The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research

The Dispute Resolution Review

The Dispute Resolution Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dispute Resolution Review - Edition 8
(published in February 2016 – editor Jonathan Cotton)

For further information please email
Nick.Barette@lbresearch.com

The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Herbert

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-83-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ADAMS & ADAMS

ARTHUR COX

ATTIAS & LEVY

AZB & PARTNERS

BAKER & PARTNERS

BONELLIEREDE

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CONSULEGIS ABOGADOS

CRAVATH, SWAINE & MOORE LLP

DITTMAR & INDRENIUS

HENGELER MUELLER

HERGÜNER BİLGEN ÖZEKE ATTORNEY PARTNERSHIP

JUN HE LAW OFFICES

KBH KAANUUN

KYRIAKIDES GEORGOPOULOS LAW FIRM

LS HORIZON LIMITED

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MAPLES AND CALDER

MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH
NORTON ROSE FULBRIGHT US LLP

MOLITOR AVOCATS À LA COUR

MOTIEKA & AUDZEVIČIUS

NIEDERER KRAFT & FREY

OSLER, HOSKIN & HARCOURT LLP

PATRIKIOS PAVLOU & ASSOCIATES LLC

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

SCHRECK LAW OFFICES

SHIN & KIM

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

STRELIA

SZECSKAY ATTORNEYS AT LAW

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

UTEEM CHAMBERS

WOLFF GSTOEHL BRUCKSCHWEIGER ADVOKATURBÜRO

WU & PARTNERS, ATTORNEYS-AT-LAW

YOUNG CONAWAY STARGATT & TAYLOR, LLP

CONTENTS

EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 5

BRITISH VIRGIN ISLANDS

Arabella di Iorio and John MacDonald[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The British Virgin Islands (BVI) is a British Overseas Territory, and the British government is responsible for foreign affairs and defence. Executive authority is vested in Queen Elizabeth II and is exercised on her behalf by the Governor, currently His Excellency Mr John Duncan OBE. There is, however, a large degree of internal self-government. A new Constitution was adopted in 2007, and the country is now led by the Premier, who is elected in a general election and who nominates a Cabinet, which is appointed by the Governor. The legislature consists of the Queen (represented by the Governor) and a House of Assembly. The official currency is the US dollar. There are no exchange controls and no restrictions on the free movement of currency.

Since the 1960s the BVI has steadily moved from an agriculture-based economy towards tourism (mainly boat chartering, although it is also a cruise ship destination and popular beach resort) and financial services. It is now a leading offshore financial centre. Over 1 million companies have been incorporated in the BVI and it is the second-largest domicile for the formation of offshore investment funds.

The Eastern Caribbean Supreme Court (ECSC) is the superior court of record for the BVI, as well as for Anguilla, Montserrat, Antigua and Barbuda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Grenada, and Dominica. The ECSC is headquartered in Saint Lucia, although each member state has its own High Court Registry and its own High Court Judiciary. Since 2009 the ECSC has had a dedicated commercial division, located in the BVI, with its own judge (currently Mr Justice Barry Leon) and its own modern premises. Saint Lucia is also to have a Commercial Division from the end of 2015. Appeals from the High Court are to the ECSC Court of Appeal,

1 Arabella di Iorio is a partner and John MacDonald is an associate at Maples and Calder.

which sits in the BVI approximately three times a year, and appeals from the Court of Appeal are to the Judicial Committee of the Privy Council in London. The BVI also has a Magistrates Court, which has both a criminal and a civil jurisdiction, and from which appeals lie directly to the Court of Appeal.

II THE YEAR IN REVIEW

i Major actions

This year has seen a number of interesting actions in the BVI, confirming the jurisdiction as one of the pre-eminent forums for commercial litigation. One Privy Council decision in particular is worthy of careful consideration.

Under BVI law, ownership of shares in a BVI company is *prima facie* established not by share certificates or instruments of transfer but by the entry of the shareholder's name and other details on the register of members of the company.

Section 43(1) of the BVI Business Companies Act 2004 (the Act) provides that where information that is required to be entered in the register of members is omitted or inaccurately entered, or where there is an unreasonable delay in entering such information, a member of the company or any person aggrieved by the omission, inaccuracy or delay, may apply for an order that the register be rectified. Section 43(2) of the Act permits the BVI court in any rectification proceedings to determine any question relating to the right of a person who is party to the proceedings to have his or her name entered in or omitted from the register of members, whether the question arises between two or more members or alleged members or between members or alleged members and the company itself. Section 43(2) of the Act also permits the BVI court to determine in the proceedings 'any question that may be necessary or expedient to be determined for the rectification of the register of members'.

Rectification proceedings under Section 43 of the Act are a summary procedure and, until this recent decision of the Privy Council, had been used by applicants in order summarily to determine disputes concerning the beneficial interest in shares in BVI companies.

Nilon Limited and another v. Royal Westminster Investments SA and others[2] (*Nilon*) was one such case, where the applicants sought to rectify the register of members of Nilon, a BVI company, claiming to be the legal and/or beneficial owners of shares in Nilon pursuant to an oral agreement allegedly made between the applicants and a Mr Varma, who, according to the register of members, was the sole registered shareholder of all of the issued shares in Nilon. As well as the rectification claim against Nilon, the applicants claimed damages against Mr Varma for breach of contract for failing to procure the issue of shares to the applicants.

The applicants applied for permission to serve Mr Varma out of the jurisdiction on the grounds that he was a necessary or proper party to the dispute between the applicants and Nilon. This application was refused at first instance by Bannister J on the basis that the applicants could not establish an arguable claim for rectification against Nilon since

2 [2015] UKPC 2.

they were not shareholders in Nilon and there was no allegation that Nilon had agreed to allot shares to them and, therefore, there was no claim to which Mr Varma could be a necessary or proper party. The claim against Nilon was struck out for the same reason. The applicants had sought to rely on the English Court of Appeal decision in *Re Hoicrest Ltd*,[3] where it was held that a person who had no right to claim legal title to certain shares and had only an equitable interest in those shares was entitled to maintain a claim for rectification of the share register. However, in striking out the claim, Bannister J held that *Hoicrest* was bad law to the extent that it decided that the English equivalent of Section 43 of the Act conferred a 'self-standing jurisdiction' to decide who owns what, regardless of whether or not the company's register of members included the names of all those persons who should have been included on it. Only in circumstances where shares had actually been allotted to a party could the court have jurisdiction to order the rectification of the share register.

The Eastern Caribbean Court of Appeal, relying heavily on the decision in *Hoicrest*, reversed the decision of Bannister J, holding that rectification proceedings could be used to determine whether a defendant was in breach of a contract to procure that a company would issue shares.

The decision was appealed to the Privy Council. The questions for the Privy Council were whether a claimant can bring proceedings for rectification of the share register of a BVI company when the reason for rectification is an untried allegation that a defendant has agreed to allot shares in the company to the claimant, and, if so, whether that defendant is a necessary and proper party to the claimant's action for rectification against the company and whether the BVI is the appropriate forum for the claimant's claim against that defendant.

The Privy Council reversed the decision of the Court of Appeal and held that *Hoicrest* had been wrongly decided. The opinion of the Privy Council clarified the scope and power of the BVI court to rectify a BVI company's register of members, holding that rectification proceedings could only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title and not merely a prospective claim against the company dependent on the conversion of an equitable interest to a legal title by an order for a specific performance of a contract. Put simply, rectification proceedings were not an appropriate procedure to determine disputes concerning the beneficial interest in shares.

The Privy Council decision also provided some useful guidance on the 'necessary and proper party' gateway for service out of the jurisdiction and made some obiter comments on the doctrine of *forum conveniens*, although the latter issue had not arisen at first instance given Bannister J had found that there was no claim against Nilon, the anchor defendant, for rectification or breach of any agreement to allot shares.

On the issue of service out of the jurisdiction, Lord Collins noted that three requirements had to be satisfied:

a the claimant must satisfy the court that in relation to the foreign defendant, there is a serious issue to be tried on the merits;

3 [2000] 1 WLR 414.

b the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other; and

c the claimant must satisfy the court that in all the circumstances the forum that is being seised is clearly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

Accordingly, the critical issue for the Privy Council was whether the applicants had a 'good arguable case' to a present right to rectification against Nilon, over which the BVI court had automatic jurisdiction given it was a company incorporated in the BVI. In the absence of such a claim against Nilon, there was no claim to which Mr Varma could be a necessary or proper party and therefore no ability to grant service out.

On the issue of forum, the Eastern Caribbean Court of Appeal had held that the BVI was clearly the appropriate forum for issues arising between the members and alleged members of Nilon due to the underlying subject matter of the dispute being shares in a BVI company, and on the basis that matters concerning the organisation and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company has been formed. However, Lord Collins did not agree with this approach and held that the primary issue was the validity and terms of the alleged oral contract, to which it was not suggested Nilon was a party, and the question of the most appropriate forum to determine that issue concerned contract law and not company law. In the current matter there was nothing that pointed towards the BVI as the appropriate forum. The alleged oral contract was made in England, Nilon was to be managed from Jersey, the underlying business was concerned with Nigeria and India, the operating companies were to be in Nigeria, the relevant witnesses were in England in the main, and the documents were in England and Jersey. Therefore, there was no connection with the BVI other than that it was the place of Nilon's incorporation.

The decision of the Privy Council draws a curtain on the practice of using the summary process of rectification proceedings to determine disputes concerning the beneficial ownership of BVI shares. Instead, claims related to rectification are likely to require an initial action to determine an entitlement to the relevant shares, which may or may not involve proceedings in the BVI, and a subsequent application in the BVI to rectify the register.

ii Other cases of note

Fair valuations on minority member exit from a BVI company

From time to time a BVI company and its minority members will not agree on certain matters affecting the minority's interests and objectives. As a business and investor-friendly jurisdiction, BVI company law provides a mechanism for the minority to exit, and achieve a fair value for their shares (in cash), while ensuring that the company's business transactions are not at risk of delay or derailment.

The BVI Commercial Court has taken a sensible and pragmatic approach so as to make the statutory process workable in practice and has recently addressed, in an

unreported decision (2015), the approach to be taken in the event that the appraisers appointed to value a shareholding cannot agree on a fair price. To put that decision in context, a review of the mechanism for valuing the minority's shares is set out below.

The right for a minority member to exit and be paid a fair value for his or her shares arises on his or her dissenting from any of the following acts:

a a merger (unless the member continues to hold the same or similar shares in the merged entity) or a consolidation;

b any sale or transfer of more than 50 per cent of the company's assets by value, other than in the ordinary course of the business of the company (which may include standard dealings in investment property, depending on the circumstances) or if the terms of the deal require all or substantially all of the net proceeds to be paid out to members within a year;

c a squeeze out of his or her shares at the instigation of a majority holding 90 per cent of the shareholding or more; and

d a plan of arrangement, if the court orders that dissent rights should apply (dissenting members' rights will never apply to a scheme of arrangement as opposed to a plan).

The Act sets out the process and timetable for the dissenting member to object to the proposed act, and for the company and that dissenting member to agree a price for his or her shares.

If the company and the dissenting member fail, within 30 days, to agree on the price to be paid for the shares owned by the dissenting member, then within 20 days after the end of the 30-day period:

a the company and the dissenting member shall each designate an appraiser;

b the two designated appraisers together shall designate a third appraiser; and

c the three appraisers shall fix the fair value of the shares owned by the dissenting member.

Fair value is to be fixed as at the close of business on the day prior to the date on which the members' vote authorising the act was taken, or the date on which written consent was obtained from the members. The value must exclude any appreciation or depreciation directly or indirectly induced by the act or its proposal, and that value is binding on the company and the dissenting member for all purposes.

The BVI High Court confirmed in *Brantley Inc v. Antarctica Asset Management Ltd* (2008) that the 20-day period for the appraisal process is not an extension of the negotiation period, but is the time frame within which the appraisal process must be started and completed. If the 20-day period expires without anything having been done (whether intentionally or unintentionally) the court has an inherent jurisdiction 'to deal justly and fairly with matters of such nature'. For example, the court has jurisdiction to order appraisers to be designated even though the 20-day period has passed, but the parties should not assume that the court will consider it appropriate to do so in every case.

In *HRH Prince Faisal v. PIA Investments Limited* (2011) the BVI High Court was asked to consider whether fair value should reflect the general lack of marketability

of minority shares (there will usually be no public market for the shares). A contractual valuation provision would typically state whether a minority discount will be applied or not, but the Act is silent.

The judge commented that 'fair value' is capable of meaning different things in different cases: a discount for minority shares was only one component in determining fair value. A determination of fair value might well require an assessment of the nature of the business of the company: where asset-based valuations might be appropriate, an earnings approach may not. It may be that where an asset-based approach was used, the minority discount had no application at all. The judge also said that 'fair' must mean fairness to both parties but no particular gloss should be put on the phrase so as to impose a principle that a discount could never be applied due to the lack of marketability of minority shares.

The BVI Court in *HRH Prince Faisal* also upheld the validity of an agreement between a dissenting member and the company that the fair value of the dissenter's shares would be appraised under an alternative to the statutory appraisal process. The Court held that the parties may contract out of the statutory mechanism for assessing fair value, which is 'merely a mechanism for establishing a price'. If a particular dissenting member prefers other machinery he or she is merely choosing a different route to achieve the same end, albeit the company's agreement is required to that alternative route.

All of which brings us to the BVI Commercial Court decision referred to above. The Court confirmed that a majority of two out of the three appraisers designated to carry out the appraisal may, in the absence of unanimity, fix the value of the shares owned by the dissenting member.

This decision is very welcome, as it:

a removes the spectre of deadlock (which itself raised further complications, such as whether the three appraisers could themselves agree a deadlock-breaking mechanism; whether they could do so by majority, and whether they needed to reach agreement on that mechanism before the commencement of the valuation or only if and when deadlock was reached);

b avoids the need to consider the extent of the jurisdiction (if any) of the court to break a deadlock; and

c sidesteps the question of whether deadlocked valuers could or should be replaced so as to attempt to increase the prospect of unanimity.

All of the above were a recipe for uncertainty and expense. Appraisal of fair value within the statutory time frame can now be completed efficiently and cost-effectively on the basis of a majority view.

Alternative service of proceedings

In *Storca Intertrans Corp. & another v. Minco Enterprises Limited & others*,[4] judgment handed down by Leon J, the BVI Commercial Court has provided useful guidance as to when parties are able to seek an order providing for alternative service of proceedings under ECSC CPR 7.8A.

4 [2015] 2015/96.

The applicants sought an order for alternative service of the underlying claim in the context of *ex parte* freezing injunctions and other interim orders made against a number of BVI and foreign-based respondents, the Court having dispensed with personal service of the interim orders. To avoid the common but unsatisfactory situation where an injunction is served simply and expeditiously but service of the underlying proceedings lags far behind, the Court was persuaded to take a commercial and user-friendly approach and order alternative service from the outset.

In 2014, in *JSC VTB Bank v. Alexander Katunin*,[5] Bannister J had held that, given sufficient evidence, it was reasonable to order alternative service of proceedings even where no attempt had yet been made to do so by the usual method (in that case by Hague service). Yet the *JSC VTB Bank* decision provided no support for the proposition that considerations of 'speed and convenience' provided a good basis for allowing alternative service, unlike the English approach as exemplified in *Deutsche Bank AG v. Sebastian Holdings* and *Knauf UK GmbH v. British Gypsum Ltd*.[6]

This new decision puts to bed any uncertainty on the point and establishes beyond doubt that in circumstances where interim orders have been made it is in the interests of all concerned that the proceedings should be served as quickly as possible, by alternative means if necessary. Furthermore, the test under CPR 7.8A, that service by the usual methods should be 'impracticable,' must be read in light of Court's overriding objective and the realities of modern cross-border commerce and litigation. In this vein, Justice Leon cited with approval the Australian case of *Davis v. Turning Properties PTY Ltd and Another*[7] and the judgment of Lord Sumption in *Abela v. Baadarani*,[8] which both emphasise 'today's on-the-ground realities', leading him to state:

> *While rules regarding service are not to be ignored, they are to be seen not as impediments but as a tool for, or aids available to, a claimant who needs to […] give a defendant 'notice of the commencement of proceedings which [is] necessary to enable a defendant to decide whether and how to respond in his own interest.'*

It is hoped that this modern approach to service will assist the BVI Court in determining disputes in a timely and cost-effective manner to the benefit of claimants and defendants alike.

It should be borne in mind, however, that CPR 7.8A(5), which provides that any purported alternative service carried out pursuant to a method which is subsequently shown to be contrary to the law of the service jurisdiction will be found invalid, still provides an important check on the BVI Court's ability to avoid the consequences of illiberal service rules elsewhere, and this decision cannot therefore be seen as a complete solution to service challenges.

5 BVIHC(Com) 2014/62.

6 [2014] EWHC 122 & [2001] EWCA Civ 1570.

7 [2005] NSWSC 742.

8 [2013] UKSC 44.

Service out of third-party costs orders

The issue of whether it is possible to serve costs orders on third parties out of the jurisdiction arose in the BVI Commercial Court and then in the Court of Appeal in *Halliwel Asset Inc and Panikos Symeou and Marigold Trust Company Limited v. Hornbeam Corporation, Cadim Shulman (Respondent)*.[9] The BVI Court had refused permission to allow the service of a costs order on the ultimate beneficial owner (residing in Monaco) of a company, the respondent in this matter, against whom costs orders had been made but not met. The Court had not commented on an application by the appellants to have the ultimate beneficial owner joined as a party to the proceedings giving rise to the costs orders.

The Court held that rule 7.3(10), which permits service out of the jurisdiction where 'A claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to in this Rule' did not apply to claims for costs, reasoning that while the English CPR had a separate specific gateway for such costs orders the BVI did not, and refused permission for service out. However, the Court also suggested, obiter, that such ultimate beneficial owners may in fact have submitted to the jurisdiction and on that basis leave to serve out might not in fact be required.

The Commercial Court judgment was appealed and in its judgment the Court of Appeal set out a useful analysis of CPR rule 7, in particular rule 7.3(10), as to which the Court held 'it is clearly contemplated that those claims are claims which have been commenced by claim form.'[10] As the rule was only applicable to claims commenced by way of claim form and the claim for costs was commenced by way of notice of application, it was held that rule 7.3(10) could not apply and this was not therefore an available jurisdictional gateway under which service out could be permitted.

However, the Court of Appeal then turned to rule 7.14, which allows service out of 'an application, order or notice issued, made or given in any proceedings' in which 'permission has been given to serve the claim form out of the jurisdiction', which appeared not to have been considered by the court below. Allowing that the third party on whom permission for the service of the costs order was sought was not a party to the claim, the Court of Appeal nevertheless held that 'it is fairly arguable that if the joinder application was successful in the court below (although I express no opinion on its merits), then it is also fairly arguable that the claim form would qualify for service out under the gateways.' This scenario would then sufficiently engage CPR 7.14, which is predicated upon permissibility of the claim form being served out of the jurisdiction.

The Court of Appeal held that a costs order could be served on a third party in these circumstances and remitted the matter to the court below, holding that it should allow service out if it considered that the joinder application was appropriate on its merits.

9 BVIHCMAP2015/0001.

10 At Paragraph 19.

Specific performance of a commercial contract

The BVI High Court recently granted an interim injunction obliging the defendant to continue to deliver diesel and gasoline to the claimant under the terms of a contract which the defendant had attempted to terminate on the grounds that increased costs were making the price charged to the claimant unprofitable. *British Virgin Islands Electricity Corporation v. Delta Petroleum (Caribbean) Limited*[11] was an unusual case in that specific performance of such a contract is rarely ordered by the Court.

On 30 August, 2014, the claimant, the British Virgin Islands Electricity Corporation (BVIEC) and the defendant, Delta Petroleum (Caribbean) Limited (Delta) entered into an agreement for the exclusive sale and purchase of diesel fuel and unleaded gasoline from 1 September 2014 to 31 August 2018 (the supply period). BVIEC provides all the electricity generated on the BVI, almost entirely from the petroleum products supplied to it under the agreement.

The agreement contained terms that allowed Delta performance relief upon any one of six listed events. The event relevant to the dispute was a curtailment of supplies from third-party storage facilities on St Croix, USVI, whence the Delta received its BVI fuel supplies at this time.

On 1 December 2014 the third party on St Croix gave notice to Delta that it would be closing its facilities there and Delta subsequently sourced its fuel from a supplier in Antigua. Delta and BVIEC then engaged in correspondence where Delta requested a renegotiation in the contract price because the costs of sourcing fuel were higher in Antigua than they had been in St Croix, making the agreement unprofitable to it. BVIEC rejected this request and commenced legal proceedings against Delta seeking a declaration that it had breached the agreement, an order for specific performance and damages. BVIEC also brought an application for an interim injunction compelling Delta to continue to deliver fuel in accordance with the terms of the agreement pending the determination of the substantive action.

The Court reviewed the principles set out in *American Cyanamid v. Ethicon Ltd*[12] relating to the granting of interim injunctions and also, as the injunctive relief being sought was mandatory, the more rigorous guidelines set out in *Seecomm Network Service Claimant v. Colt Telecommunications*.[13] This guidance states, first, that the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Secondly, an order that requires a party to take a positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly granted than one that merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the Court has a high degree of assurance that the claimant will be able to establish this right at trial: the greater the degree of assurance the claimant will ultimately establish his or her right, the less will be the risk of injustice if the injunction is granted. Finally, even where there is no such assurance, there may still be circumstances in which it is appropriate to

11 BVIHCV2015/158.

12 [1975] AC 296.

13 [2002] EWHC 2638.

grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice, if the injunction is refused, sufficiently outweighs the risk of injustice if it is granted.

The High Court found that there were serious issues to be tried and proceeded to examine the question of the substantive relief sought by the claimant. Specific performance is an equitable remedy, described by the Court as 'an exceptional remedy which courts are reluctant to grant when damages would provide an adequate remedy and it is now well established that under an ordinary agreement for the sale of non-specific goods, damages would usually be a sufficient remedy' under the principles set out in *Whitwood Chemical v. Hardman*.[14]

After reviewing the arguments put forward in respect of this issue from both parties, the Court held that damages would not be an adequate remedy in this case. The Court considered, on the basis that BVIEC was a utility company with a statutory mandate in the Territory, that it must take into account the potential impact of its decision on the general public and the potential loss of reputation to BVIEC from affected supply or increased costs. In addition, the Court was not satisfied that there was in fact a suitable alternative source of supply from which BVIEC could obtain fuel.

On reviewing the case put forward by Delta in opposition to the assertion that damages would be an adequate remedy in the event that it was successful at a subsequent trial, and of the potential impact that specific performance would have on that company, the Court held 'the simple fact is that [Delta] has not done enough to satisfy the Court that there is a serious danger [it] will be forced out of business.'

The Court applied a similar test of public interest to the question of the balance of convenience, and considered which course was likely to involve the least risk of injustice if the Court turned out to be wrong in its judgment. The Court held that the balance here tipped in favour of granting the injunction as Delta had not persuaded the Court that the risk of injustice if the injunction were granted sufficiently outweighed the risk of injustice if it were not granted.

An interesting argument put forward by Delta in this matter was its contention that BVIEC's behaviour in the negotiations between the parties precluded the Court from exercising its discretion in awarding the equitable remedy of specific performance. Delta contended that during negotiations BVIEC had led it to believe that it would be willing to consider some form of consideration to offset the increased costs to Delta of performing the agreement, but this had been an attempt by BVIEC to deliberately mislead Delta with the result that six months of fuel had been delivered by Delta at a loss. BVIEC did not address this issue, to the Court's surprise, but rather contended that Delta's conduct was that which should be scrutinised.

On this issue, the Court considered it could not make a definitive ruling when the issues had not been fully aired. It would appear that the Court felt that the public interest of granting the injunction outweighed the allegation, and that only grave and proven misconduct will potentially preclude an equitable remedy in the granting of an interim injunction.

14 [1891] 2 Chapters 416 and 427.

III COURT PROCEDURE

i Overview of court procedure

The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR) govern practice and procedure in the BVI courts, as supplemented by Practice Directions. The CPR were significantly amended in 2011, in particular, in respect of the practice and procedure relating to service out of the jurisdiction (Part 7) and appeals to the Court of Appeal (Part 62). English case law continues to be persuasive in the jurisdiction, however, where the CPR provides for a different approach to that of England and Wales, the English Civil Procedure Rules will not be of assistance. Where no special provision exists under BVI law in respect of the exercise of jurisdiction vested in the High Court in civil proceedings, pursuant to Section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act, the BVI court will exercise its jurisdiction as nearly as may be in conformity with the law and practice for the time being in force in the High Court of Justice in England.

Parts 69A and 69B of the CPR are of note. These provide for a *sui generis* approach to Commercial Court cases, heard in the BVI Commercial Court. A case is suitable for determination in the Commercial Court when it falls into certain categories of cases arising out of the transaction of trade or commerce and generally has a monetary value of over US$500,000.

In addition, practice and procedure in respect of certain Insolvency Act proceedings are governed by the Insolvency Rules 2005. The CPR may still apply if there is a lacuna, provided that the Insolvency Act or the Rules are not contradicted.[15]

ii Procedures and time frames

A fixed-date claim form, akin to a Part 8 claim form under the English CPR, must be used in claims arising out of hire-purchase or credit sale agreements, in proceedings for possession of land, whenever its use is required by a rule or practice direction and where, by any enactment, proceedings are required to be commenced by originating summons or motion. The procedure used for a fixed-date claim form is designed to speed up the process for determination of the matter and generally such claims take a few months to be determined.

All other cases (save for certain insolvency proceedings as described below) are commenced by claim form, in the form prescribed at Form 1 of the CPR. The claim form must be issued with a statement of claim, unless the claimant has included in the claim form all the information required by the CPR or the court gives permission for there to be no statements of claim. In cases of emergency a claimant may issue and serve the claim form without a statement of claim (or an affidavit or other document required by the rules) but must apply to the court for permission thereafter. Claims commenced under this form generally take a couple of years to reach trial, allowing for interlocutory applications and time extensions.

15 Insolvency Rules, 2005 Section 4.

In proceedings for the appointment of a liquidator under the Insolvency Act 2003, it is necessary to bring the application by way of originating application. The Commercial Court sets liquidation hearing dates on a regular basis, so determination of an application will generally take place quite quickly. Thereafter all further applications in the liquidation must be brought by ordinary application.

iii Class actions

There is no provision in the BVI for class action lawsuits, but pursuant to Part 21 of the CPR, it is possible to bring a representative action where five or more people have the same or a similar interest in a claim. Special provision is also made in the CPR for representation of persons who cannot be ascertained (or readily ascertained) in proceedings that concern the construction of a written instrument, the estate of someone who is deceased or property subject to a trust.

iv Representation in proceedings

All parties to a claim may be represented by a BVI-admitted legal practitioner. Barristers or solicitors, who are called to the BVI bar, have rights of audience to conduct cases in both chambers and open court.

Any natural person may appear in court as a litigant-in-person. There is no express provision in the CPR for a McKenzie friend but it has been permitted both at first instance and appellate levels.[16]

A firm or partnership may be represented in court by a duly authorised employee provided that the court grants permission. A body corporate may be represented by a duly authorised officer, who will require permission to represent the body corporate in open court, save for in the Commercial Court, where all bodies corporate must be represented throughout by a BVI-admitted legal practitioner.

v Service out of jurisdiction

Part 7 of the CPR governs service out of the jurisdiction of BVI proceedings. Permission must be sought from the court, unless service is on the agent of a principle who is out of the jurisdiction and certain criteria are met. The court may only grant permission where one or more gateways is engaged. These include cases where there is between the claimant and a person on whom the claim form has been or will be served, a real issue that it is reasonable for the court to try and the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to that claim. The enforcement gateway has recently been extended to common law enforcement proceedings, rather than being limited to enforcement under statute.

The court may also grant permission where the claim is for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction, or for a remedy against a person domiciled or ordinarily resident within the jurisdiction.

16 And the McKenzie friend (who in essence assists a litigant in person) was permitted to address the court.

Rule 7.3 of the CPR also sets out a number of other gateways. Examples include claims where the contract contains a term to the effect that the BVI Court has jurisdiction to determine any claim in respect of that contract, claims in tort where the act causing the damage was committed within or the damage was sustained within the BVI, and claims that relate to the constitution, administration, management or conduct of the affairs or the ownership or control of a company incorporated within the jurisdiction. English common law principles of *forum non conveniens* and the relevant case law, as locally developed, will be and are regularly applied to the question of service out.

The application for permission to serve out may be made without notice. Once service is effected on a foreign defendant, the foreign defendant is required procedurally to file an acknowledgement of service. Thereafter he or she may apply to the court to set aside any order for service out or apply for declaratory relief and a stay of proceedings on forum grounds.

vi Enforcement of foreign judgments

Enforcement under statute

The statutory basis for enforcement of foreign judgments is provided for by the Reciprocal Enforcement of Judgments Act (Chapter 65) 1922 and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 27) 1964. There is a view among some practitioners (with which the authors disagree) that the latter statute is not in fact effective, but the arguments for and against this approach are beyond the scope of this work.

These statutes deal with the registration of judgments from the High Court in England, Northern Ireland or in the Court of Session in Scotland as well as from the Bahamas, Barbados, Belize, Bermuda, Grenada, Guyana, Jamaica, St Lucia, St Vincent, Trinidad, Australia and its states and territories, and Nigeria.

The judgment must be made for a definite sum of money and must be enforceable in the place in which it was made. The judgment cannot be registered if:

a the original court acted without jurisdiction;

b the judgment debtor:
- was not ordinarily resident nor carrying on business within the jurisdiction;
- had not submitted or agreed to submit to the original court's jurisdiction;
- had not been duly served and did not appear; or
- satisfies the BVI court that an appeal is pending or that he is entitled to and intends to appeal the judgment;

c the judgment was obtained by fraud; or

d the judgment was in respect of a cause of action that for public policy or similar reasons could not have been entertained by the BVI court.

The application for registration is made under Part 72 of the CPR, without notice, supported by affidavit evidence exhibiting an authenticated copy of the foreign judgment, verifying the amount due, and setting out other details required by the CPR. It should be made within 12 months after the date of the judgment or such longer period with the permission of the court if in the circumstances of the case the court considers it just and convenient that the judgment should be enforced in the BVI. The order for registration

will provide that the debtor may apply to set the order aside within a specified time limit. If no application is made or the application to set aside is unsuccessful, the creditor can proceed to execution.

Enforcement at common law

A foreign judgment may be enforced by action at common law provided that it meets certain criteria:

a it must be made by a court of competent jurisdiction;
b it must be for a debt or definite sum of money;
c it must not be a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
d it must be final and conclusive.

The judgment creditor may apply for summary judgment if the above criteria are met, as the BVI court will not entertain a retrial of the action. There is very limited scope to defend an action for enforcement at common law. The defences are if:

a the above criteria were not met;
b the judgment was obtained by fraud;
c recognition or enforcement of the judgment in the BVI would be contrary to public policy; or
d the foreign proceedings contravened the rules of natural justice.

vii Assistance to foreign courts

The Evidence (Proceedings in Foreign Jurisdictions) Act 1988 in essence gives effect to the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Under the Act the court may issue an order for the obtaining of evidence for a foreign court including for the examination of witnesses, the production of documents, and the inspection, custody or detention of property. The court must be able to take the steps requested as a matter of BVI law were the matter to proceed in the BVI, and witnesses can only be compelled if they are compellable as a matter of BVI law.

In addition, under the Financial Services Commission Act, 2001 the Financial Services Commission (FSC) may receive and grant assistance on request from a foreign regulatory authority so that the foreign authority may discharge its regulatory functions. The FSC may apply for the examination of witnesses either by the appointment of an examiner or before a magistrate and may disclose information to overseas regulatory bodies and law enforcement agencies. Furthermore, the Financial Investigation Agency plays a similar role in respect of requests for information from foreign fiscal authorities – it can, among other powers available to it, order the production of documents.

The Insolvency Act Part XIX allows for judicial assistance in insolvency proceedings. The BVI court may make an order assisting a foreign insolvency or restructuring process. The Act allows certain foreign office holders to apply to the BVI courts for assistance. The court may exercise its discretion, if it considers it just, and grant relief provided (among other matters) that the rights of a secured or preferential creditor are protected, as are those resident in the BVI with claims (so that they are not prejudiced or inconvenienced by the foreign process) and that treatment of all persons

claiming in the foreign proceedings is just. However, this will be on an order-by-order basis, and will not involve recognition of the representative *per se*. The provisions of Part XIX, and the residual common law rights of recognition in the BVI, are only available to foreign representatives of insolvency proceedings in Australia, Canada, Finland, Hong Kong, Japan, Jersey, the United Kingdom and the United States.

Last, there are a number of bilateral treaties in respect of drug enforcement and anti-terrorism with the USA, which have been extended to the BVI, that provide for mutual assistance in those fields. In addition the Terrorism (United Nations Measures) (Overseas Territories) Order 2001 provides that the Governor may grant disclosure to the United Nations and to any foreign government in order to detect the evasion of United Nations measures that are related to terrorism.

viii Access to court files

Members of the public are able to access originating court process (e.g., a claim form or notice of appeal), judgments and orders, unless the court file is sealed. Any other document can be obtained with the leave of the court, which may be granted on an application made without notice. Parties to the litigation are entitled to see all documents filed, unless the court file is sealed, in which case they too would require permission from the court to view them.

ix Litigation funding

There is no statutory provision for legal aid within the BVI for civil matters. Most litigation fees are structured on a time-spent basis and conditional and contingency fee arrangements are infrequent. Third-party funding of litigation is permitted provided that it does not offend common law principles against champerty and maintenance. Insurance can cover the cost of litigation.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Legal Profession Act 2015 came into force on 11 November 2015. It contains a Code of Ethics that deals with the issue of conflicts. This provides that a legal practitioner may represent multiple clients but only if each client's interests can adequately be represented with their consent to such representation after full disclosure of the possible effects of multiple representation. Where a legal practitioner is unable to adequately represent the interests of multiple clients due to a conflict of interests, the legal practitioner shall desist from engaging in multiple representation in relation to the clients affected thereby.

The BVI currently adopts the English common law position with respect to Chinese walls.

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

Only the activities of 'regulated persons' are caught by the Anti-Money Laundering Regulations 2008, made under the Proceeds of Criminal Conduct Act 1997. Lawyers only fall within that category when they conduct transactions that are considered 'relevant

business'. Relevant business for lawyers is the provision of legal, notarial or accounting services for the buying and selling of real estate, management of client money, securities or other assets, management of bank, savings or securities accounts, the organisation of contributions for the creation, operation or management of companies and the creation, operation and management of legal persons or arrangements or the buying and selling of business entities.

When conducting relevant business, lawyers are required to maintain client identification procedures and records, maintain suspicious transaction records and ensure that internal controls and communication procedures are at a level appropriate for the purposes of forestalling and preventing money laundering. This includes training any employees on the money laundering regulations in the BVI, so that they are able to identify and have the requisite knowledge to deal with clients who may be high risk. Failures to adhere to the requirements of the legislation or to report suspicious transactions, may result in criminal prosecution with maximum fines ranging between US$150,000 and US$500,000. The maximum term of imprisonment for certain money laundering offences is 14 years.

iii Data protection

The Computer Misuse and Cybercrime Act 2014, creates a number of offences including unauthorised access to computer data, facilitating unauthorised access, and unauthorised publication of computer data. The sanctions range up to fines of US$100,000 and 10 years in prison. After some controversy, a public interest exception clause was added to the unauthorised publication offence before the Act was passed.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Legal professional privilege attaches to legal advice and to any document produced in contemplation of or arising from or in connection with legal proceedings for the primary purpose of providing or receiving legal advice. The English common law position applies and privilege can also be claimed in respect of the Crown and public interest privilege. Without prejudice communications may not be used in proceedings pre-judgment.

ii Disclosure

There are no pre-action protocols applicable in the BVI and therefore there is unlikely to be any basis for pre-action disclosure. Given that the CPR covers other aspects of disclosure, and in view of case law,[17] it is unlikely that Section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act can be used to import the law and practice administered for the time being in the High Court of Justice in England and thereby provide for pre-action disclosure.

17 *Veda Doyle v. Agnes Deane* HCVAP2011/20.

Disclosure and inspection of documents is governed by Part 28 of the CPR. 'Document' is defined as anything on or in which information of any description is recorded. Disclosure is ordinarily by mutual exchange of lists, and a party's legal practitioner is required to certify on the face of the list that he has explained to the maker of the list of the need to make full disclosure and the possible consequences of a failure to do so.

Parties are required to disclose documents that are directly relevant to the matters in question in the proceedings and that are in that party's control. In order for a document to be directly relevant, the party with control of it either intends to rely on it, or it tends to adversely affect that party's case or support another party's case, but the rule of law known as the rule in *Peruvian Guano*[18] does not apply. Control of a document means that it is or was in the physical possession of the party, the party has or has had a right to inspect or take copies of it or the party has or has had a right to possession of it. It is also possible for the court to order specific disclosure, in addition to standard disclosure.

Disclosure from third parties: Norwich Pharmacal relief

The BVI court follows English common law in that it has the jurisdiction to order disclosure from third parties following the case of *Norwich Pharmacal Co v. Commissioners of Customs & Excise*.[19] In order for an applicant to succeed they must show that a wrong has (at least arguably) been carried out by the wrongdoer, that the claimant intends to assert his or her legal rights against the wrongdoer and that the order is necessary and proportionate to enable the action to be brought. The third-party respondent must have been mixed up, or have facilitated the wrongdoing, albeit innocently. In the case of *JSC BTA Bank v. Fidelity Corporate Services Limited et al*[20] the Court of Appeal confirmed that knowledge of the wrongdoing was not required and thus innocent registered agents (who provided corporate services to BVI companies) could be made subject to such an order, as they were not 'mere onlookers'.

VI ALTERNATIVES TO LITIGATION

i Arbitration

The BVI is supportive of arbitration, reinforced by the appointment of Mr Justice Barry Leon, well-known international arbitrator, as the resident judge at the Commercial Court on 31 March 2015.

The Arbitration Act 2013 (the Act) came into force on 1 October 2014, and imports the UNCITRAL Model Law (subject to some variation) and therefore contains

18 Under the rule in *Peruvian Guano*, documents that may fairly lead to a train of enquiry that has the result of advancing a party's own case or damaging that of his or her adversary are also disclosable. In other words, disclosure obligations are not limited to documents that are directly relevant, but also to documents that may indirectly advance a party's case or injure that of his or her opponent.

19 [1974] AC 133.

20 HCVAP 2010/035.

comprehensive legal provisions that take into account modern principles and practices of arbitration. Together with the BVI's accession to the New York Convention on 25 May 2014 (making an arbitral award from a BVI tribunal enforceable in other contracting states and vice versa) the Act is designed to make the BVI as popular a seat for international arbitration as London, Paris and New York. In particular, the Act provided for the establishment of a statutory body, the BVI International Arbitration Centre (IAC), which was opened in May 2015, with a governing board and the power to promulgate rules.

The Act applies to arbitration under an arbitration agreement if the place of arbitration is in the BVI. The common law will govern whether a dispute is capable of being resolved by arbitration.

The approach of the BVI courts is to uphold arbitration agreements if at all possible, so as to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the courts. The liberal interpretation of arbitration clauses, thereby avoiding semantic arguments about whether the dispute 'arose out of' or was 'in connection with' or 'arose under' a contract, was forcefully espoused in England in *Fiona Trust Corp v. Privalov & Ors*,[21] an approach that has been endorsed in the BVI in *Victor International Corporation and Victor (BVI) Limited v. Spanish Town Development Company Limited & Ors*.[22] In summary, in the absence express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated.

A question that frequently arises is whether applications to appoint liquidators, or claims by minority shareholders in relation to unfairly prejudicial conduct, fall within the exclusive jurisdiction of the BVI courts or are arbitrable. In *Zanotti v. Interlog Finance Corp*,[23] the BVI court held that an arbitrator could grant relief in unfair prejudice proceedings. As far as winding up applications, in the writers' view an order appointing liquidators over a BVI company may only be made by the BVI court. In *Artemis Trustees Limited & Ors v. KBC Partners LP & Ors*,[24] the BVI court held that the position is different in relation to limited partnerships: because: (1) a limited partnership, unlike a limited company, has no identity separate from the identities of its constituent members; and (2) because winding up or dissolution of the partnership would have no effect on the rights and interests of third parties.

If a party commences court proceedings concerning a matter that is the subject of the arbitration agreement, then any party to that agreement can ask the court to refer the matter to arbitration. The Court must make that referral (and stay the court action) unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

There were two important cases in 2015 which considered the provisions of the Arbitration Act 2013. In *Sonera Holding BV v. Cukurova Holding AS*, the Commercial Court considered whether it had jurisdiction to grant an anti-suit injunction, restraining

21 [2007] UKHL40.

22 BVI HCV 2007/0293.

23 BVI HCV 2009/0394.

24 BVI HC (COM) 2012/0137.

a foreign arbitral proceeding. The 2013 Act provides under a section dealing with its objects and purpose that the BVI Court shall not interfere in the arbitration of a dispute save as expressly provided in the Act. Cukurova therefore submitted that the Court could not restrain it from prosecuting an arbitration in Switzerland. Sonera's argument was that the provision only applied to domestic arbitrations because it did not appear in a list of sections which were stated to apply to arbitrations outside the BVI. The Court held that the clear policy of the Act was one of absolute non-interference by the Court unless the Act expressly permitted it, and it was difficult to imagine that the legislature had envisaged that policy changing, based merely on where the arbitration had its seat. The anti-suit injunction was refused. The decision was appealed and the Court of Appeal's judgment is awaited.

In December 2015, the Court of Appeal considered how the mandatory stay provisions in the Arbitration Act 2013 applied in the context of proceedings seeking to set aside a statutory demand.[25] One of the grounds relied on by the debtor in seeking to set aside the demand, was that the alleged debt arose under a contract which contained an arbitration clause. On that basis, the debtor argued, the mere existence of a dispute about the debt was sufficient to engage the mandatory stay provisions. The Court of Appeal upheld the decision of the Commercial Court that in deciding such applications the test was that set out in the Insolvency Act 2003, namely whether the debt was disputed *bona fides* on substantial grounds. Applications to set aside statutory demands were to be distinguished from proceedings brought to recover a disputed debt which arose under a contract containing an arbitration clause. In the latter case the mandatory stay provisions would apply even if the dispute was not a substantial one.

Procedure

The Act imports Articles 10 to 24 of the UNCITRAL Model Law and therefore contains detailed provisions on the procedure of the tribunal.

Interim remedies

Under the Act, Articles 17 and 17A to 17G of the Model Law are brought into effect. The parties are able to agree that the tribunal should not have power to grant interim measures, but in the absence of such agreement the tribunal is given broad powers to preserve the status quo, prevent harm or prejudice to the arbitral process itself: preserve assets and evidence, and to make preliminary orders.

The court itself is empowered to grant interim measures in support of any arbitral proceedings that have been or are to be commenced in or outside the BVI. In relation to arbitral proceedings outside the BVI, interim relief can only be granted where the proceedings are capable of giving rise to an award that may be enforced in the BVI and the nature of the interim measure sought is such that a BVI court is able to grant in relation to arbitration proceedings. There is no appeal from the court's grant or refusal of an interim measure.

25 *C-Mobile Services Limited v. Huawei Technologies Co Limited* BVIHCMAP 2014/006.

Enforcement of foreign awards

The Act explicitly provides that the grounds for refusal of enforcement that apply to a New York Convention award also apply to the enforcement of a non-Convention award, and in both cases those grounds are fully incorporated into the Act itself. However, the Court has a general discretion not to enforce an award from a non-Convention state if it considers it just to do so, whereas it does not possess that discretion in relation to awards from Convention states.[26]

Confidentiality

The Act contains a number of provisions intended (save in limited specified circumstances) to maintain the confidence of arbitral proceedings, including that any court proceedings should be heard in chambers, imposing reporting restrictions and prohibiting parties from disclosing, publishing or communicating any information relating to the arbitration proceedings or the award.

Remedies

The Act expressly empowers the tribunal to award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings. Unless otherwise agreed by the parties, the tribunal also has the same power of the court to order specific performance or any contract, other than one relating to land or an interest in land. The position in relation to an award of punitive damages is unchanged, and it remains unenforceable.

ii Mediation

The situation with regard to mediation is at present perhaps a little opaque. Under the CPR,[27] the BVI Court has no power to order mediation. However, further to a Practice Direction[28] the Court has powers to refer a case to mediation and the parties will not be allowed to opt out except by order of a master or judge and upon adducing good and substantial reasons. Refusal to take part in such a mediation by a party is likely to have costs implications. There is some debate among practitioners as to whether a Practice Direction is capable of granting the Court powers not given to it by delegated legislation however the authors consider it prudent to assume the court does possess these powers until such time as this is tested.

The Arbitration Act also allows for mediation[29] where an arbitration agreement provides for the appointment of a mediator who will act as arbitrator in the event that no settlement is reached in the mediation.

The BVI has a roster of mediators, although their services are most frequently invoked in family disputes rather than commercial cases.

26 A UK arbitral award now counts as a New York Convention award in the BVI and can be enforced as such.

27 CPR 25.1(h).

28 No. 1 of 2003.

29 Arbitration Act, 2013 Section 30.

VII OUTLOOK AND CONCLUSIONS

The commercial division of the High Court continues to hear some of the most important commercial and insolvency disputes. Shareholder disputes (and related applications for freezing relief) continue to provide regular work for practitioners and the court. Trusts litigation is still on the increase. The aim of the BVI Commercial Court is to deliver justice quickly, efficiently and at a reasonable cost.

As of 31 March 2015 the resident judge of the Commercial Court, the Honourable Mr Justice Edward Bannister QC, stepped down and was replaced by Mr Justice Leon, an arbitration specialist.

Appendix 1

ABOUT THE AUTHORS

ARABELLA DI IORIO

Maples and Calder

Arabella di Iorio is a partner in Maples and Calder's BVI office, where she is head of the BVI litigation and trusts practice groups. She specialises in complex international commercial litigation, including insolvency, distressed funds, shareholder issues, asset tracing, trust disputes, insurance and reinsurance, professional negligence and contractual claims. She is frequently asked to give expert evidence on matters of BVI law. Miss di Iorio is a fellow of the Chartered Institute of Arbitrators, and has considerable arbitration and mediation experience and is a solicitor-advocate. She also advises on non-contentious trusts matters.

JOHN MACDONALD

Maples and Calder

John MacDonald is an associate and solicitor-advocate in the litigation and trusts practice groups of Maples and Calder's BVI office. He has broad experience in commercial litigation, civil and criminal fraud and shareholder disputes, having previously practised in London and Guernsey, and is an affiliated member of the Society of Trusts and Estates Practitioners.

MAPLES AND CALDER
Sea Meadow House
PO Box 173
Road Town
Tortola VG1110
British Virgin Islands
Tel: +1 284 852 3000
Fax: +1 284 852 3097
arabella.diiorio@maplesandcalder.com
john.macdonald@maplesandcalder.com