's international clientele. Those reforms provided for:

- exemption from taxation and from public registration requirements
- settlor reserved powers and the grant of powers to protectors
- an extended perpetuity period (which was further extended to up to 360 years in May 2013)
- non-charitable purpose trusts and
- clarity in relation to the conflict of laws

The statute was further reformed in 2003 to make BVI trusts more popular by including provisions relating to:

- the facilitation of commercial transactions such as those with banks and other lenders
- the variation of trusts, i.e. to cater for changed circumstances
- more advanced features in relation to non-charitable purpose trusts
- more advanced conflict of laws provisions (and especially, cutting edge "firewall" provisions seeking to outlaw challenges against BVI trusts and their trustees based on "forced heirship" and matrimonial claims)
- charities

In 2003, the now-popular Virgin Islands Special Trusts Act made its appearance. This statute enables a special type of trust, known as the VISTA trust, to be set up in the BVI. VISTA effectively enables settlors, or those selected by them, to continue to run companies after placing their shares in trust and essentially requires the trustees to adopt a hands-off approach in relation to management matters.

VISTA is a bespoke trust regime which has been especially crafted for the ownership of shares in companies; it has proved to be extremely popular amongst settlors and trustees alike. It appeals to settlors because it enables their expectations to be achieved and it is popular with trustees since it protects them against the liability concerns which might otherwise arise from holding shares in companies which take decisions involving financial risk.

In 2007, the BVI's Financial Services (Exemptions) Regulations made their entry onto the statute book. Professional trustees had, since 1990, been appropriately and robustly regulated in the BVI and there are currently over 200 licensed trust companies in the BVI alone, of which more than 100 hold unrestricted trust licences. Licensed trustees must conform to strict regulations and are supervised by the BVI's Financial Services Commission.

If, however, a settlor does not wish a professional trustee to be the trustee of his or her trust, he or she has the option to set up their own private trust company to be trustee. The BVI's Regulations enable BVI companies to act as trustees of trusts without needing to be licensed if they fulfil two basic conditions.

First, neither the company nor anyone associated with it (other than directors) must, directly or indirectly, charge remuneration for its trustee services. Alternatively, the company must only be the trustee of a trust which has as its beneficiaries only the settlor, specified family members and/or charities. The second of the basic conditions which must be fulfilled is that the company must not offer its services to the general public.

BVI private trust companies are extremely popular and the BVI has become the jurisdiction of choice for PTCs. Further reforms to the VISTA regime were made in 2013 to make the establishment of such types of trusts additionally attractive (for instance by facilitating the conversion of foreign trusts into VISTA trusts); in 2013 the BVI also witnessed some amendments to its Trust Corporations (Probate and Administration) Act so that many BVI corporate service providers can now act as executors of wills.

Five new Acts relating to trusts and estates passed in House of Assembly

The BVI's laws relating to trusts and estates are constantly kept under review by a committee of the BVI branch of STEP which is called the Trust & Succession Law Review Committee. This was the Committee which made the proposals which led to the enactment of all the legislation referred to above. Some further pieces of legislation, which were also based on the suggestions of the Committee, were recently passed in the House of Assembly.

First we have the Trustee (Amendment) Act which includes reforms relating to variation of trusts, reserved powers, the jurisdiction's firewall offering and the flawed exercise of fiduciary powers (by placing the "old rule in the Hastings- Bass" on a statutory footing) .

Unique variation provision

The Act includes in it a ground-breaking new section empowering the court to vary trusts without the consent of adult beneficiaries. This power would be useful for when, say, a beneficiary cannot consent to an amendment to a trust's terms because this would have adverse tax consequences in the U.S.

The new variation provisions, which is found in section 58 B of the Trustee Act, does not apply to all BVI trusts. They only apply if there is a term in the trust instrument to the effect that they apply. They also apply to foreign trusts which change their governing law to BVI law if the option to apply section 58 B is taken up when changing the trust's governing law to BVI law.

In making this amendment, the provisions of section 47 of Bermuda's Trustee Act were considered. The Bermuda statutory provision has, over the past three years, received a certain amount of very positive international attention, i.e. because it enables the dispositive provisions of a Bermuda trust to be varied by the court without the consent of its beneficiaries, but the BVI decided not to follow the Bermuda approach for a number of reasons and instead came up with what we regard as a superior and better thought-out solution.

Fulsome reserved power legislation

The same Act also includes a comprehensive new section enabling trust powers to be reserved to settlors or to be granted to others such as protectors. For many settlors, particularly those from non-trust jurisdictions (or from family backgrounds in which well administer trusts do not feature), the establishment of a trust will involve something of a leap of faith and so they will want to ensure that certain critical powers are reserved to themselves by the trust instrument. Alternatively, they might want these powers to be granted to others such as a trusted adviser who serves as the trust's protector.

The BVI was the first jurisdiction to introduce reserved power legislation, but this had become somewhat out-of-date. The new section 86 of the Trustee Act makes it clear that specified critical powers can be reserved to settlors or conferred on others such as protectors without causing the trust to be fail as an invalid testamentary instrument. These powers include the power to change trustees (and beneficiaries) and the power to veto distributions. The new reserved power legislation essentially includes the best features of our competitors' laws but omits their more problematic provisions.

It is now clear that, especially when considered in conjunction with its VISTA trust legislation, the BVI now has by far the most comprehensive, sophisticated and attractive reserved power trust legislation in the world.

Enhanced firewall offering

The Act has also strengthened our firewall provisions; this should make the establishment of BVI trusts even more popular in the context of protecting assets against "forced heirship" and matrimonial claims

Extension of resealing

The BVI also has a new Probate (Resealing) Act. This extends the ability to reseal non-BVI grants of probate and letters of administration in the BVI to grants issued by numerous other jurisdictions. The statute enables a simplified procedure to be followed if a corresponding grant of representation has already been obtained in a jurisdiction which is mentioned in the schedule to the Act. The schedule is quite lengthy and, critically, includes a reference to Hong Kong, where numerous shareholders of BVI companies are of course domiciled, together with jurisdictions such as the various States in the United States of America, India, Singapore as well as numerous other Commonwealth countries.

The act has the indirect effect of yet further increasing the attractiveness of BVI companies. ■

Christopher McKenzie
Partner, O'Neal Webster

Christopher McKenzie joined O'Neal Webster in May 2013 as a partner and head of the firm's Trusts and Estate Planning Department. He specialises in advising on all aspects of the BVI's laws relating to trusts, wills, and estates. Chris is a frequent lecturer at international trust conferences and has contributed to all the most important publications on BVI trusts and estates. He is Trusts & Trustees' country correspondent for the BVI and has also written numerous articles which have been published in that periodical, the Journal of International Trust and Corporate Planning, Private Client Business and various other industry journals.

THE CASE FOR A LEGAL DEFINITION OF DIGITAL ASSETS

By **OWEN PREW**

At present, the legal definition of the various classes of 'digital asset' remain undetermined by the highest courts across the common law world and have little or no statutory basis or definition.

If some of the extremely valuable digital assets now contained in individual portfolios, diversified funds and crypto-exchanges are not considered 'property' then as a matter of common law there are wide implications. These implications may consider everything from family trust planning and the inheritability of digital assets, through to the powers of liquidators and receivers in company insolvency or personal bankruptcy, and even queries over the availability of various common law remedies to aid in fraud and asset tracing claims over such assets.

It is also abundantly clear that digital assets do not fit neatly within the existing common law definitions of 'property' which are widely considered (on the personal property side) to be limited to either a "chose in possession" or a "chose in action".The English High Court grappled in a very limited way with this conundrum in the case of AA v Persons Unknown [2019] EWHC 3556 (Comm). The case concerned the extortion of a Canadian insurance company by hackers. The hackers infected and encrypted the target company's computer systems and demanded US$950,000 (negotiated down from the US$1.2 million) in ransom to provide software to unencrypt their systems. The ransom money was to be sent as Bitcoin. The insurance company paid the ransom and then, using a third-party company, sought to trace the Bitcoin payment back to the hackers through Norwich Pharmacal relief alongside a proprietary injunction.

Mr. Justice Bryan focused on the availability of a proprietary injunction and, in doing so, set out the crux of the current 'definitional' problem related to cryptocurrencies. At paragraph 55 of the judgment: "[Bitcoin] are not choses in possession because they are virtual, they are not tangible, they cannot be possessed [because they exist on a decentralised ledger that nobody individual controls]. They are

not choses in action because they do not embody any right capable of being enforced by action."

Colonial Bank v Whinney (1885) 30 Ch. D. 261 is the leading authority for the proposition that, as per Fry LJ: "all personal things are either in possession or in action. The law knows no tertium quid between the two." On such an analysis, cryptocurrency such as Bitcoin or Ether would not, according to the current state of the law, be classified as a form of property, in which case cryptocurrencies could not be the subject of a proprietary or freezing injunction. In considering the availability of such relief, Mr. Justice Bryan surveyed the current state of the common law by reference to a legal statement issued by the UK Judicial Task Force ("UKJT") in November 2019.

The drafters of the legal statement opined that, in making the statement that all personal things are either in possession or action, Fry LJ in Colonial Bank was in fact attributing a very broad meaning to 'things in action' to the effect that, "they are, in fact, personal property of an incorporeal nature". The drafters of the legal statement went on to conclude that the House of Lords in Colonial Bank had also adopted an expansive interpretation of 'things in action'.

The UKJT therefore concluded that: "Our view is that Colonial Bank is not therefore to be treated as limiting the scope of what kind of things can be property in law. If anything, it shows the ability of the common law to stretch traditional definitions and concepts to adapt to new business practices (in that case the development of shares in companies)."

The problem of leaving it to the courts is however highlighted in the case of Your Response Ltd v Datateam Business Media Ltd [2014] EWCA Civ 281, [2015] Q.B. 41 where the Court of Appeal, in very different factual circumstances, concluded the following in relation to the Colonial Bank authority: "[It is] very difficult to accept that the common law recognises the existence of intangible property other than choses in action (apart from patents which are subject to statutory classification)".

Moore-Bick LJ went on to say that there was a "powerful case for reconsidering the dichotomy between choses in possession and choses in action and recognising a third category of intangible property…".

The UKJT also considered the decision in Your Response against yet other cases such as Swift v Dairywise Farms Ltd [2000] 1 WLR 1177, where the court in that case had held that a milk quota could be the subject matter of a trust and that in Armstrong v Winnington [2012] EWHC 10 (Ch) that an EU carbon emissions allowance could be the subject of a tracing claim as a form of "other intangible property".

It is also abundantly clear that digital assets do not fit neatly within the existing common law definitions of 'property' which are widely considered (on the personal property side) to be limited to either a "chose in possession" or a "chose in action".

Also weighing in against the Court of Appeal in Your Response are the cases of Elena Vorotyntseva v Money-4 Limited t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov [2018] EWHC 2596 (Ch), where Birs J granted a worldwide freezing order in respect of a substantial quantity of Bitcoin and Ether, and Liam David Robertson v Persons Unknown, CL-2019-000444 (unreported), 15th July 2019 where Moulder J granted an asset preservation order over Bitcoin held in a Coinbase wallet.

In the AA v Persons Unknown case itself, Mr. Justice Bryan reached what may be considered a sensible and pragmatic conclusion that "…crypto asset[s] such as Bitcoin are property". In Mr. Justice Bryan's opinion and in the opinion of the UKJT, Bitcoin meets the four criteria set out in Lord Wilberforce's classic definition of property in National Provincial Bank v Ainsworth [1965] 1 AC 1175 as being (i) definable, (ii) identifiable by third parties, (iii) capable in their nature of assumption by third parties, and (iv) having some degree of permanence.

In Singapore, the Singapore International Commercial Court has reached a similar conclusion in B2C2 Limited v Quoine Pte Limited [2019] SGHC (I) 03. In New Zealand, the New Zealand High Court in Ruscoe v Cryptopia Ltd (in Liquidation) [2020] NZHC 728 has also held that cryptocurrencies were property for the purposes of that country's corporation law legislation, and that they were therefore capable of being held on trust by a company for its accountholders and thus out of reach of the company's creditors.

It was noted, however, in an extensive paper produced by Cambridge University entitled Legal and Regulatory Considerations for Digital Assets, that in the Mt Gox's Bankruptcy (under the Japanese Civil Code) the question arose whether Bitcoins were indeed "things" capable of ownership under Japanese law. Article 85 of the Japanese Civil Code defined "things" as tangible and restricted the right of ownership to "things". The court recognised that exceptions existed to allow property rights to be held in other rights but that in the circumstances Bitcoin did not qualify under Article 85 of the Civil Code because it clearly was not (i) tangible; and (ii) subject to exclusive control.

It is believed that Wyoming is currently the only state in the world to have put the issue of defining digital assets on a statutory footing by reference to the easily understood common law concept of 'intangible personal property' and whilst the common law courts are proving once again to be flexible and working their way gradually towards proprietary recognition, there is a lack of certainty over the status of the various classes of digital assets, which is commercially undesirable and arguably unnecessary.

Perhaps therefore now is the time for draftspersons to intervene to put 'Digital Assets' on the firm proprietary footing that their increasing adoption and economic value demands. ■

Owen Prew
Senior Associate, Bedell Cristin

Owen is an English and BVI qualified solicitor advocate specialising in Commercial and Insolvency litigation.
He is an experienced BVI commercial litigator with substantial offshore experience acting for and advising clients in respect of high-value commercial matters involving shareholder disputes, director's breach of duty claims, enforcement of judgments, applications for interim remedies (including freezing injunctions) and all forms of insolvency proceedings and remedies.

COURTING CONTROVERSY: INCREASING LITIGATION IN THE CRYPTO WORLD

By **MATT FREEMAN**

I appreciate that litigators are usually the last people that investors and entrepreneurs wish to see or hear from as our very presence usually means that something has gone wrong. This sentiment certainly extends to the virtual world where most individuals take a positive view and focus on the seemingly endless and the rapidly expanding applications of crypto assets and blockchain technology, rather than wanting to hear from naysayer litigators discussing what has and can go wrong.

Not wishing to dampen the mood (although the recent drop in value in Bitcoin may have done this in any event), I am delighted to announce that crypto assets are now considered as property. No doubt you will now be releasing cries of exasperation, most likely shouting at the page "of course they are property". After all, many of you own crypto assets in the form of crypto currency or (for the connoisseurs among us) NFTs. Indeed, many crypto assets hold similar traits to property such as value, the ability to trade or exchange them and they are capable of being lost or stolen (spare a thought here to James Howell who lost his key to a landfill in South Wales). All this is, of course true, but there is a real (and important) difference between the public at large accepting something as property and an asset being accepted as legal property.

Lawyers (and litigators in particular) love an existential question and were so taken by the status of crypto assets that the UK Jurisdiction Taskforce (headed by none other than Sir Georffry Vos, Chancellor of the High Court of England) prepared a lengthy and well considered legal statement on crypto assets and smart contracts.

In the statement, it was determined that whether English law (which is regularly applied in the BVI) would treat a particular crypto asset as property will ultimately depend on the nature of the asset, the rules of the system in which it exists and the purpose for which the question is asked. However, the Taskforce did find that:

1. crypto assets have all the indicia of property;
2. the novel or distinctive features possessed by some crypto assets (e.g. intangibility, cryptographic authentication, use of a distribution ledger, decentralisation, rule by consensus) do not disqualify them from being property;(3) nor are crypto assets disqualified from being property as pure information, or because they might not be classifiable either as things in possession or as things in action (the traditional methods for determining whether something is capable of being legal property).

The Taskforce therefore was content to find that crypto assets are therefore to be treated in principle as property. This is likely to have important consequences for the application of a number of legal rules, including those relating to succession on death, the vesting of property in personal bankruptcy, and the rights of liquidators in corporate insolvency, as well as in cases of fraud, theft or breach of trust.

Hot on the heels of the Taskforce's legal statement, the English High Court (Business & Property Courts) released its judgment in the case of AA v Persons Unknown, which considered the legal statement and welcomed the conclusions reached by the Taskforce.

The case involved a Canadian insurance provider, which had been infiltrated by a hacker. The hacker bypassed the insurance company's firewall and installed malware on its system that resulted in the insurance company's network becoming encrypted. The hacker then requested payment in the sum of US$1,200,000 in exchange for the network being decrypted. The hackers requested that payment be made in Bitcoin.

The insurance company hired an intermediary to arrange payment of the ransom and payment was made, in Bitcoin as requested. The decryption tool was provided but the insurance company also contacted a blockchain investigation firm and instructed them to track the Bitcoins that had been transferred as a ransom. In this instance, some of the Bitcoins were transferred into fiat currency but a substantial proportion of the Bitcoin (96) were transferred to a specified address. In this instance the address was linked to the Bitfinex exchange.

The insurance company applied to the English High Court for disclosure orders and for a proprietary injunction to prevent the dissipation of the Bitcoins it had paid to the hackers. When assessing whether or not to grant an injunction, the High Court first had to consider whether Bitcoins, were property at all. This is important as if Bitcoins and other crypto currencies could not be classified as a form of property, then they would be incapable of being the subject of a proprietary injunction or a freezing injunction. As mentioned above, the judge in this case considered the legal statement of the Taskforce and found the conclusions contained therein compelling and therefore determined that crypto currencies, and Bitcoin in particular are capable of being property. The Court therefore granted the relief sought by the insurance company (after confirming that the applicable principles relating to proprietary injunctions had been met). This is, of course, welcome news to all investors and victims of fraud involving crypto currencies as the English Courts have confirmed that one of the most commonly used tools of the English

Court to assist victims of fraud is available to matters involving virtual assets.

Of course, the BVI Courts (the Commercial Division in particular) are well versed in dealing with cases involving theft or fraud relating to more traditional forms of property and is therefore well placed to assist individual and institutional investors in the event that their crypto assets are illegally acquired by a third party.

Following on from the decision in AA v Persons Unknown the BVI Court recently granted a freezing injunction together with related disclosure orders to an institutional investor that had invested money in the Quantum Group. Quantum marketed to investors by saying that it operated a high frequency trading facility combined with software that would identify any discrepancies in value in crypto currency between the various exchanges. In short, Quantum claimed to operate an umbrella system that sat above all the mainstream exchanges that would run a "compare the market" type review. By way of example, if Bitcoin had a lower value on Bitfinex, Quantum would use investor funds to purchase Bitcoin at the lower level and then sell it on other exchanges at a higher rate. Investors were to benefit from high frequency and high volume exchanges using this approach.

Unfortunately Quantum did not perform as advertised and the operators started using new investor funds to pay out redemptions (i.e. a ponzi scheme that is all too familiar to many of us in the BVI). This resulted in investors losing their investment (without even a collectable Meerkat to show for it).

An institutional investor brought proceeding against Quantum in Brazil (where the operation was based) and obtained injunctions against the group of companies involved in the scheme as well as all crypto exchanges that Quantum operated on.

It is worth noting here, a feature that is unique to cryptocurrencies is the ability to locate and trace assets via the information contained in the blockchain. Unlike with fiat currencies, where a court order is needed to obtain information about accounts and transfers, cryptocurrencies operate on a system that is verified by thousands of users and has distribution registers that allow users to track and transfers of crypto currency to individual addresses. This greatly assists the victims of fraud and theft as, provided they act quickly, they can seek to freeze accounts held on certain exchanges with a view to reclaim any lost current or simply to prevent it being dissipated pending determination of ownership by a court.

In the Quantum case, the exchanges that did not operate via Brazilian entities did not comply with the injunctions and associated requests for information and Campbells were therefore instructed by an investor to apply for a free standing injunction and disclosure orders against an exchange that operates via a BVI company. The claim was made pursuant to the recent amendment to The Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act. The BVI Court granted the relief sought and the investor was able to successfully freeze the accounts and obtain KYC information that confirmed that the accounts were owned by the individuals behind Quantum.

The Quantum case highlights how the BVI courts are well equipped and ready to assist victims of fraud involving crypto currencies in particular.

Another recent finding of the BVI Court relates to the liquidation of a crypto exchange that operated via BVI entities. The exchange provided two distinct services. The first was a conventional exchange where individual users could buy and sell crypto currencies and the second operated similar to a fund whereby investors would pay crypto or fiat currency to the operator and the operator would invest and trade with the collective, higher volume, amounts provided.

In this case the BVI court considered whether cryptocurrency held by the operator (a BVI company in liquidation) is property belonging to a liquidator. This is important in the context of liquidation proceedings as any assets that belong to the company in liquidation can be applied to the debts of the company as a whole. In coming to its decision, the Court referred to AA v Persons Unknown and Taskforce's legal statement and sensibly found that User Personal Wallets belong to the user as users had not transferred crypto assets to wallets that were controlled by or belonged to the trading platform operator. However, assets that were under the control of the operator belonged to the company and should be considered assets of the estate in liquidation and used to pay the creditors of the company as a whole.

As an aside, the Court also permitted the liquidator to convert crypto assets held by the operator to US Dollars or alternatively to Tether (USDT). The Court recognised the cryptocurrencies can be extremely volatile (Bitcoin had dropped by 28% in the days leading up to the decision) and the Court found that it would be advantageous to a liquidator to convert the crypto assets to US Dollars as US Dollars are significantly more stable and will provide certainty to creditors. Again, this shows that the BVI Court is well placed to assist liquidators that have been appointed over BVI companies that operate crypto asset exchanges.

Hopefully the above has, in some small way, changed your perception of litigators and perhaps you will feel that we are certainly not always the harbingers of doom. I appreciate that this may be a lot to ask but, if you take anything away from this article, it should be that the BVI Courts is well equipped to protect victims of theft and fraud and the recent decisions of the Courts show that it has adapted well to the recent enthusiasm for crypto assets by supporting liquidators of crypto currency exchanges as well as confirming that the victims of frauds perpetrated through exchanges or operators can seek relief from the BVI Courts to freeze those assets or seek information regarding the whereabouts of such assets. ■

Matt Freeman
Senior Associate, Campbells

Matthew is a senior associate in the Litigation, Insolvency & Restructuring Group. He advises and appears in the High Court and Commercial Court of the British Virgin Islands on behalf of provisional and official liquidators, creditors, shareholders, directors, managers and other professional service providers in relation to a broad range of pre and post-liquidation disputes. He has acted in litigation involving widely varying commercial contexts and structures, but his practice principally involves shareholder disputes (specifically relating to shareholders located in China and CIS countries) and claims relating to breaches of fiduciary duties.

A LESSON ON E-SIGNATURES AND ELECTRONIC EXECUTION

By **LODEWIJK VAN SETTEN**

The COVID-19 pandemic has rapidly accelerated digital transformation across all industries, forcing many businesses to invest in digital infrastructure to enable business continuity and the shift to remote working. One of the areas where this has raised specific challenges for business has been around the execution of documents, and we have seen rapid developments in this area.

The push towards electronic signing of documents has seen significant progress in the British Virgin Islands (BVI), with many of the developments taking place prior to the pandemic. Through the Electronic Transactions Act, the law delivers both a complete and flexible approach to carrying out the execution of documents electronically. However, the law is expected to be repealed and replaced by a more modernised Act with updated provisions and developments in digital transactions, later this year.

This article will look to discuss the process of electronic execution of documents in the BVI and some of the resulting legal issues that have arisen.

WHAT IS ELECTRONIC EXECUTION

Electronic execution of documents refers to the execution of a document by way of creation of electronic signature data (an e-signature) in relation to that document. The documented information that constitutes the subject matter of the e-signature, e.g. a contract, notice, statement, record, or other form, will itself normally exist as an electronic document.

An e-signature is the electronic functional equivalent of a physical signature. There are three primary functions of a signature, whether physical or electronic, which may be distinguished.

The evidential function provides evidence of the signatory's identity, personal involvement, and the time and place of execution. The authenticating function requires the intention of the signatory to be made manifest in relation to the executed document. For example, to be legally bound by the document or confirming the signatory has notice of the contents of a document. The authenticating function distinguishes a "signature" from the mere writing of a name. In determining whether the method of signature adopted demonstrates an authenticating intention, the courts adopt an objective approach considering all of the surrounding circumstances. The formal procedural function requires satisfying a formal procedural requirement, meaning that a document must be "signed" in order to give the contemplated arrangement legal effect.

THE ELECTRONIC TRANSACTION ACTS

The Electronic Transactions Act, 2001 (the ETA 2001), shortly to be repealed and replaced by the Electronic Transactions Act, 2019 (ETA 2019), constitutes specialist BVI legislation that applies to the formation and execution of transactions and documents by electronic means, and seeks to preserve legal validity and admissibility of electronic documents and electronic signatures on those documents.

The texts of the key section of the ETA 2001 and again, the ETA 2019, are based on the text of Articles 5 to 7 of the UNCITRAL Model Law on Electronic Commerce 1996 and Article 6 of the UNCITRAL Model Law on Electronic Signatures 2001.[1] Both model laws have been accompanied by

E-signatures can take different forms, including pasting an electronic image of a physical signature into the signature block of a contract, creating a digital signature by cryptographic means, or a thumbprint via a tablet or phone.

a "guide to enactment", which provide background and other explanatory information to assist Governments and legislators in using the text of the model laws. The guides to enactment include, for example, information relating to discussions in the working group on policy options and considerations and matters not addressed in the text of the model laws that may nevertheless be relevant to their subject matter. Accordingly, the guides to enactment have persuasive interpretative value in relation to the ETA 2001 and the ETA 2019.

KEY LEGAL ISSUES

There are two key legal issues that have arisen in the case of electronic execution. The first is, whether an electronic record may satisfy a requirement that the document that is to be executed in writing. Both the ETA 2001 and the ETA 2019 deal with that issue by establishing that information shall not be denied legal effect, validity, or enforceability on the sole ground that it is in the form of an electronic record or that it is not contained in the electronic record purporting to give rise to such legal effect, but is merely referred to in that electronic record.

"Electronic record" is defined as information generated, sent, received, or stored by electronic means including electronic data interchange, electronic mail, telegram, telex, or telecopy. Accordingly, the ETA 2001 and the ETA 2019 recognise that a document should not be denied legal effect solely on the ground that it is created as a digital document, including by way of incorporation by reference. Any requirement to create information "in writing" may be satisfied by a digital document.

The second key legal issue that arises is what type of electronic signature is permissible. Again, both the ETA 2001 and the ETA 2019 provide statutory support for a broad array of electronic signatures, although the ETA 2019 streamlines the matter somewhat. In essence, an electronic signature satisfies a legal requirement for a signature if the method used to perform the authenticating and evidential functions of the signature is as reliable as appropriate in view of the document and its purpose, in the light of all the circumstances, including any relevant agreement between the interested parties. This may be proven by itself or together with further evidence. Unlike the ETA 2001, the ETA 2019 provides that, unless otherwise provided by law, the parties to an electronic transaction may agree to the use of a particular method or form of electronic signature or security procedure. In other words, the ETA 2001 and the ETA 2019 validate the formal procedural function of the e-signature by equating the e-signature with a physical signature in case of a "legal requirement" to sign a document. A "legal requirement" is defined in the ETA 2001 as "a law that requires or permits something to be done or a law that simply provides consequences for not doing something", but that definition has not been returned in the ETA 2019.

If the parties to an electronic transaction have not agreed on the type of e-signature to be used, the reliability requirement is satisfied under the ETA 2001 and the ETA 2019 if the signature creation data is linked to the signatory and no other person, the signature creation data at the time of signing is under the control of the signatory and no other person, and any alteration to the electronic signature, made after the time of signing is detectable.

The ETA 2001 and the ETA 2019 diverge slightly in scope. The ETA 2001 provided that the ETA 2001 would not require a person to accept an electronic record, which includes an electronic signature, without that person's consent, which may be inferred from a person's conduct. As noted, the ETA 2019 has streamlined certain matters and has removed the explicit reference to consent. Instead, the ETA 2019 provides that nothing in the law requires a person to use or accept electronic communications, electronic signatures, or electronic contracts. Consequently, the ETA 2019 applies unless expressly not accepted.

Importantly, both the ETA 2001 and the ETA 2019 confirm that an "electronic record", which would include digital documents and e-signatures, shall not be denied admissibility on the sole ground that it is an electronic record. Information in the form of an electronic record must be given due evidential weight, and for that purpose, regard must be had to the reliability of the manner in which the electronic record was generated, stored, or communicated. In addition, the reliability of the manner in which the integrity of the information was maintained, the manner in which its originator was identified, and any other relevant factor, is also important.

THE FUTURE OF ELECTRONIC EXECUTIONS

As has been discussed, there are a number of exceptions and reservations to be aware of when it comes to electronic executions in the BVI. As we gear towards greater digitalisation, the new Act that will replace the 2001 and 2019 Acts will continue to enhance the use of electronic signatures and digital contracts under BVI law for many businesses to take advantage of. ■

Lodewijk Van Setten
Senior Counsel, Walkers

His expertise ranges across the regulatory spectrum from authorisation and regulatory expectations of governance models to anti-money laundering and terrorist financing requirements, sanctions, exchange of tax information (CRS and FATCA), economic substance requirements, reporting of beneficial ownership and data protection regimes.

[1]The United Nations Commission on International Trade Law (UNCITRAL) is a legal body of the United Nations system with universal membership specializing in commercial law reform worldwide. A model law is a legislative text that is recommended to States for enactment as part of their national law. In order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal systems.

RISING TO THE TOP:
AN INTERVIEW WITH SIMON FILMER

Simon Filmer is the Global Lead for Company Formation at Vistra, a global business services provider that offers expert advisory and administrative support to Fund, Corporate, Capital Market and Private Wealth clients, helping capital flow, protecting investors, and safeguarding assets across multiple industries. As part of his role, Simon is responsible for several Vistra offices, including in the British Virgin Islands (BVI).

As someone who has been a champion and advocate of the BVI's financial services industry, we caught up with Simon to discuss his career to date, some of the milestone changes that he's seen and been a part of in the BVI, as well as discussing the key themes that are shaping the global industry.

Simon, you've been working in financial services for over 20 years now. Tell us a bit about yourself and how you got to where you are.

I didn't have the most typical route for someone working in the financial services industry. When I first came to the BVI in 1992, I came to work in the tourism industry as a scuba diving instructor, running dive boats and dive shops, which I did for several years and thoroughly enjoyed. It was only after the birth of my daughter, who is a BVI Islander, that I thought I needed to change my own career to increase my earning power.

At that time, I was very new to the financial services world. I was 30 years old, had never worked in an office and I was entering the field with very little professional experience. However, it was in the BVI that I was given a chance – I was taken on in a relatively junior position and from there, I progressed within the financial services industry.

In fact, all of the career accomplishments I have achieved over the last 20 years have been built on the back of the BVI's financial services industry. In the many roles and businesses that I have worked in, I have been given career-defining opportunities. I have had the opportunity to travel extensively, to work across multiple offices and jurisdictions, (from Hong Kong to India to London and Dubai) and interact with clients and colleagues globally - - all of this stems ultimately from the BVI.

As a major pillar of the economy, the BVI's financial services industry has been an incredible platform. It has provided me with the chance to advance both locally and internationally, as well as giving me the opportunity to learn from some of the most innovative and brightest minds in the industry, for which I am immensely grateful.

What sort of training or professional qualifications did you have to do to help improve your knowledge, skills, and professional development?

Initially, it took me nearly two years to get a job within BVI financial services because of my lack of professional experience. I was fortunate that I already had a degree from a university in the UK before I came to the BVI, which was helpful. However, to get into the industry, I did some relevant courses at HLSCC (H. Lavity Stoutt Community College). In fact, I would often head straight to college after my day teaching scuba diving - freshly out of a wet suit and into the classroom learning about corporate administration!

Once I got the job, I then started a professional course whilst I was working – the Chartered Secretary qualification, (now known as the Chartered Governance qualification). Once that was completed (which took a couple of years), I then undertook the full STEP qualifications. Both the Chartered Secretary and STEP qualifications are highly relevant for our industry. Undertaking these professional qualifications at pace and whilst I was working was crucial - my options and career progression would have been limited without them, so I threw myself into the deep end and did them both as quickly as possible.

At the time, it was also fairly challenging as there was no local tuition or online classes available. It was old fashioned textbooks and studying past papers by myself – some grit and determination enabled me to complete them. That's now all changed for the better - the training and development for financial services has improved dramatically in the BVI. There is now local tuition available for a number of financial services courses thanks to the Financial Services Institute at HLSCC, which has advanced the curriculum for those wanting to progress professionally – and which I highly recommend to all those interested in furthering their career.

There are a number of people who may be considering pursuing a career in financial services. What would be your advice or recommendations for those following in your path?

Hard work, dedication and resilience pay off – but you'll only ever get so far. You've got to put the work in and ensure you do the right professional qualifications to complement the professional experience. Without it, your progression may be limited.

For me, an important bit of advice which I think is vital, is to keep your eyes and ears open to opportunities and to do something new – to push yourself, to stretch yourself and, when these opportunities come, to put your hand up and say yes. You'll be amazed how much you can learn when you do this.

When I joined Vistra eight years ago, we didn't have our own staff on the ground in the BVI; we were run as a managed operation. My first task was to open a fully-staffed office, and we have worked to make sure that we invest in local talent and advance people in the BVI to ensure that BVIslander have a direct impact on the financial services industry and have more opportunities.

I am extremely proud that Rexella Hodge, a BVIslander, is the Country Managing Director of Vistra's BVI office. Rexella has over 20 years of experience in the BVI's financial services industry and is the proof of what hard work, determination, and resilience achieves alongside investing in professional qualifications and taking advantage of the opportunities when they come.

You're often viewed as one of the most passionate voices of the BVI. What inspires you most about the BVI's financial services industry?

If we look at the trajectory of the BVI's financial services journey over the past few decades, it is clear that its journey has been one of resilience and constant innovation. Despite the size of the BVI community, our international impact is expansive. The BVI is home to an international business and finance centre that mediates over US$1.5 trillion of investment globally and supports more than two million jobs worldwide.

We are constantly developing new legislation and services, which fosters innovation and leads to the development of new solutions that have a far-reaching impact. At the same time, we are also working collaboratively with others - and with great agility and pace - to make significant changes and improvements to the financial services industry.

Over the years, I have been heavily involved in committees, consultations, and public sector boards, where I have tried to contribute to key changes, to further strengthen the jurisdiction. I have a genuine passion and commitment to do all that I can to further the BVI as a leading international financial centre. I firmly believe that it is possible to effect change, and, with our voices, we have the ability to impact the industry for the better and overcome the adversity that we face on an international level.

There are a number of other financial centres where you are not able to effect change in this way. Relationships with a government or regulator are not usually as consultative as they are in the BVI, and this has enabled many individuals, not just me, to be at the forefront and interface of change and innovation.

Furthermore, it has also advanced my learning. Having the opportunity to sit on several panels and hear about other people's challenges - from regulators to civil servants to private sector colleagues – I've been able to learn so much more by gaining insight from other people's perspectives.

I am extremely proud to have been a part of some of the most significant developments in the industry, and I remain passionate and inspired to be a positive voice for the BVI both locally and internationally.

What have been some of the biggest milestones changes that you've seen take place in the BVI's financial services industry?

My time in the BVI and in financial services has always been marked by significant change. There have been significant legislative and regulatory developments that I can point to and which have shaped the financial services landscape.

For example, the introduction of the 2004 BVI Business Companies Act, which replaced the landmark International Business Companies Act; the introduction of the Virtual Integrated Registry Regulatory General Information Network, known as VIRRGIN, in 2006, which formed the central and online heartbeat of industry in the BVI; and more recently the introduction of the internationally renowned Beneficial Ownership Secure Search System (BOSSs), established in 2017, which has digitally enabled competent authorities to have access to beneficial ownership information on BVI corporate entities.

All of these developments have helped to highlight the BVI's constant innovation in evolving and adapting to reassert the strength of its offering amidst the backdrop of some of the bigger macro changes in the global financial services sector. If we look back at some of the key pivotal moments that have shaped the wider landscape – from data leaks to constant regulatory evolutions through to the COVID-19 pandemic – we can see that these changes have required us to navigate and manage the incoming and unavoidable change that has been largely driven by external factors.

Year after year, the BVI has shown its staying power. From robust regulatory developments through to embracing digital innovation, the BVI has shown that change is an essential component of maintaining resilience. And we will continue to evolve and embrace what comes our way.

"Keep your eyes and ears open to opportunities and do something new – to push yourself, to stretch yourself and, when these opportunities come, put your hand up and say yes."

You have been a driving force behind Vistra's annual research on the corporate services industry – The Vistra 2020 series. From your findings, what do you think still holds true for the industry and the

BVI in the years to come?

The Vistra 2020 series, which we rebranded this year as Vistra 2030, is industry leading research that we have been running for the last ten years. Each year, we focus on issues and themes around regulation, reputation, resilience, and jurisdictional rankings, as well as observing what's the next big set-piece impacting the market.

Over the last decade, the industry has adapted and thrived in a radically transformed environment. Where there were previously clear lines of separation between offshore, midshore and onshore jurisdictions, seismic shifts in global regulation, along with other factors, mean that today the corporate services industry is much more global and integrated. Furthermore, the impact of COVID has caused significant ramifications for the industry globally.

As governments become more inward-looking, this poses significant questions around globalisation and the now shifting fault lines of international trade and investment. According to the research, 76% of respondents to our Vistra 2030 survey said globalisation is under pressure, and COVID, along with political tensions, has definitely disrupted what were previously thriving interconnected markets and national economies.

But has globalisation fractured so much – and has the regulatory bar gotten so high – that international business and trade stops getting done? There were certain aspects of globalisation that were already being reversed prior to the pandemic, for example, the UK's withdrawal from the EU and the protectionist agenda of Donald Trump. As cross-border activity grows more complex, and trade wars intensify, where does that leave places like the BVI?

Although there is much uncertainty, what is certain is that corporate and private clients' businesses, assets, and families continue to be more international than ever before. This means that cross-border business, while coming more complex, will continue which is enabling them to pursue growth both domestically and overseas – whether in established and, while we that globalisation will continue to evolve and change, it means that there will continue to be a clear role for jurisdictions like the BVI in connecting the pieces of the international business puzzle together.

"It's important to ensure your voice is heard, and once you're able to articulate what you believe professionally and respectfully, it encourages constructive dialogue."

I'm aware that you're now based in Dubai. How do you best balance your time in Dubai whilst still playing a key role in the BVI, in Asia, and in other jurisdictions around the world?

Firstly, the BVI is still home, and always will be! But Dubai is a great business hub for me.

Asia is incredibly important for Vistra, and also for the BVI. The majority of our BVI client base is in Asia, including Hong Kong, China, Taiwan, and Singapore. We also have a growing number of clients in the Middle East.

Due to the time-zone, being in Dubai allows me to speak and interact, during the same working days, with clients and colleagues from Asia all the way to the Caribbean. My morning might be spent speaking with clients and/or our client-facing colleagues in Hong Kong. And afternoons and evenings, spent speaking with our colleagues in the Caribbean, including the BVI, who are providing the required services to the clients. It's very efficient for me and allows me to act as a bridge of sorts between Asia and the BVI.

Dubai is also one best travel hubs in the world. Prior to COVID, I was travelling to Hong Kong from Dubai monthly, which, at that time was very convenient and relatively easy to do. Fingers crossed; we will all be able to travel again soon.

As we draw this interview to a close, are there any final thoughts that you would like to share?

I think it's important to highlight what I mentioned earlier around the strength and excellence of the BVI's financial services industry, and how it has enabled me to get to where I am today.

As a passionate supporter of the BVI, I often find myself encouraging BVIslander to get involved in the industry so that they too can be a part of creating positive impact and change in financial services, whilst maintaining the resilience of the sector internationally. This is something I feel very strongly about, and I hope I am proof of this. When I first started out in the sector, and as I started sharing my views, nobody knew who I was, but I continued to speak up and to work collaboratively with others, including with those who had different perspectives from me both in the private and public sector.

It's important to ensure your voice is heard, and once you're able to articulate what you believe professionally and respectfully, it encourages constructive dialogue. And that's why on the many boards and panels I have been a part of we have been able to work together to make recommendations and offer suggestions - and, as a result, we have seen significant and positive change.

In closing, I would encourage those who are working in the BVI's financial services industry – as well as those who have since left but remain advocates – to continue to speak up and to contribute to the continued evolution of the industry. The BVI is a small place and every one of us has the ability to impact real change. With everybody playing their part, the BVI will maintain its position as one of the leading international financial centres for global business. ■

Simon Filmer
Global Lead (Company Formation), Vistra

Simon Filmer has more than 20 years of senior management experience in the fiduciary services industry and has considerable experience in the areas of corporate business, trusts and investment business.
Simon is regularly consulted by regulators and governments on financial services matters, and has served on numerous industry committees, especially in the BVI.

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SHAPING THE FUTURE

By **SIMON GRAY** and **PHILIP TRELEAVEN**

Regulators are sometimes unkindly criticised for having predicted all six of the last three recessions. Although it sometimes pays to be cautious, it is important that excessive caution does not stifle innovation and progress. Increasingly, leading regulators are seeking to engineer a smart financial centre where innovation is ever-present and technology is used extensively to enhance value, increase efficiency, manage risks better, and create new opportunities – invariably with the consumer in mind.

Historically prophets have not always had good press though their messages are enduring. But long term it pays to be a visionary and in today's hyper-competitive financial services industry practical forward thinking is a sign of real progress. Data-driven regulation and compliance is the key to a successful future financial services industry. With regulators being the 'public champion' for these new data technologies, the automation of regulation and compliance are areas that offer significant potential to transform services and support the work of regulators and the British Virgin Islands (BVI) is leading by example.

EXPLORING THE SANDBOX

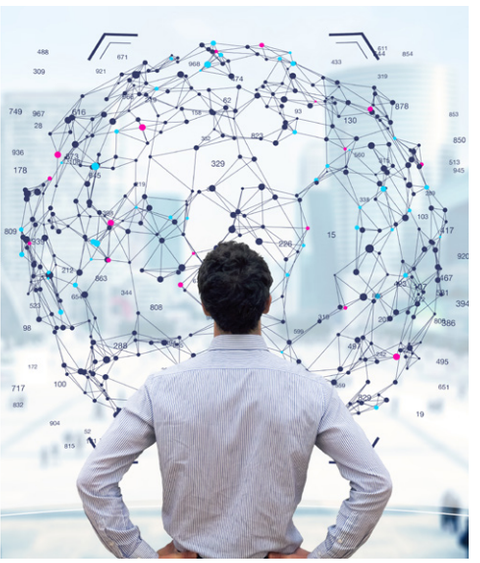
Remember playing in a sandbox as a child – using your imagination to create shapes and implement vision but in a safe and controlled environment? Metaphorically, a regulatory sandbox is no different, only this sandbox is where FinTech innovation meets RegTech practicality. The sandbox aims to promote more effective competition in the interests of consumers by allowing both existing and prospective licensees to test innovative products, services, and business models in a live market environment, while ensuring that appropriate safeguards are in place.

To this end, a sandbox can help to encourage more FinTech experimentation within a well-defined space and duration, where the regulator will provide the requisite regulatory support, with the fourfold aim of: increasing efficiency; managing risks better; creating new opportunities; and improving people's lives. The sandbox is an experiment for both regulator and regulated alike. It is the first time that many regulators have allowed licensees to test in this way, and interest is growing exponentially.

FROM FINTECH TO REGTECH

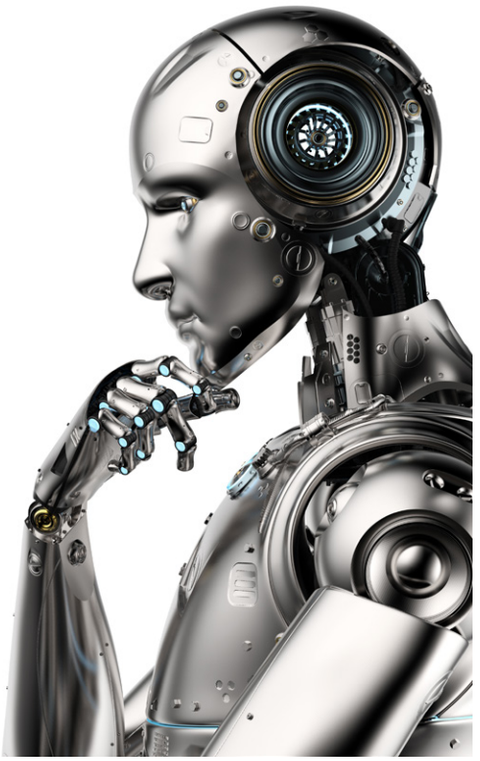
The data science technologies of artificial intelligence (AI), Internet of Things (IoT), big data and behavioural/predictive analytics, and the blockchain are all poised to revolutionize regulation and compliance; and create a new generation of Regulatory Technology or RegTech start-ups. Examples of current RegTech systems include Chatbots and intelligent assistants for public engagement, Robo-advisors to support regulators, real-time management of the compliance ecosystem using IoT and blockchain, automated compliance/regulation tools, compliance records securely stored in blockchain distributed ledgers, online regulatory and dispute resolution systems, and in future regulations encoded as understandable and executable computer programs.

Automation is all the rage but why is this happening and what are the benefits? In short, money – cost savings and greater efficiency are both imperatives and key drivers. The intended benefits of this automation will likely be reduced costs for financial services firms as well as the removal of a key barrier for FinTechs as they enter financial services markets.



BIG DATA

Regulators collect huge volumes of data (increasingly open sourced) and thus present major opportunities for so-called Big data (analytics). In general, Big data provides the opportunity of examining large and varied data sets to uncover hidden patterns, unknown correlations, customer preferences etc. Big data encompasses a mix of structured, semi-structured and unstructured data gathered formally through interactions with citizens, social media content, text from citizens' emails and survey responses, phone call data and records, data captured by sensors connected to the internet of things and so on. The notion of Big data is both increasing in volume, variety of data being generated by organizations and the velocity at which that data is being created and updated; often referred to as the 3Vs of Big data.



ARTIFICIAL INTELLIGENCE AND BEHAVIORAL ANALYTICS

AI technologies power intelligent personal assistants, such as Apple Siri, Amazon Alexa, and 'Robo' advisors, and autonomous vehicles. AI provides computers with the ability to make decisions and learn without explicit programming. There are three main branches including machine Learning - a type of AI program with the ability to learn without explicit programming, and can change when exposed to new data; natural language understanding – the application of computational techniques to the analysis and synthesis of natural language and speech; and sentiment analysis - the process of computationally identifying and categorizing opinions expressed in a piece of text.

Closely related to Big data is behavioural and predictive analytics that focus on providing insight into the actions of people. Behavioural analytics centres on understanding how consumers act and why, enabling predictions about how they are likely to act in the future. Predictive analytics is the practice of extracting information from historical and real-time data sets to determine patterns and predict future outcomes and trends. Predictive analytics 'forecasts' what might happen in the future with an acceptable level of reliability and includes what-if scenarios and risk assessment.

BLOCKCHAIN TECHNOLOGIES

Perhaps the most popular and much coined term in FinTech are the blockchain technologies. This include Distributed ledger technology (DLT) - a decentralized database where transactions are kept in a shared, replicated, synchronized, distributed bookkeeping record, which is secured by cryptographic sealing; and Smart Contracts - computer programs that codify transactions and contracts which in turn 'legally' manage the records in a distributed ledger.

AUTOMATING REGULATION & COMPLIANCE

A core focus of regulators of late has been the challenge of Digital Regulatory Reporting (DRR) and weighing up the pros and cons of each of the following concepts, namely: disambiguation of reporting requirements; common data approach; mapping requirements to firms' internal systems; a mechanism for firms to submit data to regulators; utilising standards to assist the implementation of DRR; a common data model; application programming interfaces; DLT networks; disambiguation of regulatory text; and of course utilising standards to assist the implementation of DRR.

In terms of the potential benefits of DRR, these can be summarized as less time and more efficiency to comply with regulatory reporting requirements and improving consistency in information provide as well as enhanced information sharing between firms – specifically internal risk mitigation.

REGULATION AND LEGAL STATUS OF ALGORITHMS

Legal redress for algorithm failure seems straightforward. If something goes wrong with an algorithm, just sue the humans who deployed the algorithm. But it may not be that simple: for example, if an autonomous vehicle causes death does the lawsuit pursue the dealership, the manufacturer, the third-party who developed the algorithm, the driver, or the other person's illegal behaviour? This stimulates the debate as to whether or not algorithms should be given a legal personality in the same way as a company.

As we know, a 'Legal person' refers to a non–human entity that has a legal standing in the eyes of the law. A graphic example of a company having legal personality is the offence of corporate manslaughter, which is a criminal offence in law being an act of homicide committed by a company or organization. Another important principle of law is that of Agency, where a relationship is created where a principal gives legal authority to an agent to act on the principal's behalf when dealing with a third party. An agency relationship is a fiduciary relationship. It is a complex area of law with concepts such as apparent authority, where a reasonable third party would understand that the agent had authority to act.

As the combination of software and hardware is producing intelligent algorithms that learn from their environment and may become unpredictable, it is conceivable that, with the growth of multi algorithm systems, decisions will be made by algorithms that have far reaching consequences for humans. It is this potential of unpredictability that supports the argument that algorithms should have a separate legal identity, so that due process can occur in cases where unfairness occurs. The alternative to this approach would be to adopt a regime of strict liability for those who design or place dangerous algorithms on the market, to deter behaviours that appear or turn out to have been reckless. Is this a case of bolting the door after the horse has escaped?

GLOBAL COLLABORATION AND COORDINATION

The situation remains fluid with increasing signs of international coordination, which is most welcome. For example, the collaboration of financial regulators and related organisations to create the Global Financial Innovation Network (GFIN), building on earlier proposals to create a 'global sandbox' – a network for collaboration and shared experience of innovation. Formerly launched in 2019, GFIN is designed to be an inclusive community of financial services regulators and related organisations that now numbers more than 60 with expansion inevitable. ■

Simon Gray
Head of Business Development and Marketing, BVI Finance

As part of his role, he leads BVI Finance's efforts to promote the territory's international business and finance services locally and overseas with a particular focus on wealth management and global capital markets.

Philip Treleaven
Professor, University College London

As Director of the Financial Computing Centre he is responsible for the UK PhD Centre for Financial Computing; a joint Doctoral Training Centre involving UCL, LSE, LBS and 15 major financial institutions. His research and teaching interests include computational finance and algorithmic trading.

BVI'S REGULATORY SANDBOX WILL SPUR FINTECH INNOVATION

By **AYANA HULL**

The British Virgin Islands continues to build on its innovative approach to global regulation with launch of sandbox designed to foster fintech innovation and compliance.

Digital and fintech innovations are rapidly reshaping financial systems around the world. The arrival of sophisticated new products and technologies, such as blockchain and crypto assets, pose significant opportunities in the financial sector and beyond. As these innovations mature in the coming years, they will redefine financial services. To fully reap the benefits while simultaneously mitigating risk, it is important that regulatory bodies develop appropriate policies and regulations to govern these innovations, while ensuring excessive caution does not stifle progress.

In light of this, leading regulators are increasingly taking a far more proactive approach in fusing financial technology with regulatory technology (RegTech). Instead of waiting to see if a new innovation satisfies regulatory requirements once it has been fully developed, some markets are now encouraging experimentation and providing a well-defined space – a sandbox – where regulators can provide support and help the products achieve compliance. The idea is that innovative products will then launch fully developed and ready to perform, having satisfied key regulatory measures.

The BVI, along with other leading financial centres, is paving the way and actively investing in its fintech and regulatory capabilities. Last year, the BVI launched its Fintech Regulatory Sandbox – a platform where fintech businesses can conduct testing in a live-environment and assess whether products meet legal and regulatory requirements. In so doing, the BVI is creating a smart financial centre where innovation is ever-present and technology is used extensively to enhance value, increase efficiency, mitigate risk, and create new opportunities for its customers and partners.

WHAT IS A SANDBOX?

Like the sandboxes found in playgrounds where children are encouraged to experiment and use their imagination, a regulatory sandbox is where fintech innovation meets RegTech. A sandbox is essentially a controlled testing ground for prospective licensees to test innovative products, services and business models while ensuring that appropriate safeguards are in place. The sandbox is designed to encourage fintech experimentation within a well-defined space and timeframe. A sandbox also facilitates close regulatory interaction that highlights areas for improvement, flags inherent business and provides opportunity to finetune products. Throughout this process, policymakers may discover new insight as to which regulations are necessary to achieve a better balance between safeguarding customers and fostering innovation. In this respect, the sandbox is an experiment for both regulators and the regulated alike, enabling them to work together to achieve compliance and provide value to customers and partners. It is the first time that many regulators have allowed licensees to test in this way, and interest is growing exponentially.

These initiatives will be of particular interest to licensees who are looking to apply technology in an innovative way, in order to provide financial services to be regulated in due course. The target audience includes, but is not limited to, licensees, fintech firms, and professional services firms partnering with or providing support to such businesses. Regulators are now teaming up with prominent universities to fashion the best-fit solutions for the future.

HOW DOES IT WORK?

The regulatory sandbox is open to entrepreneurs developing genuinely innovative new products or services in the fintech space that show clear benefit for customers and partners, through their potential to improve accessibility, efficiency, security, and quality in the provision of financial services business. The sandbox will provide a well-defined space to experiment with support from regulators to develop and meet compliance. It will also include appropriate customer safeguards and exit plan when testing is complete.

Depending on the area of financial services, the applicant involved, and the application made, the regulator will determine the specific legal and regulatory requirements that it is prepared to relax. There are certain areas where the rules may not be relaxed, for example: confidentiality of customer information; fit and proper criteria, particularly on honesty and integrity; handling of customers' moneys and assets by intermediaries; and, of course, the prevention of money laundering and countering the financing of terrorism.

On the other hand, good examples of what may be relaxed include: asset maintenance requirements; board composition; cash balances; credit rating; financial soundness; fund solvency and capital adequacy; license fees; management experience; guidelines, such as technology risk management and outsourcing; minimum liquid assets; minimum paid-up capital; relative size; reputation; and track record.

In terms of assessing the new fintech propositions, the regulator will need to establish whether the proposed financial service addresses a problem, or brings benefits to consumers or industry, and test scenarios to establish if the applicant has the intention and ability to deploy the proposed financial service in a respective jurisdiction after exiting the sandbox. Firms must clearly define expected test outcomes of the sandbox and report their progress to the regulator on an agreed schedule. This will allow for the sandbox to be meaningfully executed while sufficiently protecting the interests of consumers and maintaining the safety and soundness of the industry.

All significant risks arising from the proposed financial service should be assessed and mitigated and an acceptable exit or transition strategy should be clearly defined in the event that the proposed financial service has to be discontinued, or can proceed to be deployed on a broader scale after exiting the sandbox. Finally, it is important that the proposed financial service includes new or emerging technology or uses existing technology in an innovative way. This also assumes that the regulator has its own teams of tech specialists to help in these evaluations.

PURPOSE AND BENEFITS

The sandbox program provides major advantages for firms, predominantly the ability to test products in view of regulatory authorisation, and the opportunity to evolve and address potential business risks, for example, build appropriate consumer protection safeguards into new products and services. There are also indirect but equally important benefits of sandboxes, such as a reduction in time and cost of getting innovative ideas to market. In addition, having gone through rigorous testing and working closely with regulators to achieve compliance, firms have greater credibility and legitimacy, and more likely to attract investment. ■

Ayana Hull
Counsel and Head of Private Wealth and Regulatory Practice, Harneys

As part of her role, she routinely advises on economic substance issues and the impact of BVI regulatory legislation on ICOs and FinTech initiatives.
Prior to joining Harneys in 2013, Ayana practised corporate, commercial, funds and regulatory law in the BVI. She also acted as in-house counsel to the BVI Financial Services Commission and its regulatory divisions.
Ayana is the current chairperson of the BVI Financial Services Commission Securities and Investment Business Act Advisory Committee as well as a member of the BVI Financial Services Commission FinTech Advisory Committee.

REGULATION OF VIRTUAL ASSETS IN THE BVI: WHAT YOU NEED TO KNOW

By **ADENIKE SICARD**

The rise of virtual assets poses significant opportunities with potential to make payments easier, faster, and more secure, as well as to enhance financial inclusion for those without access to traditional banking. However, these exact qualities - coupled with the anonymity of virtual assets - presents new challenges in the fight against money laundering and financial crime. However, this is about to change with growing calls from the industry as well as governments to regulate virtual assets and providers to safeguard against financial crime.

In July last year, the British Virgin Islands Financial Services Commission (BVI FSC) issued a guidance on the application of the laws in the BVI to virtual assets (VAs). This was welcomed by industry practitioners as the use of VAs has seen a consistent global increase over the last 10 years or more since its first introduction. As would be expected, the FSC has been receiving increasing enquiries into its supervision of BVI entities engaging or intending to engage in activity involving virtual assets.

The FSC's guide follows recommendations by the Financial Action Task Force (FATF) published in June 2019, which stated that country regulators must monitor virtual assets and providers and apply key standards to combat financial crime. Measures, such as supervising the sector in the same way that other financial institutions are scrutinized and requiring all virtual asset providers to be licensed or registered by the jurisdiction, will help ensure that there is accountability and transparency in the sector. But of course, as outlined in the FATF's recommendations, enforcing these standards must be global in order to be truly effective to "ensure [that] VA technologies and businesses can continue to grow and innovate in a responsible way"[1].

The FATF recommended that where a regulated VA service provider is already subject to regulations to mitigate money-laundering and terrorist financing risk, the country would not be required to enact separate legislation dealing with VA related services.

Accordingly, as the BVI already has these regulations in place, the FSC issued its guide to describe the applicability of existing financial services laws and regulations to VAs and VA related products. There is a six-month transition period for VA related entities or providers to comply with the existing legislation, if applicable.

[1] www.fatf-gafi.org.

WHAT IS A VIRTUAL ASSET?

Utilising the FATF's definition, the guide describes a VA as "a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes".

HOW ARE VIRTUAL ASSETS REGULATED IN THE BVI?

VAs are regulated based on existing financial services legislation.

The FSC regulates "relevant persons"[2] conducting "relevant business"[3] in or from the BVI. With respect to VAs, the likely relevant business would fall under the Securities and Investment Business Act, 2010 (as amended) (SIBA) as an investment or investment activity, or under the Financing and Money Services Act, 2009 (as amended) (FMSA). Additionally, such relevant persons would be required to comply with the BVI's Anti-Money Laundering Code of Practice, 2008, the Regulatory Code, 2009, and the Financial Services Commission Act, 2001.

Under SIBA, no person shall conduct, or represent himself as conducting investment business of any kind in or from the BVI, unless he is licensed by the FSC to conduct that kind of investment business.

The FSC's guide states that virtual asset products may be regulated if they fall within the existing regulatory framework in one of two ways. Firstly, at the stage of initial issuance, or secondly after issuance when they are the subject of investment activity.

INITIAL ISSUANCE

It is important to determine whether the virtual asset falls within the definition of an "investment" under SIBA, which means an asset, right or interest specified in its Schedule 1.

The guide lists each investment in Schedule 1 and explains when the virtual asset would be viewed as an "investment" and therefore requiring the issuing entity to be licensed.

Investments Under SIBA	Virtual Assets Product Requiring Regulation
Shares or stock, Interests in a partnership or fund interests	INITIAL COIN OR TOKEN OFFERING Virtual assets, such as cryptocurrencies, are not shares and do not usually provide their holders with any equitable interests or rights (such as ownership or voting rights) in the issuing entity, which shares, and interests do. However, where a coin or token is issued in manner whereby it confers rights on the holders that are equivalent to shareholder rights, the issuance of the ICO or ITO may be considered an investment under SIBA and would require regulation. Similarly, if the coin or token is issued as an interest in a collective scheme and satisfies the definition of a mutual fund under SIBA, then the entity would require regulation.
Debentures or Warrants, or other instruments giving entitlement to shares, interests or debentures	TOKENS OR COINS Where a token/coin issued creates or acknowledges a debt and satisfies the definition of debentures, etc., or is issued in a manner which creates an entitlement and satisfies the definition of warrants, it would be considered an investment and require regulation.
Certificates representing investments (conferring contractual or property rights)	TOKENS OR COINS A certificate or other instrument that conveys a right to VAs would be an investment.
Options to acquire or dispose of an investment, any currency, palladium, platinum, gold or silver, or an option to acquire or dispose of any of the above. - Futures - Contracts for Differences - Rights to and interests in investments	VIRTUAL ASSET DERIVATIVES (VAD) Where the VAD is deemed to be an investment and the investment becomes the subject of (1) an option to acquire or dispose, (2) a futures contract, or (3) a contract for differences or any contract for the purposes or intended purpose of which it is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description, then the issuing BVI entity would require a licence.

WHAT IS NOT INTENDED TO BE REGULATED?

VAs and VA related products are used only as payment for goods and services (such as tokens, or prepayment vouchers for future services), and persons using VAs for personal use only (e.g., miners), and who are not engaging in investment activities described above, are not intended to be captured by BVI financial services legislation. However, where VAs provide a benefit or right beyond a medium of exchange it may be captured under such legislation.

In conclusion, persons who wish to embark on any investment or investment activity involving a BVI entity should ensure that they do not violate the financial services legislation in the BVI and that the guide be followed. In order to do so, "careful analysis of the terms and features of any virtual asset product or service is critical"[4] in order to determine whether or not a licence is required.

It is also imperative to note that the guide is not designed to be exhaustive and may be amended and revised as deemed necessary, from time to time, by the FSC.

[2] As defined in Regulation 2, Anti-money Laundering Regulations, 2008.

[3] Same as above.

[4] Guide, page 4.

FINTECH FIRMS APPLYING FOR THE SANDBOX WILL NEED TO SHOW HOW THEIR PROPOSITIONS MEET THE FOLLOWING CRITERIA:

- a detailed comprehensive business proposal and a written indication of the test scenarios the applicant has carried out based on the applicant's fintech business model including projected outcomes of those test scenarios;
- evidence of resources of the applicant (financial, technological, human or otherwise);
- the maximum number of clients the application wishes to engage during the participation period;
- the risks associated with the applicant's business model; and
- the strategies for exiting the sandbox (whether by transitioning into a licensing regime after the sandboxed period or without seeking a licence under a regulatory legislation).

AS REGARDS ITS REGULATORY HYGIENE, A SANDBOX RECIPIENT MUST ALSO:

- have at least two individual directors (in the case of a company); or at least two individual partners (in the case of a partnership); or in any other case, have at least one individual at a senior level who manages the business of the sandbox participant;
- have no more than the maximum number of clients approved by the Commission;
- notify the Commission immediately of any matter or change in circumstances relating to the sandbox participant which is unforeseen and not initiated by the sandbox participant;
- take adequate measures to identify and address potential risks, including the prevention of money laundering, terrorist financing and proliferation financing; and
- at such intervals as the Commission may determine, file interim reports regarding the tests he or she is carrying out in the regulatory sandbox.

AS REGARDS CLIENTS, THE SANDBOX PARTICIPANT MUST DISCLOSE:

- the potential risks to participating in the regulatory sandbox;
- that the sandbox participant does not hold a licence issued by the Commission, and where such is the case, to provide the business activity being tested within the regulatory sandbox;
- that the business activities of a sandbox participant will be conducted pursuant to and in accordance with the sandbox participant's business proposal;
- that the sandbox participant's fintech or fintech-related product or service is being tested within the regulatory sandbox; and
- the period approved by the Commission within which the sandbox participant may test within the regulatory sandbox.

Nevertheless, there are limitations. For example, the sandbox may not be suitable for fintech propositions that differentiate only slightly to that currently exist on markets, or propositions where the applicant has not demonstrated due diligence, including testing the proposed financial service in a laboratory environment and a robust understanding of the legal and regulatory requirements for deploying the proposed financial service. While the sandbox is not a guarantee of a product's success, it fulfils an important role in providing a safe space for firms to prove their business models are beneficial and will thrive in a regulated world. ■

Adenike Sicard
Partner, Sinclairs (BVI)

Adenike has been practising law in the BVI for over 18 years, and specialises in corporate and commercial matters, banking and finance, investment funds and regulatory, and real estate matters.

As part of her role, she routinely advises on compliance issues and on the Anti Money Laundering and Terrorist Financing Laws and Regulations in the BVI.

CRYPTO CURRY CLUB OF THE BVI

By **JAMES DRURY**

THE STATE OF THE CRYPTO MARKET

As a personal investor in the digital asset and cryptocurrency space, in Q3 and Q4 of 2020, I started seeing a resurgence in the crypto world. Bitcoin (BTC) was at $10,764 in September 2020 and continued moving in an upwards trajectory through November ($18,114). At the end of the year, in December 2020, the price of BTC was $28,769. Despite the enormous growth we were seeing in BTC, the leading crypto currency, the entire digital assets industry was also soaring with Non-Fungible token (NFTs) and de-centralized protocols and tokens attracting huge investment.

The difference this time, from the prior cycles in 2013 and 2017, seemed to be that despite cryptocurrencies being initially viewed by traditional financial institutions as radical and risky, as knowledge and understanding of cryptocurrencies was growing, their use and adoption by mainstream institutions, even sovereign government, was similarly increasing. More and more institutional investors were buying into crypto. Daily news outlets were filled with headlines about crypto. So far in fact that BTC's market cap increased from $200 billion in September 2020 to $1 trillion by April 2021.

CRYPTO INSOLVENCY: MITIGATING THE RISKS FOR BVI

It is evident that crypto and digital assets are not going away any time soon, in fact the opposite, and therefore, there is likely to be lots of work and changes in the way we do things for the entire Territory in the future.

With my insolvency head on, my natural train of thought regarding digital assets turned towards the business opportunities for Kalo. The old phrase what goes up must come down was resonating and we knew that the exponential growth of crypto, may continue to go up but it cannot go up at this rate continually without some correction. There was and remains a number of new retail entrants and "fomo" investors looking to get rich quick, with a greater propensity to suffer huge losses. We then thought, how do we at Kalo prepare ourselves for this? What do we need to do? As Insolvency Practitioners, the big case study we considered was Mt. Gox, which, at the time, handled over 70% of all BTC transactions worldwide. Beginning in late 2011, over time 850,000 BTC, valued at more than US$450 million, were stolen straight out of the Mt. Gox hot cryptocurrency wallet. This narrative, if it happened now at one of the crypto exchanges that calls BVI home or one of the new BVI crypto funds, wouldn't be a good story for the BVI so we set out to look at what we needed to do to ready ourselves for if, and when, a big insolvency involving crypto happens.

Despite crypto discussions consuming Kalo office chatter for months, looking at the bigger picture more holistically,

we were acutely aware that despite the BVI's rich list of crypto clients and many of our friends and peers quietly working on ICOs and crypto funds for a number of years, there wasn't any opportunity for a meeting of minds in the BVI that specifically focused around crypto.

CRYPTO PROVIDING FOOD FOR THOUGHT

With the need identified, we sought inspiration from other jurisdictions and set up a LinkedIn page; "The Crypto Curry Club of the BVI" (CCC). From there, discussions began with contacts we knew were active in the digital asset space, to gauge the appetite for a dedicated BVI Crypto forum. A regular social meet to enjoy technical and educational sessions focused around cryptocurrency, digital assets and blockchain.

EVENTS SO FAR

The CCC officially launched in January this year and we've hosted a further three events so far this year. The number of attendees has increased exponentially and we were delighted to welcome over 50 on-island crypto enthusiasts at our June event.

With the group firmly established, so too is the content calendar and list of notable speakers from across the industry. Our April event welcomed Simon Gray from BVI Finance; a self-professed advocate of the CCC. Simon shared details of the BVI Finance's Digital Asset Working Group and its key priorities in the short and long term for the BVI. This was followed by a passionate and engaging tale from Graham Stanton and James Brodie of ID Theory who shared highlights from their genesis story, why they chose the BVI as a home for their fund, as well as discussing a number of hot topics in the crypto space such as DAOs/LAOs, NFTs, and the metaverse.

So much of crypto discussion is about the future and hypotheticals; where crypto may go and wider adoption into everyday life. So, at our June event we wanted to really hone in on what firms are actually doing in the BVI on a day to day basis by looking at the practical and legal steps being taken by our on island peers. David Matthews of Ogier talked through ICOs and coin offerings, Natalie Bundy of Harneys discussed investment funds and incubator funds, whilst Matthew Freeman of Campbells looked at it from a different angle; where something goes wrong which results in litigation, tracing and enforcement action.

JOIN US AT THE CCC?

The CCC now provides a forum for free-thinking and creativity and we believe given our members' unique wealth of experience in the offshore sector, this provides a sandbox to consider how the Territory's existing suite of products can be harnessed in this exciting field as well as identification of new products to better serve the sector. BVI has been a leading offshore center for some 40 years, and how the jurisdiction pivots to grow its importance in the digital asset sector will be testament to its next generation survival. And now, by sharing intellectual capital and leveraging skills and expertise, BVI is now even better placed to face the future challenges that may come before us. The CCC can only improve the BVI and ensure that we are talking about and considering the challenges that may be before us to avoid the many potential pitfalls.

The CCC is held every 6 to 8 weeks and we try to use a different location each time so that we can support local restaurants and proprietors given the impact that COVID-19 has had on so many such establishments.

The CCC is still very much in its formative state with a preliminary committee established of five BVI Finance Members; Matthew Freeman, Rebecca Jack, David Mathews, Natalie Bundy and myself.

WHAT'S NEXT FOR THE CCC?

One of the key priorities for me and the CCC Committee is to ensure the group has longevity and it is very much an open forum group for the BVI. To do that, and whilst Kalo has, to date, spearheaded its formation in terms of driving its establishment and launch, we recognise it will be imperative that the members drive this group forward together to ensure it continues to evolve. We are exploring a number of options of how can achieve this, including formalizing the group as a not-for-profit organisation or even, making the group a DAO. This will allow the community to vote on where the group goes in the future and will be an innovative approach.

Alternatively, we may look at options for membership via crypto payment (including yield farming), incorporating blockchain technology into these events. Fundamentally and critical to the CCC's ongoing success is the focus on collaboration and content. We are confident with these two ingredients, we can ensure that our members are engaged and benefitting from the events.

INVITATION TO LINKEDIN

The CCC is open to anyone and everyone and welcomes like-minded people who are willing to learn and share their knowledge with others. Please join and follow our LinkedIn account. We look forward welcoming new members to the CCC in the future. ■

James Drury
Diector, Kalo (BVI) Limited

As an Insolvency Practitioner with more than 16 years of experience, he has developed a broad range of corporate restructuring & recovery experience managing a number of high profile multi-jurisdictional engagements including complex insolvency, restructuring, forensic and advisory focused engagements across multiple industry sectors.

James is involved with BVI Finance's Digital Asset Working Group and the founding member and spokesperson for the Crypto Curry Club of the BVI.

POSITIONING THE BVI FOR ASIA'S POST-PANDEMIC RECOVERY

By **DR. RICARDO WHEATLEY**

In the midst of the ongoing COVID-19 pandemic and resulting global economic downturn, the British Virgin Islands' financial services industry continues to thrive retaining its global position as a leading Offshore Financial Center (OFC). With the exception of an initial downturn between March and May (2020), BVI's financial services sector posted strong third and fourth quarter growth figures in transactional activity. By the close of 2020, revenue and incorporation numbers (380,449) were only slightly below those of 2019 (387,344), consistent with a gradual longer term annual 1-4% contraction under way since 2015. This positive growth trend has continued into the first quarter of 2021 with strong expectations that 2020's numbers will be exceeded by the close of the year.

The continued vibrance and elasticity of BVI's Financial Services sector in the midst of the pandemic is largely attributable to its present and historical links to Chinese/East-South East Asian markets internationally, and sound management of the pandemic locally. The larger percentage of BVI business continues to emerge from the Asia-Pacific, whose efficient regional management of the pandemic has allowed business to continue largely unimpeded in a "new normal" anti- COVID-19 format. The number of total cases and deaths (as of February 2021) in East & South East Asia (3 million+ cases) are only a fraction of those in North America and Europe (60 million+ cases). Twelve countries in Europe and North America have surpassed 1 million infections and 15,000 deaths, whereas India & Indonesia (the world's 2nd & 4th largest populations) are the only Asian countries to surpass 1 million cases and 10,000 deaths (as of February 2021). As a result, significant activity in the real economies of Asia has continued supported by government funded economic stimulus measures. Sound public health management has set a firm foundation for a strong regional economic recovery in 2021. Additionally, both China and Hong Kong's financial markets have remained in an extended hyperactive phase throughout the pandemic stemming from China-US trade-technology tensions and the vast investment opportunities China's economic recovery presents investors in economically stagnant Europe, North America, and the Middle East. The cumulative result has been a sustained demand for financial services in a period of fluctuating global economic conditions. As a trusted and already regionally integrated Offshore Financial Center, BVI is a direct beneficiary of the conditions for economic recovery in the Asia-Pacific.

BVI has aided in its own good fortunes by keeping the jurisdiction open for business throughout the pandemic via efficient and effective management of the crisis. By the close of February 2021, the Territory had registered 153 total positive cases and 152 recovered cases, and a total suspension of in-office government services of less than 1 month throughout the duration of the pandemic. The jurisdiction has worked hard to maintain its reputation as consistent, efficient, and trustworthy in both certain and uncertain economic times. BVI retains the confidence of the Asian markets and remains the Asia-Pacific's offshore jurisdiction of choice for company incorporations as the pandemic continues unabated.

PREPARATION FOR THE POST-PANDEMIC ECONOMIC ORDER

While BVI's financial services sector has fared comparatively well during the pandemic, with vaccine drives underway world-wide and the likely resumption of global economic growth in 2021, the jurisdiction must begin preparing itself to thrive in post-pandemic conditions. Prior to 2020, the sector had been subject to a five-year 1-4% annual contraction attributable to increasing market saturation, jurisdictional competition, increasing regulatory costs, increasingly complex regulatory compliance, and structural market changes.

A swath of small offshore financial centres increased their presence in China and Asia-Pacific markets over the last decade from whom BVI faces increasing competition yearly. Existing market saturation has resulted in diminishing returns on the Territory's investments in regional marketing and business development, making its leading position increasingly difficult to maintain. The structure of Chinese & East-South East Asian development is presently characterized by a transition from increasing quantities of modernizing infrastructure, to qualitative smart technology and higher value chain products & services. BVI's product offerings require upgrade and adjustment to service the evolving needs of the market.

In addition, finance/financial services are in the midst of a long-term technological transition to digital finance and fintech; a process began in the last decade unleashed by the 2008-09 global financial crisis. As a financial centre not located in a technology hub, BVI does not benefit from the learning effects of the evolution of fintech or digital finance in real-time as do tech hubs like Hong Kong and Singapore. Nevertheless, the jurisdiction has the ability to develop the internal capacity required to effectively service this segment of the market.

Overall, BVI now has the rectangular challenge of coping with the pandemic, outperforming its competitors, adopting to the evolving structure of its traditional markets, and adopting the new digital implements necessary to stay on the cutting edge of international finance. The jurisdiction is taking dramatic steps to address these challenges prior to the pandemic's end in order to secure BVI's leading position as an IFC in the post-pandemic financial order. "Critical actions that can be pursued now towards this objective include both the pursuit of new markets and provision of new products or industry segments.

NEW HIGH-VOLUME MARKETS: INDIA & INDONESIA

Having successfully serviced East & South East Asia for the past 35 years, BVI's financial services sector will expand its presence in South Asia where the emerging Indian market leads regional growth in Asia. Following in the footsteps of China's spectacular 40 years of transformation, India continues its rapid economic development and will surpass Japan as the world's third largest economy by 2030. India is undergoing a triangular transformation in terms of building fundamental infrastructure, rapid integration of online services, and digitization of finance.

Presently serviced by offshore centres Mauritius, Seychelles, Singapore, Malaysia, and the UAE, the Indian market, has not yet reached a maturation nor saturation point in a developing 8 trillion-dollar (PPP-2020) economy of 1.2 billion people. BVI is uniquely positioned to engage the market as both a competing jurisdiction, and jurisdiction of compliment, in much the same way BVI financial products are paired with those of competitor jurisdictions Bermuda, Cayman & the Channel Islands in East-South East Asian markets. India is at a similar developmental phase as China in the early 1990s when BVI made a dramatic expansion into East Asia. It is an insatiable market which holds the potential for an uninterrupted 30-year supply of corporate business for BVI's Financial Services industry.

Second to India, BVI must also scale up its presence in emerging Indonesia, South East Asia's largest and Asia's fifth largest economy. It is also presently undergoing an infrastructural transformation, broad IT integration, and digitization of finance as the country develops and modernizes. As a growing 3.3 trillion-dollar (PPP-2020) economy of 273.5 million inhabitants Indonesia presents massive opportunities for BVI's Financial Services industry over the next decade. Its international financial services market is presently underserved, dominated by Singapore, Malaysia, and the UAE. Exponential growth over the present decade will provide a large enough market expansion for BVI to capture a significant percentage of the market.

NEW INDUSTRY SEGMENTS/PRODUCT OFFERINGS: FINTECH-DIGITAL FINANCE

International finance and financial services are evolving in the direction of digital finance & fintech, a continuation from the previous decade. Asia leads the world in the transformation process utilizing blockchain technologies and other implements followed by North America and Europe. BVI's digitization and fintech regime has grown steadily between 2015 and 2020 inclusive of digital payments, crypto assets, and initial coin offerings. As fintech has evolved and international & onshore regulatory frameworks have become more clearly defined, the opportunities for BVI's participation in the digital transformation process have dramatically increased.

The possibility now exists to transform the jurisdiction from a world leading International Finance Center (IFC), to a premier International Fintech Financial Center (IFFC): "A one stop shop for the structuring, domiciling, and financing of fintech business globally." The BVI has an existing base of resources, expertise, legal and administrative structures to be able to provide a similar base of fintech financial services as hubs in Asia, Europe, and North America. In addition, BVI is positioned to offer fintech businesses worldwide the plethora of corporate, tax, and other offshore specific benefits that have attracted 800,000 companies to its shores over the last 35 years.

The morphing of BVI from an IFC into an IFFC has low infrastructural and capital costs, requiring primarily the implementation of a forward looking comprehensive legislative & regulatory framework. The ability to transform is very much within the means of the jurisdiction who is already off to a good start in upgrading its digitization related legislation and launching of its Fintech Regulatory Sandbox in 2020.

A NECESSARY TRANSITION

Had the COVID-19 pandemic not occurred in 2020, BVI's Financial Services sector would still have been faced with numerous challenges to be addressed for the industry to remain vibrant and successful over the course of the present decade. The pandemic delayed the immediate need to address those challenges due to the resulting global economic downturn. Fortunately, BVI's existing integration into Asia-Pacific finance, an uneven global recovery centred on China and its neighbours, and the jurisdiction's ability to stay open for business throughout the pandemic, provided conditions for its Financial Services sector to thrive throughout the crisis.

However, as the pandemic recedes and pre-pandemic challenges begin to re-emerge, the jurisdiction will still have to make necessary adjustments to maintain or expand its global market share of offshore finance. The task ahead for BVI's Government Authorities is to mobilise the industry's central institutions (FSC, ITA, BVI Finance, etc) to execute a workable plan of internal and external transformation towards this objective. If these adjustments can be made swiftly and efficiently prior to mid-decade, BVI can maintain its position as a leading Offshore Financial Center beyond the immediate future. ■

Dr. Ricardo Wheatley
Director, BVI House Asia
Asia-Pacific Representative, Government of the Virgin Islands

Prior to his diplomatic posting Dr. Wheatley was a University Lecturer in the area of International Politics and Development Studies in South Korea (Ajou University), United States, (Clark Atlanta University), Bangladesh (North South University), and the United Kingdom.

He holds a PhD in International Relations (Clark Atlanta University), MA in Political Science (Clark Atlanta University), and MSC in Public Administration and Economy (Leiden University), and is a member of the Society of Trust and Estate Practitioners (STEP).

TAXING TIMES: A ROUNDTABLE DISCUSSION ON THE IMPACT OF A PROPOSED GLOBAL CORPORATE MINIMUM TAX

INTRODUCTION

Following proposed global tax reforms supported by the Organisation for Economic Co-operation and Development (OECD), G7 and G20 countries, BVI Finance convened an esteemed panel of experts to discuss the possible implications of the latest reform package and what this might mean for international finance centres (IFCs) and the BVI.

The expert panel consisted of Lisa Penn-Lettsome, Executive Director, International Business BVI Government; Geoff Cook, Geoff Cook Advisory Ltd, Chair of Mourant Consulting Ltd and Chair of the STEP Global Public Policy Committee; and Mark Pragnell, Director Pragmatix Advisory Limited. The event was moderated by Oliver Cooper, Tax Consultant at Charles Russell Speechlys LLP and Counsel to the IFC Forum.

The closed discussion was attended by delegates from around the world, including BVI Finance members, private sector practitioners and representatives from some of the world's leading financial services firms.

BACKGROUND

Proposals for new global tax regime are nothing new. For close to 10 years the OECD has been working to develop a new tax framework that is fit for purpose in a globalised and digitalised 21st century economy. Following years of negotiations, the OECD has now put forward a two-pillar package with the goal of ensuring that large Multinational Enterprises (MNEs) pay tax where they operate and earn profits, while adding much-needed certainty and stability to the international tax system.

Pillar One will ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs with a clear target on digital companies. It would re-allocate some taxing rights over MNEs from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there.

Pillar Two seeks to put a floor on competition over corporate income tax, through the introduction of a global minimum corporate tax rate (GTR) that countries can use to protect their tax bases.

As stated by the OECD, the two-pillar package will look to provide much-needed support to governments needing to raise necessary revenues to repair their budgets and their balance sheets while investing in essential public services, infrastructure and the measures necessary to help optimise the strength and the quality of the post-COVID recovery.

THE NEED FOR CLARITY

With a number of meetings and announcements made in recent months by the OECD, G7 and G20 countries, there has been a constant drumbeat of media coverage on the tax reform proposals. This has led to a wide and divergent range of interpretations on the new proposals and what they mean for countries – particularly smaller countries and those with lower corporate tax rates. This was a common theme of the panel discussion following which the following top-line observations were noted:

- Countries do not have to impose a global minimum corporate tax rate

  Jurisdictions do not have to increase their tax rates to the global minimum, there is only a 'right' for home countries to impose a top-up tax in relation to multinational enterprises (MNE) operating in other countries with lower taxes.

  An agreed GMT rate means that MNEs will broadly have to pay a minimum tax rate across their global operations, imposed on a jurisdiction-by-jurisdiction basis. A GMT rate is not, however, a requirement for jurisdictions to increase their own tax rates to the global minimum. Instead, it gives the right to the jurisdiction where the MNE is headquartered to impose a top-up tax on the corporate tax paid by that MNE in a second jurisdiction where it does business or earns a profit where that second jurisdiction has not imposed a minimum level of tax.

- Countries are not required to impose a top-up tax but have the right to impose it without facing legal action.

  The proposal states that countries have a right to impose a top-up tax without being sued in the International Court of Justice, or the WTO arbitration process.

  All the large global IFCs have joined the OECD's Inclusive Framework Statement on 1 July and, while they are not obliged to impose a top-up, theoretically they have the same right as larger jurisdictions to do so without being sued. IFCs were therefore not incorrect to join the OECD's Inclusive Framework Statement.

- The proposals are not all encompassing

  Companies with less than a threshold of EUR 750 million in turnover will not be affected and countries do not have a right to impose a top up against these businesses.

  The fact that the proposal isn't all encompassing also means that private wealth and many corporate structures that are the bread and butter of IFC services are left out of the proposals. Funds are a case in point, which are excluded altogether, and the OECD inclusive framework includes a provision to allow for even more exemptions to reduce the overall bureaucratic burden.

- Proposals are far from final with more details set to emerge

  The tax proposals contain a number of points on which OECD Inclusive Framework members must still agree details – for example the global minimum tax rate will be "at least" 15%, with precise numbers to be decided.

  In addition, a small number of Inclusive Framework members have not signed on to these proposals. The wider success of the initiative might depend on the inclusion of a broad set of coercive measures. For instance, countries might be afforded certain incentives such as tax reliefs. There is also the possibility that the reforms might be driven by a new multilateral treaty that overrules existing deferred tax liabilities.

- Opportunity for IFCs to explain model

  The proposed tax reforms present an opportunity for IFC's to come together and explain the 'tax neutral' model to a wider audience. Tax neutrality plays an important role in the global investment process, where IFCs facilitate investment into developing countries to create value and stimulate growth. This is much in line with the OECD's ambition to help reboot a post-COVID global recovery.

WATCH THIS SPACE

There is no doubt that the century's-old tax regime is no longer fit for purpose in today's digitized global economy. While changes in digital assets are moving at light speed, the digital transformation is still evolving, and tax reform is very part of that process.

The OECD and G20 countries have voiced support for change – yet there is much more detail yet to come on how these proposals will be implemented. It will be critical for IFCs to remain engaged and continue to play a constructive role in developments within a new global framework. ■

Oliver Cooper
Tax Consultant, Charles Russell Speechlys LLP
Counsel to the IFC Forum

Oliver advises governments and private clients on international regulations and trends in tax, trade, and financial services. His work specialises in advising on international tax reform, economic substance, and related market access issues.
Oliver speaks and writes regularly on international regulation and tax matters, particularly as they affect small jurisdictions. He has extensive experience in public policy in the United Kingdom and European Union. Oliver is a member of the Society of Professional Economists.

Mark Pragnell
Director, Pragmatix Advisory Limited

With over 25 years' experience of applying economics to markets, businesses and public policy, Mark advises companies, trade associations and public bodies globally. He helps them plan for the future, understand the implications of changing government policy and make their case to investors, regulators and politicians.

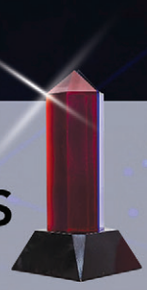
Lisa Penn-Lettsome
Executive Director, International Business BVI Government

Mrs. Penn-Lettsome serves as the Government's chief technical and policy advisor on international business and financial services. She is a lawyer with over 25 years' experience and has served in the public sector for over 11 years, several of these as Deputy Managing Director of the Financial Services Commission, prior to a 13-year stint as Head of Regulation in a well-known international law firm.

Geoff Cook
Geoff Cook Advisory Ltd, Chair of Mourant Consulting Ltd, Chair of the STEP Global Public Policy

An experienced Chair, Chartered Company Director and Chartered Banker, with a consistent track record of successfully leading significant business enterprises. Geoff has extensive experience of developing and communicating strategic thinking, with effective execution and implementation. For more than a decade Geoff played a leading role in setting the strategic direction of Jersey as an international finance centre instigating a number of strategic reviews in partnership with London Business school, McKinsey and EY. During this time he was a standing member of a number of high level governance boards.

2020 FINANCIAL SERVICES AWARDS



BEST CORPORATE SOCIAL RESPONSIBILITY

O'Neal Webster

INSOLVENCY PRACTICE OF THE YEAR

KPMG

REGULATOR OF THE YEAR

TELECOMMUNICATIONS REGULATORY COMMISSION VIRGIN ISLANDS

LITIGATION PRACTICE OF THE YEAR

Ogier

TECH SAVVY FIRM OF THE YEAR

BANK OF ASIA 亞洲銀行

CORPORATE SERVICES PROVIDER OF THE YEAR

TMF GROUP

INSIDE BACK COVER

BANK OF THE YEAR

CIBC FirstCaribbean International Bank

COMPLIANCE OFFICER OF THE YEAR

T'sa James Hodge (Ogier)

INSURANCE AGENCY OF THE YEAR

NAGICO INSURANCES

LAWYER OF THE YEAR

Vanessa King (O'Neal Webster)

AUDITOR OF THE YEAR

KPMG

FUTURE LEADER'S AWARD

Ayana S. Hull (Harneys)

ACCOUNTING FIRM OF THE YEAR

KPMG

JURISDICTION OF CHOICE

BRITISH VIRGIN ISLANDS

WHY BVI?

- Compliance with international regulatory standards
- Competitive start-up costs
- Innovative legislation
- Internationally renowned commercial court
- No currency controls
- Qualfied professional pool of practi - tioners
- Strong partnership between public and private sectors

Pioneering, innovative and leading the way in global business solutions, the **British Virgin Islands (BVI)** is an internationally respected business and finance centre with a proven committment to connect markets, empower clients and facilitate investment, trade and capital flow.

BVI Finance
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