The Dispute Resolution Review

Third Edition

Editor
Richard Clark

Law Business Research

The Dispute Resolution Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dispute Resolution Review, Third Edition (published in April 2011 – editor Richard Clark).

For further information please email
Adam.Sargent@lbresearch.com

THE DISPUTE RESOLUTION REVIEW

Third Edition

Editor
Richard Clark

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette
Hannah Thwaites

EDITORIAL ASSISTANTS
Nina Nowak
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Kathryn Smuland

SUBEDITOR
Davet Hyland
Sarah Morgan

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2011 Law Business Research Ltd
www.TheLawReviews.co.uk
© Copyrights in individual chapters vest with the publisher and with the contributors.
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2011, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN: 978-1-907606-05-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

AKINCI LAW OFFICE

APPLEBY

ARTHUR COX

ASHTAR AUSAF ALI & ASSOCIATES – ADVOCATES AND SOLICITORS

ASTERS

BÄR & KARRER AG

BLAKE DAWSON

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUFETE HERNÁNDEZ-ROMO

BUGGE, ARENTZ-HANSEN & RASMUSSEN (BA-HR)

CAMPOS FERREIRA, SÁ CARNEIRO & ASSOCIADOS

COLLAS CRILL

CRAVATH, SWAINE & MOORE LLP

CROCI, SILVA & CAJINA ABOGADOS

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

DORDA BRUGGER JORDIS RECHTSANWÄLTE GMBH

ELVINGER, HOSS & PRUSSEN

ESTUDIOS PALACIOS LLERAS SAS

FONTES & TARSO RIBEIRO ADVOGADOS

FULBRIGHT & JAWORSKI LLP IN ASSOCIATION WITH MOHAMMED AL-GHAMDI LAW FIRM

HENGELER MUELLER

HUTABARAT HALIM & REKAN

JUN HE LAW OFFICES

KARANJAWALA & COMPANY

LAMBADARIOS LAW FIRM

LASZCZUK & PARTNERS

LIEPA, SKOPINA/BORENIUS

LOGAN SABAPATHY & CO

LOYENS & LOEFF

MAGISTERS

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MARVAL, O'FARRELL & MAIRAL

MOTIEKA & AUDZEVICIUS

NISHIMURA & ASAHI

OGILVY RENAULT LLP

PELLEGRINI & URRUTIA

QUEVEDO & PONCE

RUDOLPH, BERNSTEIN & ASSOCIATES INC

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TASSOS PAPADOPOULOS & ASSOCIATES LLC

TOMAIER & TOMAIEROVÁ, LAW FIRM

TSMP LAW CORPORATION

TUCA ZBÂRCEA & ASOCIATII

URÍA MENÉNDEZ

URÍA MENÉNDEZ - PROENÇA DE CARVALHO

VLASOVA, MIKHEL & PARTNERS

YULCHON

CONTENTS

Editor's Preface xv
Richard Clark

Chapter 1 ARGENTINA 1
Martín Campbell

Chapter 2 AUSTRALIA 27
Sergio Freire, Amanda Lees, Chris Goddard and Wen-Ts'ai Lim

Chapter 3 AUSTRIA 53
Christian Dorda and Felix Hörlsberger

Chapter 4 BELARUS 68
Olga Grechko and Kira Bondareva

Chapter 5 BELGIUM 85
Geert Bogaert, Etienne Kairis and Aude Mahy

Chapter 6 BERMUDA 106
Kiernan Bell

Chapter 7 BRAZIL 116
Marcus Fontes, Max Fontes and Júlia Elmôr

Chapter 8 BRITISH VIRGIN ISLANDS 134
Eliot Simpson

Chapter 9 CANADA 147
William McNamara and Randy Sutton

Chapter 10 CAYMAN ISLANDS 163
Katie Brown

Chapter 11 CHILE 185
Enrique Urrutia and Julio Pellegrini

Chapter 12 CHINA 196
Xiao Wei, Zou Weining and Stanley Xing Wan

Chapter 13 COLOMBIA 208
Hugo Palacios Mejía and Oscar Tutasaura Castellanos

Chapter 14 CYPRUS 221
Nicos G Papaefstathiou

Chapter 15 CZECH REPUBLIC 232
Jan Tomaier and Matúš Hanuliak

Chapter 16 ECUADOR 248
Alejandro Ponce Martínez

Chapter 17 ENGLAND & WALES 263
Richard Clark and Damian Taylor

Chapter 18 FINLAND 284
Petteri Uoti and Johanna Jacobsson

Chapter 19 FRANCE 294
Tim Portwood

Chapter 20 GERMANY 308
Henning Bälz and Carsten van de Sande

Chapter 21 GREECE 324
Prokopis Dimitriadis

Chapter 22 GUERNSEY 333
Christian Hay and James Tee

Chapter 23 HONG KONG 349
Mark Hughes

Chapter 24 HUNGARY 366
Zoltán Balázs Kovács and Dávid Kerpel

Chapter 25 INDIA 381
Raian Karanjawala and Manik Karanjawala

Chapter 26 INDONESIA 403
Pheo M Hutabarat

Chapter 27 IRELAND 426
Andy Lenny, Claire McGrade, Gareth Murphy and Sara Carpendale

Chapter 28 ISLE OF MAN 439
Christopher Cope, Fletcher Craine and Claire Collister

Chapter 29 ITALY 456
Monica Iacoviello, Vittorio Allavena and Andrea Carlevaris

Chapter 30 JAPAN 479
Hiroyuki Tezuka and Yutaro Kawabata

Chapter 31 JERSEY 493
Fraser Robertson and Davida Blackmore

Chapter 32 KOREA 509
Young Seok Lee and Sae Youn Kim

Chapter 33 LATVIA 521
Dace Kalnmeiere

Chapter 34 LITHUANIA 532
Ramunas Audzevicius, Tomas Samulevicius and Mantas Juozaitis

Chapter 35 LUXEMBOURG 547
Léon Gloden

Chapter 36 MALAYSIA 559
Sylvia Cotter

Chapter 37 MAURITIUS 573
Gilbert Noel

Chapter 38 MEXICO 583
Miguel Angel Hernández-Romo Valencia

Chapter 39 NETHERLANDS 597
Ruud Hermans and Margriet de Boer

Chapter 40 NIGERIA 616
Babajide Ogundipe and Lateef Omoyemi Akangbe

Chapter 41 NORWAY 630
Jan B Jansen

Chapter 42 PAKISTAN 643
Ashtar Ausaf Ali, Ahmed Uzair and Zoya Chaudary

Chapter 43 PERU 656
Claudio C Cajina and Marcello Croci G

Chapter 44 POLAND 666
Justyna Szpara and Agnieszka Kocon

Chapter 45 PORTUGAL 680
João Maria Pimentel

Chapter 46 ROMANIA 692
Levana Zigmund

Chapter 47 RUSSIA 705
Dmitry Dyakin and Alexander Vaneev

Chapter 48 SAUDI ARABIA 715
Mohammed Al-Ghamdi, John Lonsberg, Jonathan Sutcliffe and Sam Eversman

Chapter 49 SINGAPORE 733
Thio Shen Yi, Karen Teo and Peter John Ladd

Chapter 50 SOUTH AFRICA 747
Gerhard Rudolph and Estelle Bester

Chapter 51 SPAIN 772
Esteban Astarloa

Chapter 52 SWEDEN 792
Jakob Ragnwaldh and Niklas Åstenius

Chapter 53 SWITZERLAND 801
Daniel Hochstrasser

Chapter 54 TURKEY 811
Ziya Akinci and Cemile Demir Gokyayla

Chapter 55 UKRAINE 825
Oleksiy Didkovskiy, Andriy Pozhidayev and Yaroslav Petrov

Chapter 56 UNITED ARAB EMIRATES 835
Bashir Ahmed

Chapter 57 UNITED STATES 846
Nina M Dillon and Timothy G Cameron

Appendix 1 ABOUT THE AUTHORS 863

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... 899

Chapter 8

BRITISH VIRGIN ISLANDS

Eliot Simpson[*]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The British Virgin Islands ('BVI') are located approximately 60 miles due east of Puerto Rico at the north-eastern corner of the Caribbean Sea. They have a population of around 24,000, mostly on Tortola, the largest island at 12 miles long by three miles wide; nevertheless, the territory has achieved the status as a leading financial centre. Well over 800,000 companies have been incorporated within its shores, including a significant number of mutual funds and hedge funds and captive insurance and trust companies. It is the world's second largest jurisdiction for the incorporation of hedge funds.

The BVI (or technically, the Virgin Islands) remain a British overseas territory, with the British government retaining responsibility for its foreign policy and defence. Executive authority invested in the Queen is exercised on her behalf by the Governor, currently His Excellency, Mr Boyd McCleary. Otherwise, it is a largely self-governing jurisdiction, with its own Constitution (adopted in 2007 by the Virgin Islands Constitution Order) and Parliament.

The court system in the BVI consists of a Magistrates Court, a High Court and a Court of Appeal, with the final court with appellate jurisdiction being the Privy Council in London. The Superior Court of Record for the BVI is the Eastern Caribbean Supreme Court ('the ECSC'), which also serves as the Superior Court of Record for two other British overseas territories (Anguilla and Montserrat) and six independent member states of the Organisation of Eastern Caribbean States (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint Lucia, and St Vincent and the Grenadines) ('the OECS').

The ECSC consists of three divisions: the Court of Appeal, the High Court of Justice and the Commercial Court. The Court of Appeal is an itinerant court whose sittings rotate between the nine members of the OECS. The BVI also has a Magistrates

* Eliot Simpson is a partner at Appleby.

Court, from which appeals lie direct to the Court of Appeal. The Magistrates Court has both a criminal and a petty civil jurisdiction.

In what is widely seen as an important development, not just for the BVI but for the wider Eastern Caribbean region, the Commercial Division of the High Court opened in BVI in 2009. The court's first judge, Edward Bannister QC (an experienced English silk) began sitting in temporary premises in April 2009. In October 2009, the new and modern Commercial Court building opened for business.

II THE YEAR IN REVIEW

In the area of commercial disputes, a number of interesting and important decisions came out of BVI's Commercial Court and the Court of Appeal in 2010.

In *Western Union v. Reserve International Fund*, the applicant sought to appoint liquidators to the fund on the basis that it was just and equitable to do so because the substratum of the company had gone. The fund had invested in bonds in order to provide a reliable return. However, the investments included bonds issued by Lehman Brothers. Following Lehman's collapse redemptions were suspended and the company's stated aim was to wind down its positions. On that basis, Bannister J accepted that the fund's substratum had gone. Western Union claimed to be entitled to redemption proceeds and therefore to make its application as a creditor. This was opposed on the basis of Section 197 of the Insolvency Act 2003, which provides that a member or past member cannot claim in a liquidation for a sum due to him in his character as a member. Mr Justice Bannister held that this did not apply to redemption proceeds that were due and payable, as these were not claimed in the character of a member.

The view that Section 197 does not prevent a former member from claiming as a creditor has, however, since been considered by the Court of Appeal in *Westford Special Situations Fund v. Barfield Nominees Limited and Another*. In that case, the Commercial Court had made a winding-up order on the application of members seeking unpaid redemption proceeds on the basis that they were creditors and their claims were not barred by Section 197. The judgment of the Court of Appeal has not yet been delivered, but the fund's appeal was allowed.

In *Zanotti v. Interlog Finance Corp and Others*,[1] Bannister J considered an application to stay an action under Section 184I of the BVI Business Companies Act 2004 (unfair prejudice) on the basis of an arbitration clause in the company's articles of association. The company was owned and operated by two brothers and after their falling out the claimant was removed as a director. The claimant sought against the company and other members a declaration that the affairs of the company had been conducted in a manner unfairly prejudicial to him under Section 184I. The defendants sought a stay under Section 6 of the Arbitration Ordinance on the basis that the articles contained an arbitration agreement. It was significant that the agreement applied only as between the company and a member. It did not apply as between members *inter se*. Bannister J nevertheless determined that the claims against the company must be stayed as there

1 BVIHCV 2009/0394.

was no applicable exception under the Ordinance and the agreement was not contrary to public policy.

This year has seen a significant step towards a position where 'free-standing injunctions' might be available in BVI. BVI does not have any statutory basis for such injunctions. However, in *Black Swan Investment ISA v. Harvest View Limited and Another*,[2] Bannister J granted freezing orders against a number of BVI companies preventing disposal of their assets, in circumstances where the companies were, or appeared to be, owned by a defendant to proceedings in South Africa. He noted that it would be 'highly detrimental' to the interests of important offshore financial centres such as the BVI not to have within their armoury the jurisdiction to grant injunctive relief in aid of foreign proceedings where appropriate. Perhaps hinting at arguments to come, the Judge made specific reference to the terms of Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act and held that it was open to him to resolve the question left open by the Privy Council in *Mercedes Benz* and to 'fill it in this jurisdiction by respectfully adopting the [dissenting] reasoning of Lord Nicholls in *Mercedes Benz*'. The position of defendants not subject to the territorial jurisdiction of the BVI court did not directly arise on the facts.

The availability of the *Norwich Pharmacal* jurisdiction to obtain information from companies' registered agents was reviewed in *JSC BTA Bank v. Fidelity Corporate Services Limited and Others*.[3] The claimant bank sought disclosure of information and documents relating to the ownership of BVI companies that had allegedly received tainted funds. Bannister J decided that *Norwich Pharmacal* relief was not available because it was not necessary; the bank was aware of the identity of the alleged wrongdoers. Bannister J also decided that the facts did not support the grant of *Bankers Trust* relief. There was no evidence that any of the discovery defendants were likely to be in possession of relevant information. Bannister J then considered the degree of involvement required before a third party could be required to give discovery. The discovery defendant must have participated in or been involved in the wrongdoing. The mere offering of corporate services to the BVI companies was not sufficient. There was no evidence that the discovery defendants had been involved in or facilitated the receipt by the BVI companies of stolen money. The bank therefore failed to pass the threshold 'involvement' test.

In *Picard v. Bernard L Madoff Investment Securities LLC*,[4] the Commercial Court considered an application by the New York appointed trustee to the business of Bernard L Madoff Investment Securities for recognition in BVI. The application was made pursuant to Part XIX of the BVI Insolvency Act 2003. Bannister J refused the application. He noted that cross-border insolvency matters are dealt with in Part XVIII and Part XIX of the Act. Part XVIII is an enactment of the UNCITRAL code, but is not currently in force. Part XIX allows a foreign representative from a 'relevant' country to seek the assistance of the BVI court (the United States being a relevant country for these purposes). Bannister J held that the two parts were mutually exclusive and therefore

2 BVIHCV2009/399.

3 BVIHC (COM) 137 of 2010.

4 BVIHCV 140 of 2010.

while Part XVIII was not in force, foreign representatives are confined to Part XIX. As such, the common law concept of recognition has no place under BVI legislation.

In *Grand Pacific Holdings Limited v. Pacific China Holdings Limited*,[5] Grand Pacific applied for the appointment of liquidators, relying on the failure to an arbitration award as evidence of insolvency. Pacific China responded that the debt was disputed due to shortcomings in the way in which the Tribunal conducted the proceedings. Bannister J expressed doubt that the debt could be disputed in this way, but thought it right for the Court to consider whether the dispute was substantial, noting that the holder of an unenforceable arbitral award would not be a creditor for the purposes of the Insolvency Act. He then considered whether grounds had been identified by Pacific China that raised a real question whether the award was one that should be enforced. These included assertions that Pacific China had not been able properly to present its case and that the tribunal had flouted the procedural protocol agreed between the parties. Bannister J found that the grounds were not so flimsy as to be incapable, on full argument in an application to set aside an order for enforcement, of being developed so as to give rise to a substantial dispute as to enforceability. However, he went on to find that Pacific China's points could not be taken in isolation and must be considered in light of the Tribunal's total reasoning and overall findings. He found that, even if there had been some unfairness, it could have had no impact on the outcome of the arbitration. On that basis, he went on to appoint liquidators to Pacific China.

On 20 September 2010 the Court of Appeal gave judgment allowing Pacific China's appeal and setting aside the order appointing liquidators (*Pacific China Holdings Ltd v. Grand Pacific Holdings Limited*[6]). The central issue considered by the Court of Appeal was the nature and extent of the discretion given to the Court, by Section 36 of the Arbitration Ordinance, whether to enforce an award where a ground for refusing enforcement was made out. On this issue Grand Pacific referred to a series of Hong Kong cases suggesting that the court could enforce an award, even where a ground was made out for refusing enforcement, if the result of the arbitration would not have been different notwithstanding the irregularity. These cases included *Paklito Investment Ltd v. Klockner East Asia*[7] and *Apex Tech Investment Limited v. Chuang's Development (China) Limited*, a decision of the Hong Kong Court of Appeal.[8] This was consistent with the approach taken by Mr Justice Bannister in the Commercial Court. Pacific China relied upon a line of English Court of Appeal judgments, including *Dardana Ltd v. Yukos Oil Co*[9] and *Dallah Real Estate and Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*.[10] These cases suggested that only a narrow discretion existed in applying Section 36. In overturning Mr Justice Bannister's decision, the Court of Appeal preferred the English line of cases.

5 BVIHCV 389 of 2009.

6 HCVAP 7 of 2010.

7 [1993] HKLR 39.

8 CACV 000231/1995; 15 March 1996.

9 [2002] 1 All ER (Comm) 819.

10 [2009] EWCA Civ 755.

III COURT PROCEDURE

i Overview of court procedure

The rules of the Eastern Caribbean Supreme Court ('the ECSC CPR') are largely modelled upon the English Civil Procedure Rules ('the CPR'). There are, however, differences and some areas covered in the English CPR do not appear in the ECSC CPR. There is no detailed commentary published on the Rules.

In 2009, a new Rule, 79A, was added to the ESCS CPR in relation to the new Commercial Court. The Commercial Court has also issued a practice direction dealing with procedure in that court.

Also of considerable importance in BVI are the Insolvency Rules 2005. These set out detailed provisions on procedure and practice in insolvency matters. The ECSC CPR applies in insolvency matters only to the extent that there is nothing inconsistent in the Insolvency Act 2003 or the Insolvency Rules, or a relevant practice direction.

ii Procedures and time frames

Cases may be commenced by claim form, fixed-date claim form or originating application.

A fixed-date claim form is used for matters that would formerly have been the subject of an originating summons or motion, and generally these are matters that will be decided on affidavit evidence without pleadings. These cases would typically take a few months to be dealt with.

Applications under the Insolvency Act where there is not an existing court proceeding, such as applications for the appointment of liquidators, will be made by originating application. These matters will typically take around two to three months to be dealt with.

Other cases where full pleadings are required will generally be commenced by claim form. These cases might be expected to take longer (such as one to two years) to reach trial.

iii Class actions

There are no class actions in BVI.

The ECSC CPR contains provision on representative proceedings. Where five or more persons have the same or a similar interest, these provisions allow the court to appoint a representative body or one or more of those persons to represent all or some of the persons with the same or similar interest. These provisions are not widely used.

iv Representation in proceedings

A natural person may appear in court on their own behalf.

A body corporate can be represented by a duly authorised director or other officer, but it must be represented in 'open court' by a legal practitioner unless the court permits it to be represented by a director or officer.

v Service out of the jurisdiction

ECSC CPR Part 7 deals with service of court process out of the jurisdiction.

Rule 7.3 sets out the circumstances in which the court may permit a claim form to be served out of the jurisdiction.

The rules of the BVI High Court are broadly modelled on the English CPR. Leave may be given by the court to serve proceedings out of jurisdiction in appropriate cases. This could include cases where the defendant is a necessary and proper party to a claim that has been or will be served on another defendant, where a claim is founded on a contract with a BVI connection, cases where a tort was committed within the jurisdiction and cases relating to property within the jurisdiction.

The BVI court will apply English principles of *forum non conveniens*. Where jurisdiction to entertain a dispute is established, the court thus retains a residual discretion to determine whether or not BVI is the forum most appropriate for the resolution of the dispute.

vi Enforcement of foreign judgments

Foreign judgments may only be enforced in the BVI at common law or in one of the limited instances provided for by statute.

The statutory machinery is to be found in:

a the Foreign Judgments (Reciprocal Enforcement) Act 1964; and

b the Reciprocal Enforcement of Judgments Act 1922.

The Foreign Judgments (Reciprocal Enforcement) Act 1964

The Governor in Council may nominate the High Courts of jurisdictions in which he is satisfied that 'substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court'. To those jurisdictions, the intention was that an application for registration of the foreign judgment might be made under Section 4. Certain jurisdictions have purportedly been designated, but it is widely thought that the designation exercise was not carried out effectively.

The Reciprocal Enforcement of Judgments Act 1922

The Reciprocal Enforcement of Judgments Act applies only to judgments given in the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland. It has also been extended to additional jurisdictions.

The judgment must be final and conclusive for a specified sum of money. Section 3(2) of the Act excludes judgments from the system of registration where they were obtained by fraud,[11] an appeal is pending or the time for appealing has not expired[12] or it would be contrary to public policy to enforce the award. The BVI court would generally look to English decisions as to the types of conduct that may affront public policy; as a matter of policy, the courts of this jurisdiction will not enforce, directly or indirectly, foreign tax claims.

11 Section 3(2)(d).

12 Section 3(2)(e).

Section 3(2)(a) of the Act excludes judgments obtained from the system of registration judgments obtained where the original court lacked jurisdiction, or where:

a in the case of a judgment debtor present within the jurisdiction, he or she was not served with the proceedings;[13] and

b in the case of a judgment debtor not ordinarily resident or carrying on business within the jurisdiction of the home court, he or she did not submit to the jurisdiction of the court.

An application must be made under Part 72 of the ECSC CPR. The application is made without notice, but supported by evidence. The application must contain certain prescribed information and have exhibited to it:

a a duly authenticated copy of the judgment; and

b details of the interest that has become due under the law of the country in which judgment has been entered.

The simplicity of the without-notice application is to be contrasted with the common law route, which is to sue on the judgment itself.

Enforcement at common law

At common law, the courts in the BVI will treat any final and conclusive monetary judgment as being a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction in which the judgment was obtained. There is no requirement of reciprocity.

The judgment creditor must:

a prove the judgment; and

b show that it is a final and conclusive monetary judgment for a specified sum.

If these matters are established, a retrial of the issues in the action will not be necessary. The creditor may instead apply for summary judgment under Part 15 of the ECSC CPR.

However, since the judgment creditor is proceeding by way of a fresh action, he or she will only be able to proceed in the BVI if he or she is able to serve the proceedings upon the judgment debtor by means permitted by Parts 5 and 7 of the ECSC CPR.

The mere existence of assets within the territory is not, in itself, sufficient to found jurisdiction in the BVI courts. The need to serve proceedings can therefore give rise to difficulty where the debtor has assets within the territory, but is not himself or herself resident within it. The ECSC CPR contain no power in those circumstances to serve out of the jurisdiction – a position that contrasts curiously with the procedural rules in force in England.

13 Section 3(2)(c).

It will still be possible to defeat an application for summary judgment, or indeed an action founded upon a foreign judgment, even one which is conclusive and made in respect of a specific sum, if:

a the foreign court did not have jurisdiction in the matter, meaning that the judgment debtor either submitted to the jurisdiction or was resident or carrying on business within the jurisdiction and was duly served with the process;

b the foreign judgment includes penalties, taxes, fines or similar fiscal or revenue obligations;

c the judgment was obtained by fraud;

d recognition or enforcement of the judgment in the BVI would not be contrary to public policy; or

e the foreign proceedings were conducted in a manner that infringes the rules of natural justice.

In practice, BVI sees very little activity in relation to the cross-border enforcement of foreign judgments, unless it is through the invocation of the insolvency jurisdictions to be found within the BVI Insolvency Act 2003. This is not surprising: it is a jurisdiction with only 24,000 people but with over 800,000 business companies. Those wishing to enforce judgments will therefore typically be concerned with a corporate debtor – typically one with little connection to the jurisdiction – and whose assets may well be found elsewhere.

vii Assistance to foreign courts

The Hague Evidence Convention has not formally been extended to BVI by Order in Council. However, BVI has implemented the Convention by the Evidence (Proceedings in Foreign Jurisdictions) Ordinance 1988. The BVI High Court will therefore provide assistance in response to a letter of request issued by a court in another jurisdiction. This might involve obtaining documents in BVI or obtaining depositions.

Part XIX of the Insolvency Act 2003 provides for orders that may be made in aid of foreign insolvency proceedings. This may assist a foreign office holder to restrain BVI proceedings, to obtain information or to obtain property.

viii Access to court files

A member of the public may obtain copies of a claim form, notice of appeal and any judgments and orders from the court file.

ix Litigation funding

The position in BVI on third parties' funding litigation mirrors English common law. BVI does not have any statutory provisions on conditional fee arrangements.

Third-party funding arrangements, with independent parties funding litigation, is not common in BVI.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Issues of conflicts of interest and Chinese walls are generally governed by English common law.

The OECS Bar Association publishes a Code of Ethics that is observed in BVI. This includes provision that an attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation. In all situations where a possible conflict of interest arises, an attorney-at-law must avoid all risk of conflict by leaning against multiple representation. In addition, except with the specific approval of his client given after full disclosure, an attorney-at-law must not act in any manner in which his professional duties and personal interests conflict or are likely to conflict. An attorney-at-law must not accept or continue his or her retainer or employment on behalf of two or more clients if their interests are likely to conflict or if his or her independent professional judgement is likely to be impaired.

ii Money laundering, proceeds of crime and funds related to terrorism

Lawyers conducting certain types of business are considered to be professionals conducting relevant business under BVI's Anti-Money Laundering and Terrorist Finance Code of Practice 2008. Such business includes real estate transactions, managing client funds, and the creation, operation or management of legal persons or arrangements, or buying and selling of business entities. Lawyers engaged in those areas of business are required to obtain full 'KYC' information[14] on their clients and to report any suspicious activity or transaction (failure to do so being a criminal offence).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

English common law is applied to the issue of privilege. Privilege attaches principally to those documents that have been prepared for the purpose of seeking or providing legal advice, and those documents prepared in contemplation of litigation.

ii Production of documents

BVI does not have any recognised form of application for pre-action disclosure. There is nothing within the local Civil Procedure Rules that regulates such applications.

It is possible that an argument could be made that BVI law does (or should) possess a jurisdiction to order pre-action disclosure. Section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act, provides that the jurisdiction vested in the High Court in civil proceedings and in probate, divorce and matrimonial causes, shall be exercised in accordance with the provisions of the Ordinance and any other law in operation in the territory and rules of court, and where no special provision

14 'Know your customer' information.

is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.

The English High Court of Justice does recognise a jurisdiction to make orders for pre-action disclosure. That derives from the Supreme Court Act 1981. There is some debate as to whether Section 11 is apt to confer a jurisdiction to grant pre-action disclosure. Probably there is no such thing as pre-action disclosure under BVI law.

Disclosure

Part 28 of the ECSC CPR contains provision on disclosure and inspection broadly modelled on the English CPR. However, in BVI the test for production is whether a document is directly relevant to the issues (rather than simply relevant).

Norwich Pharmacal Relief

The English *Norwich Pharmacal* line of cases has been applied in the BVI and there is in practice nothing between English and BVI law in that regard.

Morgan & Morgan is the leading BVI appellate decision relevant to the granting of *Norwich Pharmacal* relief. Following a period when such orders were perhaps more freely granted, *Morgan & Morgan* has served to emphasise the importance of paying careful attention to whether or not the disclosure respondent, and the disclosure sought and its purpose, fall within conventionally accepted *Norwich Pharmacal* principles. As a rule, an application can succeed but only if it is shown:

a that a wrong has been carried out by the wrongdoer, or at least arguably carried out;

b that the claimant intends to assert his legal rights against the wrongdoer;

c that there is a need for the order to enable the action to be brought against the wrongdoer, usually to identify the wrongdoer; to put it another way, that it is necessary to assist the claimant in achieving justice, and that there is no other practical source of information, and that it is just and convenient to make the order sought; and

d that the respondent was mixed up, or facilitated the wrongdoing (if only innocently) or had some relationship with the wrongdoer and is able to provide the information necessary.

The judgment of Bannister J in *JSC BTA Bank v. Fidelity Corporate Services Limited and Others*[15] emphasised that obtaining information from companies' registered agents on *Norwich Pharmacal* principles will require showing some necessity and involvement in the wrongdoing.

15 BVIHC (COM) 137 of 2010.

Norwich Pharmacal in support of foreign proceedings

There is some authority that the BVI court will not grant disclosure (through the use of Norwich Pharmacal principles) in aid of foreign proceedings: in *Pacific International Sport Clubs Limited v. Comerco Commercial Limited*[16] Olivetti J held:

Without deciding the point, as it does not fall for determination, I also understand that the law governing *Norwich Pharmacal* orders is such that it does not permit an order to be made requiring anyone to disclose information for use in foreign proceedings (a different regime covers this) but in aid of suit in this jurisdiction.

The different regime to which Olivetti J refers is, of course, the potential for a letter of request under the Hague Convention.

BVI does not have an equivalent of Section 25 of the Civil Jurisdiction and Judgments Act 1982. However, in practice the court has made orders even where no BVI proceedings are commenced and it is quite possible that in appropriate cases the court will take a broad view of its jurisdiction.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Commercial disputes that are pursued in BVI are generally dealt with in the Commercial Division of the High Court rather than by alternative means. If a dispute is subject to an arbitration agreement, or the parties are minded to mediate, these processes will typically take place elsewhere. Nevertheless, most commercial litigators in BVI have experience in other jurisdictions and are familiar with arbitration and mediation and can consider these options where appropriate. In practice, issues that arise in relation to arbitration tend to be either questions of enforcement or of ancillary orders.

ii Arbitration

Arbitration in BVI is governed by the Arbitration Ordinance 1976, which contains provisions relevant both to domestic and foreign arbitrations and in relation to the enforcement of arbitral awards.

The Arbitration Ordinance gives the High Court jurisdiction to grant ancillary relief in connection with an arbitration, although it remains a moot point whether this can be used in relation to a foreign arbitration.

The BVI is a dependent territory of the United Kingdom, which is a party to the New York Convention. The BVI Parliament has given effect to the Convention by enacting Part IX of the Arbitration Ordinance, 1976. In what the Court of Appeal have held to be a clear signal of the legislatures intent (*IPOC International v. LV Finance Group Limited* (2007)), the text of the New York Convention is to be found within a schedule to the Ordinance.

A 'convention award' is defined as meaning an award made in pursuance of an arbitration agreement in the territory of a state other than the territory or the United Kingdom that is a party to the New York Convention.

16 BVIHCV 70 of 2005.

The Ordinance provides that any such award can be enforced:

a by action; or

b with leave of the judge of the High Court, in the same manner as a judgment or order of the High Court; where leave is given, judgment may be entered in the terms of the award.

These provisions spawned litigation in the IPOC case where the award included declaratory relief. The court rejected the submission that the common law operated to prevent the enforcement of purely declaratory relief. In rejecting that submission, the Court of Appeal noted that Section 36(1) provides that the '[e]nforcement of a Convention Award shall not be refused except in the cases mentioned in this section'. IPOC also put to bed the question of whether or not partial arbitral awards could be enforced.

The only grounds upon which enforcement may be refused are where:

a that a party to the award, under the law applicable to him, was under some incapacity;

b that the agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the law was made;

c that a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

d the award goes beyond the scope of the issues beyond the scope of the submission to arbitration;

e that the composition of the arbitral authority or procedure was not in accordance with the agreement of the parties or, failing agreement, with the law of the country where it took place; or

f that the award has not yet become binding or has been set aside.

In addition, similar jurisdiction and public policy exceptions appear at Section 36(3): 'enforcement of a convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or it would be contrary to public policy to enforce the award'.

The procedural mechanism for enforcement is to be found within the ECSC CPR 43.10, which provides that the application may be made without notice to the court but supported by an affidavit that exhibits the award, gives an address for service for the debtor and, where the award is for the payment of money, a certificate as to the sum due.

In January 2010, Bannister J gave judgment in *Grand Pacific Holdings Limited v. Pacific China Holdings Limited*.[17] In this judgment he considered whether a debt based on an arbitral award could be disputed for the purpose of an application to set aside a statutory demand. He found that a dispute as to the enforceability of an award amounted

17 BVIHCV2009/389.

to, or was analogous to, a dispute about the status of the party as a creditor and therefore if the dispute was substantial the court should not appoint liquidators.

iii Mediation

By Rule 27.7 of the ECSC CPR the court may adjourn a case management conference to enable settlement discussions or a form of ADR procedure to continue.

VII OUTLOOK AND CONCLUSIONS

The disputes work in BVI mostly reflects the large number of companies incorporated here. In the current economic climate, corporate insolvency work is bread and butter for BVI disputes lawyers.

In the past 12 months the litigation market, particularly in the area of insolvency, has continued to grow. There are a number of new players in the market, both law firms and insolvency practitioners. The large body of fund disputes that followed the financial crash of late 2008 have continued to generate litigation and applications for the appointment of liquidators. At the same time, there have been a number of new fraud cases coming through the courts and shareholder disputes continue to arise on a regular basis. This growth in litigation is likely to continue at least for the next 12 to 24 months.

Appendix 1

ABOUT THE AUTHORS

ELIOT SIMPSON

Appleby

Eliot Simpson is a partner at Appleby and the litigation and insolvency practice group head for the British Virgin Islands. He is also the local team leader for commercial dispute resolution, trust and estate litigation, insolvency and restructuring, fund disputes and insurance and reinsurance dispute resolution.

Eliot graduated in Law from Clare College, Cambridge in 1989, and completed his Law Society finals at the College of Law in London in 1990. He trained and qualified with Clifford Chance, London, and was admitted as a solicitor in England and Wales in 1992 (now non-practising). He is also admitted as a solicitor advocate in the British Virgin Islands, as an attorney in the Cayman Islands and as an advocate of the Royal Court of Jersey, having practised law for a number of years in each of these jurisdictions.

APPLEBY

Jayla Place
Wickhams Cay I
PO Box 3190
Road Town
Tortola
VG 1110
British Virgin Islands
Tel: +1 284 494 4742
Fax: +1 284 494 7279

info@applebyglobal.com
www.applebyglobal.com