
THE DISPUTE RESOLUTION REVIEW

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Chapter 7

BRITISH VIRGIN ISLANDS

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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, most 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 David Pearey. 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 ('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) ('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

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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

The Commercial Court, specifically Mr Justice Bannister, began sitting in April 2009. In one of his first written judgments, Bannister J addressed the question whether the failure by a company to apply to set aside a statutory demand within the strict 14-day time limit set out in the Insolvency Act 2003 meant that the company could not later assert that the debt was disputed or, in effect, oppose a winding-up application. This appeared to be the effect of a 2006 decision of Hariprashad-Charles J in *Metalloyd Ltd v. Burnwill Resources Ltd*¹. In *Fogerty v. Island Point Properties SA*² Bannister J held that Hariprashad-Charles J cannot have meant that the Act overrode the court's inherent jurisdiction to see that its processes are not abused and, moreover, that 'statutory demand' in Section 8(1)(a) of the Act must mean a valid statutory demand.

Much of the commercial litigation active in 2009 has dealt with hedge funds and other types of mutual funds. During the summer, two of the largest investors in Madoff Securities, Kingate Global Fund and Fairfield Sentry, went into liquidation. Early in 2010, Bannister J appointed liquidators to Reserve International Fund, which suffered losses in late 2008 following the collapse of Lehman Brothers.

On 18 September 2009, Bannister J gave a judgment in *Citco Global Custody NV v. Y2K Finance Inc*³. The judgment was given on an application to strike out a member's application for the appointment of liquidators. The claimant was a shareholder in a mutual fund that had made substantial redemptions, which the claimant considered prejudicial to its interests. Bannister J decided first that the proceeding was not an abuse of process, notwithstanding the existence of an earlier proceeding by which the claimant sought relief for unfair prejudice. That earlier proceeding had been struck out, but after the liquidation proceeding had been commenced. On the question whether the application was bound to fail, Bannister J made a number of findings, principally (1) that there was a reasonable prospect of success on the just and equitable ground (particularly loss of substratum) based on statements by the company that its life had come to an end and it had no reasonable expectation of meeting its objects as a mutual fund, and that it would distribute its remaining assets to its members; and (2) that assertions that the company might have claims against its directors that needed to be investigated was not a basis for a winding-up order.

1 BVIHCV 2006/0083.

2 BVIHCV 2008/0258.

3 BVIHCV 2009/0020A.

In a subsequent judgment dated 25 November 2009, Bannister J declined to make a winding-up order against Y2K Finance Inc. Although satisfied that the company's substratum had gone, the judge concluded that the company should be allowed to wind down its own affairs and proceed to a voluntary liquidation. He was also influenced by the weight of shareholder opposition to the application. In a judgment dated 19 October 2009, the Court of Appeal allowed an appeal of the order of Hariprashad-Charles J striking out the unfair prejudice action.

On 28 September 2009, the Court of Appeal gave judgment in *Alfa Telecom Turkey Limited v. TeliaSonera Finland OYJ*.⁴ The case is related to the ongoing disputes in relation to Turkcell Holdings AS, part of a group that operates the largest mobile telecoms business in Turkey. In the instant proceedings, Telia claimed that Alfa Telecom was threatening to induce Cukurova Telecoms Holdings Limited to breach a shareholders' agreement between Cukurova and Telia and sought injunctive relief. The Court of Appeal reversed the grant of an injunction by the High Court. In a wide-ranging judgment, the Court of Appeal considered a number of issues relevant to injunctions generally, including the offer of undertakings and delay. The court also reviewed whether the tort of inducing a breach of contract could be established on the facts. In an earlier judgment in May 2009 in the related BVI action, *Cukurova Finance International Limited v. Alfa Telecom Turkey Limited*, the Privy Council considered issues of English law of appropriation in relation to the enforcement of a charge over shares.

On 30 December 2008, Joseph-Olivetti J discharged *ex parte* receivership and freezing injunctions in the well-publicised *Danone*⁵ litigation, principally on the grounds that the case had not been presented fairly by leading counsel for the claimants at the *ex-parte* stage. The judgment of Joseph-Olivetti J is under appeal. On 28 September 2009, the Court of Appeal gave a judgment dealing with the question whether leave to appeal was required. This required the court to construe Section 30(4)(ii) of the Eastern Caribbean Supreme Court (Virgin Islands) Act. It confirmed that an appeal from an order in respect of injunctive relief or a receivership order whether by way of grant, refusal, regrant, continuance or discharge does not require leave.

Many of these cases are ongoing and further interesting judgments will no doubt follow.

III COURT PROCEDURE

Overview of court procedure

The rules of the Eastern Caribbean Supreme Court ('ECSC CPR') are largely modelled upon the English Civil Procedure Rules ('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.

4 HCVAP 2008/012.

5 BVIHCV2007/0262.

In 2009, a new Rule, 79A, was added to the ECSC 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.

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.

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.

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.

Service out of 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.

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 (Cap 27) 1964; and
- b* The Reciprocal Enforcement of Judgments Act (Cap 65) 1922.

i The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 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.

ii The Reciprocal Enforcement of Judgments Act (Cap 65) 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 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 (Section 3(2)(d)), an appeal is pending or the time for appealing has not expired (Section 3(2)(e)) 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.

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 (Section 3(2)(c)); 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.

iii 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.

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; and
- e* the foreign proceedings were conducted in a manner which 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.

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.

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.

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' information⁶ 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

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.

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 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.

i 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).

ii Norwich Pharmacal Relief

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

Morgan & Morgan is the leading BVI appellate decision relevant to the grant 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:

⁶ 'Know your customer' information.

- 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.

iii 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*⁷ 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.

⁷ BVIHCV 70 of 2005.

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 (Cap 6), 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.

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;
- 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*.⁸ 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 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 past 12 months have seen a marked increase in litigation, particularly insolvency proceedings, in relation to investment funds. We can expect this to continue. The litigation in relation to Y2K Finance Inc. is yet to run its course and further judgments can be expected. The court will also continue to be busy dealing with the liquidations of the BVI-registered Madoff feeder funds. The appointment of liquidators to the Reserve International Fund has been appealed to the Court of Appeal.

A number of recent judgments in this area have looked at the position of investors who have filed redemption requests. When do they become creditors and what is their status when they seek the appointment of liquidators? At what point can it be said that an investment fund that has suspended redemptions has lost its ‘substratum’ such that it may be wound up on just and equitable grounds? Bannister J has given a number of helpful judgments in this area and more can be expected from him in the coming months, and from the Court of Appeal.

8 BVIHCV2009/389.

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Mr Simpson 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 in London and was admitted as a solicitor in England and Wales in 1992 (now non-practising). He is also admitted as an attorney in the Cayman Islands, as an advocate of the Royal Court of Jersey and as a solicitor advocate in the British Virgin Islands.

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