THE DISPUTE RESOLUTION REVIEW

Twelfth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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TWELFTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 32 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully, as well as overcoming challenges that life and politics throws up along the way. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different from those closer to home.

Sitting here in London at the start of 2020, we at least have a better idea of the immediate direction of travel for Brexit. The UK will have left the EU by the time this edition goes to print. The road has been long and twisting and it has thrown up novel problems of when politics and law clash head on. The Supreme Court in the UK – not so long ago having completed its metamorphosis from the old judicial committee of the House of Lords – confirmed that it was the ultimate check against the unlawful exercise of power by the Executive; declaring that Boris Johnson's advice to the Queen to prorogue Parliament was unlawful (see the case summary of *R (on the application of Miller) v. the Prime Minister* in the England and Wales chapter of this edition). Politicians cried foul. There was (and still is) talk of reassessing how Supreme Court judges are selected; talk of political appointments (as in the US) and a fundamental rewriting of the Constitution (except there cannot be, as no one has written it down in the first place). The same judiciary that is often praised for its independence and professional approach was at times along the tortuous road to Brexit branded in the media 'enemies of the people', part of the growing band of 'traitors' who allegedly opposed Brexit – that is despite all the judgments making clear that they were not deciding whether Brexit should happen or on what terms.

Looking back on events, far from the collapse of the Constitution, the year saw a reaffirmation of the constitutional balance of powers and the rule of law. The Supreme Court spoke and was respected. Parliament was recalled and took an October no-deal exit off the table.

But politics perhaps had the final say: an election was called later in the year, the people made their choice, and Mr Johnson's Conservative government was returned with a sufficient majority to 'get Brexit done'.

All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto. At least we now know at the end of it all that the UK will leave the EU on 31 January 2020.

That is not to say that everything will be plain sailing from now. The process of disentangling the UK from the EU legal and political framework will be long and complex. Fundamental questions remain. No doubt the Supreme Court will be called on to determine issues that no one had ever thought would need to be asked not so long ago. The transitional deal with the EU expires at the end of the year and the government's position is that it will not be extended. The same questions and uncertainties will surface as the clock ticks down if a deal is not apparent.

Whatever your views on Brexit, this is law in action. It happens every day of the year, but when the stakes are so large and politicised, the scrutiny so intense, it is hard not to see and feel it a little bit more. This edition therefore includes an updated Brexit chapter that charts the progress over the past year and what lies ahead.

There is of course much more to 2019 and beyond than Brexit – especially away from these shores (where it has occupied so much of Parliament's time, to the detriment of other legislative programmes). This 12th 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.

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 can be found in Appendix 1 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.

Damian Taylor
Slaughter and May
London
February 2020

Chapter 3

BRITISH VIRGIN ISLANDS

Christopher Pease[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The British Virgin Islands (BVI) is a British overseas territory. BVI law is comprised of locally enacted legislation supplemented by BVI common law precedent. Decisions of the courts of England and Wales, and of other countries within the Commonwealth, are of persuasive authority.

The court system in the BVI is part of the Eastern Caribbean Supreme Court. For civil matters, the High Court is the court of first instance. The High Court also has a Commercial Division (often referred to simply as the Commercial Court), which is sited in the BVI and hears many of the jurisdiction's international and large-scale disputes. Appeals from the High Court (including the Commercial Division) go up to the Eastern Caribbean Court of Appeal. Any appeals from the Court of Appeal go to the Privy Council in London.

Off the back of its reputation for having a reliable and efficient legal system, the BVI has taken various measures in recent years to establish itself as a centre for international arbitration.

II THE YEAR IN REVIEW

There have been numerous important decisions that have developed BVI jurisprudence over the past 18 months (there was no BVI chapter in last year's edition of this publication), including several Privy Council decisions. These include decisions relating to the extent of a trustee's fiduciary duties, the application of the *forum non conveniens* test in the context of service out of the jurisdiction, the court's jurisdiction to grant relief in support of legal proceedings in foreign jurisdictions (both court and arbitral proceedings) and the application of BVI insolvency law.

i Gany Holdings (PTC) SA v. Khan and others; Rangoonwala v. Khan and others [2018] UKPC 21

On 30 July 2018, the Privy Council dismissed an appeal from the Eastern Caribbean Court of Appeal concerning the principles surrounding trust property and the fiduciary duties owed by trustees. Specifically, the case concerned whether certain assets, including BVI companies, had become part of trust property held by the trustee.

The Court of Appeal had relied on a legal presumption that property gratuitously transferred to a person or persons who were, at the time of the transfer, trustees of a trust

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previously established by the transferor, was to be regarded as transferred subject to the terms of that trust. The Court of Appeal relied on the case of *Re Curteis' Trusts* for the basis of that legal presumption.

The Privy Council held that both the Commercial Court and the Court of Appeal went wrong in their analysis as the issue should not, in the first instance, be resolved by reference to any legal presumption. The correct approach was to: (1) first look at whether there was an oral or written declaration of the parties' intention; then (2) look at the available evidence and come to a common sense decision; and (3) if there is no evidence, one can have regard to legal presumptions but as a last resort.

The Privy Council decided that there was sufficient evidence to establish the divestment of assets had the effect of making them part of the trust assets. The Privy Council held that it was therefore within the Court of Appeal's discretion to void the distribution of the trust assets. Importantly the Privy Council opined that failure of a trustee to investigate the assets that constituted trust property was a serious breach of its fiduciary duties.

This case provides helpful guidance to BVI trustees in understanding the extent of the duty imposed while also clarifying the Court's position on gratuitous transfers involving trust property.

ii Nimati International Trading Limited & Others v. JSC MCC Eurochem & Another BVIHCMAP 2016/0042-0046

On 18 September 2018, the Court of Appeal handed down an important judgment concerning the application of the *forum non conveniens* test in the context of several challenges to the BVI court's jurisdiction to try a dispute relating to an alleged large-scale international fraud, which entailed various BVI registered companies receiving and distributing bribes. The Court of Appeal ultimately concluded that Russia was a more appropriate jurisdiction than the BVI to try the claims.

One of the key features of the judgment was the Court of Appeal's conclusion that it was necessary to determine the governing law of the claims where governing law had not been positively pleaded. It held that the claimants could not simply proceed on the assumption that the applicable law was the law of the forum (i.e., BVI law). The Court of Appeal also found that too much weight had been placed on the fact that BVI companies had allegedly received bribe payments as being a connecting factor to the BVI.

In November 2018, the Court of Appeal granted the claimants permission to appeal its decision to the Privy Council. In doing so, the Court of Appeal recognised the importance of seeking clarification on the approach to be taken on the points highlighted above, particularly given the frequency with which claims in the BVI are subject to jurisdiction challenges. The Privy Council appeal is due to be heard on 5 March 2020.

iii Q v. R Corp & Others (case under seal)

On 13 December 2018, the BVI Commercial Court held that it had the power to grant *Norwich Pharmacal* orders (i.e., third-party disclosure orders) in support of foreign proceedings.

In coming to his decision, Justice Wallbank held that the BVI Courts would not follow the decision of the English Court of Appeal in *Ramilos Trading v. Buyanovsky*. Ramilos had cast doubt as to the English Court's power to grant *Norwich Pharmacal* orders in aid of foreign proceedings where there was existing legislation governing the process of how evidence was to be shared between foreign courts.

Justice Wallbank held that where an innocent party is mixed up in wrongdoing, they come under a duty at that point in time to assist the wronged party by providing it with information that will allow the wronged party to seek recourse. It followed that the duty to give disclosure did not only arise if and when the court made an order pursuant to application brought by the wronged party. Wallbank J concluded that the focus of the *Norwich Pharmacal* application was to enforce this duty and not on whether the Court is assisting a foreign court in obtaining evidence.

The decision marks a further divergence between the courts of the BVI and England when considering applications for *Norwich Pharmacal* relief. Such relief has become increasingly important in the BVI, where it is often the only method by which information relating to companies, particularly ownership information, can be sought in a civil law context.

iv Koshigi Limited and Svoboda Corporation v. Donna Union Foundation (BVIHCMAPP2018/0043 and 0050 of 17 January 2019)

On 17 January 2019, the Eastern Caribbean Court of Appeal delivered judgment in one of the first cases in the jurisdiction dealing with interim relief in support of foreign arbitral proceedings.

The Court held that the jurisdiction to grant interim measures in support of foreign arbitral proceedings is to be found in the clear wording of Section 43 of the Arbitration Act; the Court need not rely on or read *Black Swan* principles into the Act, which would require evidence of assets within the jurisdiction. It was also made clear that asset disclosure orders can be made as part of a freezing injunction granted pursuant to Section 43, which represents another difference from the *Black Swan* relief. The disclosure order was necessary to give teeth to the freezing injunction and was part of the judge's exercise of discretion under Section 43 of the Act.

The case demonstrates the different tests applicable to applications for freezing injunctions in support of foreign arbitral proceedings and those for freezing injunctions in support of foreign court proceedings (i.e., *Black Swan* injunctions).

v The Matters of Constellation Overseas Ltd and Ors (BVIHC (COM) 2018/0206, 0207, 0208, 0210, 0212 of 5 February 2019)

On 5 February 2019, the BVI Commercial Court for the first time ordered a light touch provisional liquidation as a protective measure to ward off creditors who may wish to take *ex parte* actions against the company to prioritise their debt recovery.

In granting this relief, the Court held that it had a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect assets owned or managed by a company. This wide jurisdiction, the Court held, included making such appointments to aid in the company's reorganisational efforts aimed at achieving that overriding objective. The Court also stated that the 'light touch' liquidation would allow the Court to cooperate with foreign courts and to have oversight of the restructuring process for the benefit of the creditors as a whole. This was in the context of evidence that the restructuring had a real prospect of succeeding in maintaining the company as a going concern.

This decision demonstrates not only that the BVI Court has a common law jurisdiction to appoint provisional liquidators to facilitate a cross-border group restructuring and provide

a moratorium against predatory creditor claims but also more generally that BVI Courts will seek to give companies the protection required if it can be shown that that they have a real prospect of recovering financially.

vi UBS AG New York and Ors v. Fairfield Sentry Ltd (In Liquidation) and Ors [2019] UKPC 20

On 20 May 2019, the Privy Council handed down its second decision in the long-running dispute between the liquidators of the Fairfield Funds and the Funds' investors. The question before the Privy Council was whether the Court of Appeal (and Commercial Court before that) had been correct to dismiss an application for an anti-suit injunction that would prevent liquidators from bringing proceedings in the US pursuant to BVI insolvency law.

The Board held that the BVI Insolvency Act, 2003, did not expressly or by necessary implication confer exclusive jurisdiction on the BVI High Court such as to prevent a foreign court from exercising such powers at the request of a BVI liquidator. The Board opined that it was not uncommon for a foreign court to apply the insolvency laws of another country when assisting in cross-border insolvency and that it is a question for the US court whether they should apply BVI law as requested by the liquidators. The anti-suit injunction had been rightly refused.

This decision demonstrates that liquidators appointed over BVI companies will be able to rely on courts in foreign jurisdictions granting relief pursuant to the BVI insolvency regime.

III COURT PROCEDURE

i Overview of court procedure

The rules governing civil procedure in the BVI are set out in the Eastern Caribbean Supreme Court Civil Procedure Rules, often referred to simply as the EC CPR or the CPR. These rules apply to civil proceedings in all jurisdictions of the Eastern Caribbean Supreme Court and as such there is a healthy body of case law from these jurisdictions that aids the interpretation of the rules.

For cases proceeding in the Commercial Division of the High Court there is a specialised procedure set out in dedicated parts of the EC CPR to ensure these cases are dealt with appropriately and expeditiously.

ii Procedures and time frames

Broadly speaking, there are four types of proceeding in the BVI: (1) standard claims; (2) fixed-date claims; (3) originating applications; and (4) ordinary applications.

Proceedings commenced by claim form

Standard claims are commenced by the filing of a claim form. A standard claim form must be accompanied by a statement of claim either at the time the claim form is filed or shortly thereafter and that document should contain the material facts upon which the claim is brought and set out the causes of action and relief that is being sought.

For claims that are commenced against defendants located within the BVI the defendants will have up to 14 days to acknowledge service and up to 28 days to file a defence from the time the claim form and statement of claim have been served on them. Where a

defendant is located outside the BVI the claimant will need to seek permission from the court to serve out of the jurisdiction before service can be effected, an application which will ordinarily take between two and four weeks to be determined. If and when permission to serve out is granted, the claimant will then need to effect service by certain specified methods (what is permitted will depend on the laws of the country where the defendant is located). Once a defendant located outside the BVI has been served they will have between 28 and 35 days to acknowledge service and 42 and 56 days to file a defence based upon where they are located (for most jurisdictions outside the BVI the longer period applies). A defendant may file a counterclaim alongside their defence.

A claimant may file and serve a reply to a defence and will ordinarily have 14 days to do so after the defence has been served. If a counterclaim has been filed, there will be an opportunity for the claimant to file and serve a defence to the counterclaim and for the defendant to file and serve a reply to that defence.

Once pleadings close there will ordinarily be a case management conference at which the court will set down directions to trial and set a trial date. The directions will generally provide for a disclosure (discovery) process and for the parties to adduce witness evidence. Some cases may also require the parties to adduce expert evidence. The time between close of pleadings to trial will depend on the size and complexity of the case, how much documentary evidence there is, how many witnesses there are and whether expert evidence is required.

Fixed-date claim forms

Fixed-date claim forms must be used for certain types of dispute. Fixed-date claims are intended for cases that will require minimal evidence and the procedure is therefore designed to bring the claim on for trial more quickly than a standard claim.

When commencing proceedings by way of a fixed-date claim form the claimant will generally file and serve an affidavit instead of a statement of claim and a defendant will have the opportunity to put in responsive evidence by way of affidavit. A hearing date will be set at the time the fixed-date claim form is filed. The first hearing will normally be used by the court to give directions for the trial of the matter but in situations where there is no defence or where the case can be dealt with summarily, the court can treat the first hearing as the trial.

Originating applications

Originating applications are used to commence certain actions within the regime laid out by the Insolvency Act and the Insolvency Rules. This will usually be related to applications to appoint liquidators or other insolvency-related applications.

The originating application procedure is similar to that commenced by fixed-date claim form – an originating application must be supported by affidavit evidence and a hearing will be fixed at the time the application is filed. The respondent(s) and/or interested parties will have an opportunity to file evidence in response and to be heard at the hearing.

Ordinary applications

Ordinary applications will usually be made within proceedings that have been, or will be, commenced through one of the originating procedures described above. However, there are limited circumstances in which ordinary applications can be used to commence free-standing proceedings in the BVI, including where interim relief is sought in support of foreign arbitral proceedings and where *Black Swan* injunctive relief is sought in support of foreign court proceedings.

Applications can be made on an urgent basis, in which case underlying proceedings do not need to be on foot at the time the application is made even if the applicant intends for the application to be in support of anticipated proceedings in the BVI. In such a situation a claim can be commenced by way of a claim form following the grant of the urgent interim relief. Urgent applications are generally heard at very short notice by the court and, when necessary, on the same date the application is filed.

iii Class actions

The EC CPR allows groups of five or more persons who have a similar interest to be represented by a single claimant or defendant and as such class actions are theoretically permitted. However, such actions are not common in the BVI.

iv Representation in proceedings

Natural persons are able to represent themselves in legal proceedings in the BVI. For corporations, a duly authorised director or other officer may conduct the proceedings on behalf of the corporation, although the court's permission is required for the corporation to be represented at any hearing in open court by anyone other than a BVI legal practitioner.

v Service out of the jurisdiction

For the BVI court to permit service of a claim form on a defendant located outside the jurisdiction the following three-stage test must be satisfied: (1) that in relation to the foreign defendant there is a serious issue to be tried on the merits; (2) that there is a good arguable case that the claim falls within one of the jurisdictional 'gateways' for service out, as set out at EC CPR 7.3; and (3) that the BVI is clearly and distinctly the appropriate forum for the trial of the dispute.

Where permission to serve out has been granted, a claimant must ordinarily serve a claim form by one of three methods: (1) through diplomatic channels or foreign governments (e.g., in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters); (2) in accordance with the law of the country in which the document is to be served; or (3) personal service by the claimant or the claimant's agent. While personal service is expressly permitted as a method of service, this is only insofar as it is not contrary to the law of the country where service is to take place.

In circumstances where the 'ordinary' methods of service are demonstrably impracticable the court may permit the claimant to serve by alternative methods.

Where the court has granted permission to serve a claim form on a defendant out of the jurisdiction a claimant may serve other documents relating to the proceedings on the same defendant without the need to obtain further permission.

vi Enforcement of foreign judgments

There are different methods of enforcing foreign judgments in the BVI depending on: (1) the jurisdiction from which the judgment originates; (2) the nature of the relief granted in the judgment; and (3) whether the judgment was issued by a court or arbitral tribunal (although the latter is generally referred to as an 'award' rather than a 'judgment').

Generally speaking, there are four methods by which foreign judgments may be enforced in the BVI:

a Money judgments issued by certain courts in certain jurisdictions can be enforced in accordance with the Reciprocal Enforcement of Judgments Act. This includes money judgments issued by the High Court in England and Wales, the High Court in Northern Ireland, the Court of Session in Scotland, and courts in the Bahamas, Barbados, Bermuda, Belize, Trinidad and Tobago, Guyana, St Lucia, St Vincent and the Grenadines, Grenada, Jamaica, New South Wales (Australia) and certain courts within Nigeria. The procedure for registration of such a judgment is relatively straightforward and is set out within the EC CPR. Once registered, the judgment shall be of the same force and effect as a judgment of the High Court in the BVI and will be enforceable as such.

b Money judgments from other jurisdictions can be enforced by way of a common law debt claim brought in the BVI as a free-standing claim. Although this entails commencing a new claim in the BVI, such a claim will usually be dealt with on a summary basis.

c Foreign non-money judgments can be enforced in the BVI, although this requires the claimant to commence a new claim in the BVI and rely on issue estoppel to prevent the defendant from raising any of the same arguments that it has already relied upon in the foreign proceedings in which the judgment was issued. The relief awarded in the foreign jurisdiction must also be available in the BVI for the judgment to be effectively replicated.

d Foreign arbitral awards are enforceable in accordance with the provisions of the Arbitration Act, and there is a summary procedure provided for in the EC CPR which means that registration of foreign arbitral awards, particularly awards from countries that are signatories to the New York Convention, will be quick and relatively straightforward absent any irregularity.

vii Assistance to foreign courts

One of the ways in which the BVI courts are able to provide assistance to foreign courts is to compel entities within the BVI to produce information or documentation. There are various ways in which a foreign court, or foreign litigants, may seek the assistance of the BVI courts in obtaining information and documentation. This includes the power of the BVI courts to grant *Norwich Pharmacal* relief in support of foreign proceedings and a statutory power to order an entity in the BVI to produce documentation for use in foreign legal proceedings, pursuant to the BVI receiving a letter of request from that foreign court.

In addition to the provision of information and documentation, the BVI courts are also able to assist foreign courts by granting injunctive relief, or other forms of interim relief, in support of foreign court proceedings. The most prominent way in which assistance can be provided is through the granting of injunctive relief to hold the ring pending determination of foreign proceedings. The *Black Swan* jurisdiction has evolved in the BVI which allows freezing injunctions to be granted over assets located in the BVI to assist foreign proceedings even if the parties to the proceedings are not domiciled in the BVI. In addition, the BVI courts have taken a liberal approach to the granting of interim relief in support of foreign arbitration proceedings.

viii Access to court files

Members of the public are entitled, upon paying the prescribed fee, to search for, inspect and take copies of the following documents that have been filed in proceedings: a claim form; a notice of appeal; judgments and orders. For a non-party to obtain any other document they will need to make an application to the court for leave to obtain such further documents, which will not generally be made available without good grounds.

The parties to any proceedings may search for, inspect and take copies of all documents on the court file (except anything that has been placed under seal).

ix Litigation funding

Although there is not currently any legislation in the BVI governing third-party funding of litigation, a 2011 decision of the Commercial Court suggests that third-party funding is not unlawful and that a third-party funder will be entitled to share in any award or profits of litigation. Despite this decision, third-party funding has historically not been commonly used in the BVI.

As to the use of contingency fees, while these are explicitly allowed in respect of non-contentious work provided that the fee is fair and reasonable, there is no such provision in respect of contentious work. As such, the common law rules relating to champerty and maintenance have not been expressly modified and it remains unclear whether CFAs would be permitted in respect of litigation.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

As the BVI has a limited number of law firms, it is relatively common for law firms to be asked to act against persons or entities that they have previously advised in relation to other matters. It is also common for law firms to be asked to act for multiple parties where there is the potential for the parties' interests to diverge.

While a law firm cannot act if their previous instruction for a client gives rise to a direct conflict with a new instruction or if they have already advised an adverse party in relation to the same matter, in practice it may be possible to set up appropriate information barriers to ensure that any previous work and the new instruction are dealt with by completely separate teams and to ensure no information passes between them.

Law firms may act for multiple parties for as long as their interests are aligned. If there comes a point at which the interests diverge and this gives rise to a conflict, then the law firm can no longer act for the two or more parties whose interests conflict.

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

The key pillars of the anti-money laundering legislation of the BVI are contained principally in the Proceeds of Criminal Conduct Act 1997, the Anti-Money Laundering Regulations 2008 and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008.

Under the Proceeds of Criminal Conduct Act 1997, a number of offences are created which apply to all persons incorporated, established or resident in the territory, which includes lawyers who practise in the BVI. These offences are: assisting another to retain the benefit of

criminal conduct; acquisition, possession or use of proceeds of criminal conduct; concealing or transferring proceeds of criminal conduct; failure to report suspicious transactions; and tipping-off.

Persons carrying on 'relevant business', which includes lawyers, are subject to further obligations under the Anti-Money Laundering Regulations 2008 and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008. A person subject to the Code of Practice and the Regulations is a 'relevant person'. A 'relevant person' must assess the risk that any business relationship or one-off transaction may involve money laundering and take a view whether they can act having regard to the degree of risk assessed.

The obligation to conduct due diligence on clients and customers may be 'simplified' or 'enhanced' depending on the perceived risks in dealing with a given client or applicant for business.

iii Data protection

Under BVI law there is no specific data protection legislation, outside of certain limited provisions relating to computer misuse. There are, however, duties of confidentiality owed by lawyers to their clients (see above) and also statutory duties of confidentiality owed in banking, trust and fiduciary relationships.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

BVI law largely follows the position in English common law as to when communications will attract privilege. For the purposes of legal advice privilege, this means that communications between a client and their foreign lawyers or in-house counsel are capable of attracting privilege.

In addition to the overarching common law position, the Evidence Act 2006 also provides a statutory mechanism whereby clients can object to documents being disclosed in legal proceedings.

The Evidence Act provides that communications will attract privilege and not be disclosable where they are: (1) created for the dominant purpose of providing legal advice to the client; (2) for the dominant purpose of providing or receiving professional legal services in relation to legal proceedings (anticipated or pending); or (3) for the dominant purpose of preparing for or conducting the proceedings.

The Evidence Act 2006 defines 'client', a term that has been subject of both controversy and scrutiny in England and Wales. For the purpose of the legislation 'client' takes on a wider meaning than the English common law definition, including: (1) an employee or agent of a client; (2) a person acting, for the time being, as manager, committee or other person however described, under a law that relates to a person of unsound mind and in respect of whose person, estate or property, the person is so acting; or (3) if the client has died, the personal representative of the client.

ii Production of documents

Generally, parties to claims in the BVI will be required to disclose all documents that are or were within their possession or control and which are directly relevant to the matters in question in the proceedings. A document is directly relevant if: (1) the party with control of the document intends to rely on it; (2) it tends to adversely affect that party's case; or (3) it

tends to support another party's case. A party has or has had control if: (1) it is or was in the physical possession of the party; (2) the party has or has had a right to inspect or take copies of it; or (3) the party has or has had a right to possession of it.

If documents are overseas or are in the possession of another person or entity but held to the order of the party then those documents will need to be disclosed if they are directly relevant. The obligation also extends to electronic records and it is common place in the BVI for large disclosure exercises to comprise the review and disclosure of digital documents and communications.

The BVI courts tend to take a pragmatic approach to disclosure and, in the event that a party makes a compelling argument that a strict application of the rules will lead to a disproportionate or oppressive process, the court will exercise its broad case management powers to apply appropriate limitations to the process.

A party discloses a list of documents that come within the criteria set out above. That list should explain which documents are no longer in the party's control and should also refer to any documents that are privileged. However, documents no longer in the control of the party or that are privileged will not have to be made available to the other party for inspection.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Historically the BVI has been a jurisdiction with a heavy focus on litigation and the courts. However, as in the wider world, parties are increasingly encouraged to explore alternative methods of resolving their disputes both before and during litigation, and the courts are generally receptive to granting parties additional time in which to explore such alternatives where litigation is already afoot.

Additionally, arbitration is gaining traction in the BVI and is increasingly seen as an attractive alternative to litigation, particularly given the confidentiality that attaches to arbitral proceedings.

ii Arbitration

Since the introduction of the BVI Arbitration Act, there has been a drive internationally to increase the BVI's prominence as a centre for international arbitration. The past few years in particular have seen a growing trend towards the use of arbitration in the BVI, which includes the incorporation of BVI arbitration agreements within contractual documents and the use of ad hoc arbitrations.

The UNCITRAL Model Law has been largely reflected in the Arbitration Act with some modifications. This will ensure that BVI arbitrations are conducted according to familiar and internationally accepted standards, and by reference to tried and tested procedural law, on which there is already a vast body of existing interpretation. The variations to the Model Law are aimed at retaining flexibility to ensure that the BVI is an attractive jurisdiction to arbitrate disputes and which also allows for the efficient registration and enforcement in the BVI of foreign arbitral awards.

As a member of the New York Convention, arbitral awards granted in the BVI benefit from being easily exportable to other jurisdictions around the world.

The BVI has its own arbitral body, the BVI International Arbitration Centre (the BVI IAC). The territory also has state of the art facilities to accommodate arbitral hearings. The BVI IAC has developed a bespoke set of arbitration rules, which have been developed by prominent arbitration practitioners.

iii Mediation

The BVI courts are expressly permitted by the EC CPR to encourage the parties to a dispute to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate. The court can facilitate the use of such procedures and, to this end, the Eastern Caribbean Supreme Court offers court connected mediation which coordinates mediations and provides trained mediators, where the parties agree to use it or where the court orders that the case be referred to mediation.

In practice, the court will rarely order the parties to refer their dispute to mediation unless all parties agree.

iv Other forms of alternative dispute resolution

Other forms of alternative dispute resolution are not widely used in the BVI. However, the EC CPR provides a mechanism whereby a referee can be appointed to try the claim or any specific issue or allegation. Referees will only be used where there are specific issues to be determined that it is not convenient for the court to determine or where the parties agree to refer the case or issue to a referee.

VII OUTLOOK AND CONCLUSIONS

Litigation continues to be the default method of resolving disputes in the BVI, although those doing business in the BVI are increasingly becoming aware of the benefits of arbitration and it is expected that there will be an increase in arbitration proceedings with their seat in the BVI, and that take place in the BVI, in the coming years. The courts have demonstrated that they are willing to grant interim measures in support of arbitral proceedings elsewhere, regardless of whether there is evidence of assets being located in the BVI.

Early in 2020 the Privy Council will hear the appeal in *Eurochem*, which could have far-reaching consequences regarding the ability of the BVI courts to retain jurisdiction over disputes concerning BVI entities, particularly in cases concerning fraud, where BVI companies have been used as a vehicle for the wrongdoing.

Finally, the BVI courts have also demonstrated a willingness to apply the *Norwich Pharmacal* jurisdiction more liberally than the courts in England, and this is increasingly becoming a crucial tool in uncovering actionable wrongs that would otherwise go undetected in the BVI.

Appendix 1

ABOUT THE AUTHORS

CHRISTOPHER PEASE

Harney Westwood & Riegels

Chris Pease is a member of the firm's litigation, restructuring and insolvency practice in the BVI. He advises on all aspects of commercial disputes and insolvency matters, with a particular specialism for disputes concerning fraud and bribery; asset recovery; applications for interim injunctive relief; and applications for pre-action and third-party disclosure.

Prior to joining Harneys, Chris was a managing associate in the dispute resolution team at Linklaters in London.

In his UK practice, Chris specialised in advising on complex fraud and contractual disputes as well as large-scale contentious regulatory matters, internal investigations and crisis management. As part of this practice, Chris advised on several successful settlement negotiations, including at mediation.

Chris was heavily involved in the civil recovery work undertaken by the Attorney General of the Turks and Caicos Islands in the wake of findings of a Commission of Inquiry into fraud and corruption concerning public officials, which were published in 2009.

In 2019, Chris was recognised as a 'Rising Star' in *The Legal 500 Caribbean* directory.

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