LEXOLOGY®
Getting The Deal Through

Complex Commercial Litigation

in British Virgin Islands

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BACKGROUND

Frequency of use

How common is commercial litigation as a method of resolving high-value, complex disputes?

In the British Virgin Islands (BVI), litigation remains the most popular method of resolving high-value, complex disputes. There is a dedicated Commercial Division of the High Court specifically designed to deal with such cases.

Although it is far less common to resolve such disputes in the BVI by way of alternative dispute resolution (ADR), there is an increasing focus on the use of arbitration in the wake of the Arbitration Act that came into force in 2014 and the establishment of the BVI International Arbitration Centre.

Litigation market

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

As one of the world's largest centres for the incorporation of companies, with just under 450,000 active BVI business companies, which hold assets estimated to have a combined value of US$1.5 trillion, BVI courts are often relied upon where relief is sought in relation to the ownership, administration or management of any company registered in the BVI or where there is a dispute concerning the assets held or controlled by those companies.

Much of the complex commercial litigation in the BVI has an international element to it. Often, proceedings will be related to or a component of legal proceedings elsewhere in the world. As such, the market for litigation consists of corporations, high-net-worth individuals and trusts based in various countries around the world. In many instances, the underlying client will be operating through legal counsel already appointed in other international financial centres, which also brings foreign-based law firms into the market for BVI litigation.

Legal framework

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

The law of the BVI is derived from a combination of statute and common law, which is influenced by the laws of England and other Commonwealth jurisdictions.

The court system in the BVI falls under the jurisdiction of the Eastern Caribbean Supreme Court, together with a collection of other Caribbean countries. The BVI High Court is the court of first instance. The Eastern Caribbean Supreme Court also has a dedicated Commercial Court that sits in the BVI. Although the Commercial Court is theoretically available for use by any of the member jurisdictions of the circuit, in practice its caseload is overwhelmingly made up of cases from the BVI. Appeals are referred to the Eastern Caribbean Court of Appeal, and from there on to the Judicial Committee of the Privy Council (Privy Council).

While decisions of the BVI courts are treated as precedents in the usual way, reference often needs to be made to decided cases in other jurisdictions. While the common law of England is recognised in the jurisdiction by way of statutory enactment, this is subject to local conditions that give the court a degree of flexibility. However, in practice, the courts ordinarily treat English judgments as highly persuasive (although in certain cases, the BVI courts have declined to follow English precedents, which is normally justified by distinguishing on the basis that the position is

modified in the BVI by statute). The BVI forms part of the wider jurisdiction of the Eastern Caribbean Supreme Court, so judgments from other courts in the same jurisdiction are normally persuasive, even though they are not technically binding upon the court. Judgments from other leading Commonwealth jurisdictions, particularly Australia and Hong Kong, are also often considered by the BVI courts.

Practice in the High Court (and Commercial Court) is governed by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (CPR), which are broadly modelled on the English Civil Procedure Rules, along with practice directions issued from time to time.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

What key issues should a party consider before bringing a claim?

As in all jurisdictions, one of the chief considerations will be whether litigation is a necessary and appropriate method of achieving the desired result. In particular, a party will want to ensure that the relief it is seeking will be effective in law and in practice. That will entail a consideration of whether the court will have jurisdiction to determine the claim, whether any judgment can be enforced against the defendant and, where applicable, the defendant's assets. Parties should also consider the potential time and costs that will be incurred in engaging in litigation and whether it is likely that costs could be recovered from the defendant in the event the claimant is successful.

Other methods of dispute resolution should be weighed against litigation to determine whether they offer any advantages in the circumstances.

Where there is a possibility that steps will be taken by a defendant to frustrate any potential judgment against it, a prospective claimant should also consider the availability of interim relief to protect his or her position pending determination of his or her claim.

Establishing jurisdiction

How is jurisdiction established?

The court's jurisdiction is founded upon proper service of originating process. A claim form must be served at a place within the jurisdiction, except where permission to serve a party outside of the jurisdiction is permitted. Where a defendant can be served within the jurisdiction, the court will generally have jurisdiction over him or her in personam.

Permission to serve outside of the jurisdiction may only be granted if a case comes within one or more of the gateways provided for in CPR Part 7.3. Even where a claimant has a good arguable case that the claim falls within one of these gateways, the court has a residual discretion to decide whether to allow service outside of the jurisdiction.

A defendant who wishes to dispute the BVI court's jurisdiction to try the claim or argue that the court should not exercise its jurisdiction, including on forum non conveniens grounds, can apply to the court for a declaration to that effect. The commencement of such an application should follow an acknowledgment of service containing a notice of intention to defend, and will have the effect of extending the deadline for filing a defence until such time as the court determines the application and sets a new date (if a declaration is not given).

Where proceedings already exist in the BVI and there is reason to believe parallel proceedings have been or may be commenced in another jurisdiction, the court has the power to grant an antisuit injunction prohibiting the commencement or continuation of other proceedings.

Preclusion

Res judicata: is preclusion applicable, and if so how?

Yes. Once a cause of action has been adjudicated upon, whether in the BVI or by a foreign court, it becomes res judicata and the parties are estopped from rearguing the matter. This estoppel relates both to the cause of action as a whole and to any issue that is determined in the course of the trial.

Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

BVI courts will apply foreign law to the extent a dispute before them requires issues to be determined in accordance with foreign law. For example, a BVI court may be asked to determine a contractual dispute where the contract is governed by a foreign law but the BVI court has jurisdiction to try the claim. In these circumstances, the BVI court will determine the dispute in the usual way, but will deal with points of foreign law by requiring that the analysis of the foreign law is undertaken by an expert qualified to practise the law in question.

Given that expert evidence of the applicable foreign laws will be adduced and an expert's duty is owed to the court rather than any of the parties, there is no obvious tactical advantage in applying foreign law in the BVI.

Initial steps

What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

At the outset, consideration should be given as to whether the defendant has the means and capacity to satisfy a judgment made against it (eg, third-party disclosure order or specific disclosure). Where a claimant anticipates enforcing a judgment against a defendant's assets, it should take steps to determine whether a BVI judgment will be recognised in the jurisdiction where those assets are held. If there is a risk that a defendant will dissipate his or her assets, then the claimant should consider the availability of interim relief that would prevent the defendant from doing so (eg, by obtaining a freezing order).

While a defendant can, in practice, take measures to make enforcement of a judgment against him or her or his or her assets more difficult, there may be grounds on which a claimant can unwind transactions intended to frustrate enforcement or defraud existing or expectant creditors. A claimant may also have a tracing claim allowing him or her to claim against the proceeds of the sale of any assets disposed of by the defendant.

Freezing assets

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A claimant should consider obtaining a freezing order if there is a risk that the defendant will dissipate assets that the claimant intends to recover or enforce against.

The BVI courts have a statutory discretion to grant a freezing injunction in all cases in which it appears to the court to

be just and convenient. However, the governing principles for the availability of freezing injunctions are accepted as being the same as under the general common law. To succeed, the applicant will need to show:

- a good arguable case;
- that the refusal of an injunction would involve a real risk that a judgment or award in favour of the claimant would remain unsatisfied; and
- that it is just and convenient for the injunction to be granted.

It is worth noting that freezing injunctions may be granted in aid of foreign proceedings against a respondent within the in personam jurisdiction of the court in cases where there is no substantive cause of action already existing in the BVI.

Pre-action conduct requirements

Are there requirements for pre-action conduct and what are the consequences of non-compliance?

While there are no pre-action protocols set out in the CPR, when making cost awards the court is entitled to consider any relevant aspect of the conduct of the parties, including their conduct in relation to the matter that gave rise to the litigation. All aspects of litigation (including pre-action conduct) should, in any event, be conducted in accordance with the overriding objective.

Other interim relief

What other forms of interim relief can be sought?

Besides freezing orders and other injunctive relief, there are other forms of interim relief potentially available to parties to litigation.

Where a claimant or potential claimant requires further information held by a third party before it is able to make or fully particularise a claim, then it may seek the provision of information from that third party in accordance with the Norwich Pharmacal principles.

Where a claimant intends to enforce a debt against the assets of a defendant, it may seek to obtain a charging order over those assets with a view to ultimately appoint receivers to sell those assets to satisfy the debt. In addition, or alternatively, a claimant may seek to appoint provisional receivers to take control of assets in certain circumstances, the powers of whom can be determined by the court accordance.

Both parties may be able to obtain security for costs if there is a concern that the other side will not be able to satisfy any costs award made against it, although this is usually a form of relief reserved for defendants in circumstances where the claimant is impecunious.

Alternative dispute resolution

Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

Although there is no formal requirement for parties to engage in ADR at the pre-action stage or any other stage of a case, it may be a relevant factor for the court to consider when assessing costs.

Claims against natural persons versus corporations

Are there different considerations for claims against natural persons as opposed to corporations?

Save for directors, natural persons who are defendants to high-value, complex claims commenced in the BVI are rarely domiciled within the jurisdiction, and it will often be necessary to seek the court's permission to serve out of the jurisdiction on the individual, so consideration will need to be given as to whether the court is likely to grant that permission.

Another consideration is that it may be more difficult to obtain information relating to natural persons than corporations. Depending on where corporations are incorporated they will often be required to file certain documents that can be inspected as a matter of public record and will have a registered address. BVI-domiciled companies are required to have a registered agent that will be responsible for keeping certain documents on behalf of the company that it may be possible for a claimant to obtain by way of Norwich Pharmacal relief. It can be much more difficult to obtain information such as details of an individual's location or net worth than it would be when dealing with a corporation.

Class actions

Are any of the considerations different for class actions, multi-party or group litigations?

Although class actions are not specifically recognised in the BVI, the CPR does allow groups of five or more persons having a similar interest in proceedings to be represented by a single claimant or defendant.

In all cases where there are numerous parties, an additional consideration to bear in mind is the dynamic between the numerous parties, and whether that dynamic is likely to provide a claimant or defendant with any particular tactical strengths or weaknesses that could be exploited (eg, the potential for numerous defendants to provide conflicting evidence).

Third-party funding

What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

There is no legislation in the BVI governing third-party funding of litigation. However, a decision of the Commercial Court (Hugh Brown & Associates v Kermas Limited [2011] (BVIHCV (COM)) indicates that third-party funding is not unlawful and that a third-party funder will be entitled to a share of any profits.

Contingency fee arrangements

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

Section 44 of the Legal Profession Act 2015 (LPA) envisages the use of contingency fee agreements (CFAs) in relation to non-contentious matters. While Schedule 4 Part B of the LPA expressly prohibits legal practitioners from acquiring a 'financial or other interest' in a case, there is a carveout to this provision which confirms that it is not improper for a BVI lawyer to enter into a CFA with a client in this context provided that such fee is fair and reasonable.

In relation to contentious business, the position at common law in relation to champerty and maintenance has not been

expressly modified by statute. It remains unclear what view the BVI court would take on such arrangements and specifically whether they would be viewed as unenforceable on the grounds of public policy. This therefore remains an area of some uncertainty.

THE CLAIM

Launching claims

How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

The procedure for starting a claim in the BVI is set out in Part 8 of the CPR. This applies to all claims, save for certain insolvency proceedings and other limited circumstances in which a fixed-date claim form (similar to a Part 8 claim form under the English Civil Procedure Rules) may be used. A claim is commenced by issuing and serving a claim form (in the form prescribed at Form 1 CPR). A claim form must usually be accompanied by a statement of claim, save where the claim form includes all information required by the CPR or where the court has given permission for there to be no statement of claim; or, where required by a particular court rule, an affidavit. For limitation purposes, the claim is issued on the date entered on the claim form by the court registry (CPR 8.1(2)).

With regard to structure, a claimant must include in the claim form a short description of the nature of the claim, specify any remedy that the claimant seeks and provide an address for service (CPR 8.6)). The claim form or statement of claim must contain a statement of all the facts upon which the claimant relies (which must be as short as practicable), must identify any document considered by the claimant to be necessary to its case and must contain a certificate of truth in the prescribed form (CPR 8.7).

In relation to service, the general rule is that a claim form must be served within six months of the date on which the claim was issued. A claimant must serve a defence pack on a defendant together with the claim form and statement of claim.

Serving claims on foreign parties

How are claims served on foreign parties?

A claimant must obtain the permission of the court to serve a defendant out of the jurisdiction. For permission to be granted, a claimant will need to satisfy the court that there is a serious issue to be tried, that there is a good arguable case that the claim falls within one of the jurisdictional gateways set out in Part 7 CPR and that the BVI is the appropriate place (forum conveniens) for the trial of the action.

Once the permission of the court has been obtained, a claim form may be served personally by the claimant or claimant's agent in accordance with the law of the country in which it is to be served or via a foreign government or judicial and consular authorities (CPR 7.8(1) and 7.9). Where service via the above-mentioned means is impracticable, the claimant may apply for an order that the claim form be served by a method specified by the court.

Any court process other than the claim form may be served out of the jurisdiction and without the court's permission if served in proceedings in which the court's permission to serve the claim form has been obtained. Service must be effected via the same means as for the claim form (CPR 7.14).

Key causes of action

What are the key causes of action that typically arise in commercial litigation?

The litigation landscape in the BVI is dominated by corporate, shareholder and trusts disputes as well as by claims in connection with asset tracing and insolvency. Such disputes are frequently multi-jurisdictional and complex in nature. Causes of action that commonly arise are breach of contract, misrepresentation, negligence, breach of duty, fraud-based causes of action (such as unlawful means conspiracy) and specific statutory causes of action such as unfair prejudice.

Claim amendments

Under what circumstances can amendments to claims be made?

As a statement of case (CPR 2.4), a claim form or statement of claim may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference (CPR 20.1(1)). A statement of case may not be amended or parties substituted without the permission of the court if the change is sought to be made after the end of a relevant limitation period. In such circumstances, the court may allow an amendment, but only if the new claim arises out of the same or substantially the same facts as a claim for which the party wishing to make the amendment has already claimed a remedy in the proceedings. If the amendment relates to the correction of the name of a party, the court will only allow an amendment to correct a mistake where the mistake was genuine and not one that would, in all circumstances, cause reasonable doubt as to the identity of the party in question (CPR 20.2).

In other circumstances, the court may give permission to amend the claim form or statement of claim at a case management conference or at any time upon the application of a claimant to the court. In considering whether to grant permission to amend, the court is required to consider a range of factors. These include:

- how promptly the applicant has applied to the court to make the amendment;
- the prejudice to the parties in the instance of the permission being granted or refused;
- whether the prejudice can be compensated by the payment of costs or interest;
- the impact upon the trial date or likely trial date; and
- the administration of justice (CPR 20.1(3)).

Remedies

What remedies are available to a claimant in your jurisdiction?

The BVI courts are empowered to award a wide variety of legal and equitable remedies. These remedies include damages, injunctions, specific performance, rescission, rectification and declaratory relief. In breach of trust claims, a claimant may be granted an order that allows it to follow, trace and recover property that has been transferred in breach of trust.

The court is also empowered to grant interim remedies (such as interim declarations and injunctions) at any time upon the application of a party (including before a claim is made and post-judgment) (CPR 17.2). Unless the court orders otherwise, a defendant may not apply for an interim order before filing an acknowledgment of service. In a pre-claim context, the court may only grant an interim remedy if the matter is urgent or if it is otherwise necessary to do so in the interests of justice. Interim remedies that are commonly granted in the BVI include third-party pre-action disclosure orders (known as Norwich Pharmacal orders) and freezing injunctions.

In enforcement proceedings, a number of remedies exist, including charging orders, judgment summons, orders for the seizure of goods or possession of land and the appointment by the court of a receiver.

Recoverable damages

What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

A court may award a claimant damages for the loss that it has suffered (including economic loss). Damages are typically compensatory, although in certain instances, a claimant may be awarded aggravated damages or (in more limited scenarios) exemplary or punitive damages. This position is similar to that in other common law jurisdictions.

RESPONDING TO THE CLAIM

Early steps available

What steps are open to a defendant in the early part of a case?

Once a defendant has been served with a claim it must take prompt action within the prescribed time frames to ensure that the claimant cannot apply for default judgment to be entered against it (see question 28).

If a defendant wishes to dispute the claim, it must file and serve an acknowledgment of service in the prescribed form at the court registry within 14 days of service of the claim form. It must then file a defence in accordance with Part 10 CPR within 28 days of service of the claim form. Where a defendant has been served out of the jurisdiction, the relevant time frames are typically 35 days for filing and service of the acknowledgment of service and 56 days for filing and service of the defence. If a defendant has a counterclaim or claim against a third party, this may be brought in accordance with Part 18 CPR. This is discussed in further detail in question 26.

Where a defendant wishes to dispute the court's jurisdiction to try the claim or to argue that the court should not exercise its jurisdiction, including on the grounds of forum non conveniens, it must still file an acknowledgment of service at the court office containing a notice of intention to defend the claim (CPR 9.2(1)). The act of filing an acknowledgment of service does not mean that a defendant loses its right to dispute the court's jurisdiction; however, taking other substantive steps in the proceedings (such as filing a defence) will usually be treated as submitting to jurisdiction. The exception to this position is when such steps are taken at the same time and without prejudice to contesting the jurisdiction of the court. A defendant wishing to dispute the court's jurisdiction must deploy the procedure set out in CPR 9.7 to apply to the court for a declaration. An application under CPR 9.7 must be made within the period for filing a defence (CPR 9.7(3)).

Where a defendant has been served outside the jurisdiction and contends that the court should not exercise its jurisdiction in respect of any proceedings, it may apply to the court for a stay and a declaration to this effect. CPR 9.7A sets out the procedure for such an application, which may be made at any time (CPR 9.7A).

If a defendant applies for a stay on the grounds of forum non conveniens, this will only be granted where the court is satisfied that there is some other available forum having competent jurisdiction in which the claim may be tried more suitably for the interests of the parties and the ends of justice (Spiliada Maritime Corporation v Consulex Ltd [1987] AC 460). The principles that the court will apply in determining an application for a stay on the grounds of forum non conveniens may be summarised as follows:

- the defendant must establish that he or she is amenable to the jurisdiction that he or she asserts to be the more appropriate forum;
- the defendant must establish that there is some other available forum having competent jurisdiction that is the

more appropriate forum for the trial of the action; and

- where the court is satisfied that there is another forum that is prima facie the appropriate forum for the trial of the action, the burden will fall upon the claimant to show that there are circumstances by reason of which justice requires that the trial should still take place in the BVI.

Defence structure

How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

CPR 10.5 prescribes that a defence must set out as concisely as possible all the facts on which the defendant relies to dispute the claim. It must state which (if any) allegations in the claim form or statement of claim are admitted, denied or neither admitted nor denied. The defence must also state which allegations the defendant wishes the claimant to prove. Where allegations are denied, the defendant must state the reasons for doing so. Where it intends to prove a different version of events from that given by the claimant, the defendant's own version of events must be set out. Any documents that are considered necessary to the defence must be annexed thereto.

A defence must be filed and served within 28 days of service of the claim form, or within 28 days of service of the statement of claim (if this was not filed with the claim form). Where a claimant has obtained the leave of the court to serve a defendant outside of the jurisdiction, the court order will make provision for the dates by which filing and service of the defence must take place; however, this time frame is typically 56 days.

Changing defence

Under what circumstances may a defendant change a defence at a later stage in the proceedings?

The rules pertaining to the amendment of a statement of case (which includes a defence) are set out in Part 20 CPR and are discussed in question 20. A defendant is not permitted to rely on any allegation or factual argument that is not set out in the defence but that could have been set out therein unless the court gives permission or the other parties agree (CPR 10.7).

A statement of case may be amended once, without the permission of the court at any time prior to the first case management conference (CMC) other than where the change pertains to the addition or substitution of a party or other changes after the end of a relevant limitation period. In these circumstances, a defendant would need to apply to the court for permission to amend the defence. CPR 20.2(2) provides that the court may allow an amendment that has the effect of adding or substituting a new claim, but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings. If the amendment pertains to the correction of a mistake as to the name of a party, the court may allow an amendment, but only where the mistake was genuine and where it is not one that would, in the circumstances, cast reasonable doubt as to the identity of the party in question.

Any further amendments prior to the first CMC would require the permission of the court. Similarly, following the first CMC, a defendant would need to seek the court's permission by application to amend a defence. There are a number of factors that the court will consider when considering an application to amend a statement of case, such as:

- how promptly the defendant applied to the court after becoming aware that the change was one that he or she wished to make;
- the prejudice that the defendant would suffer if the change were refused;

- the prejudice to the other parties if the change were permitted;
- whether any prejudice could be compensated by the payment of costs or interest; and
- the impact upon the case timetable, trial date and the administration of justice.

Sharing liability

How can a defendant establish the passing on or sharing of liability?

A defendant may rely on a defence of set-off or may counterclaim (ie, claim against the claimant) or bring a claim against an additional party. In the BVI, these claims are called ancillary claims and must be pleaded in the same way as a claim. A person upon whom an ancillary claim form is served becomes a party to the proceedings if that person is not already a party.

The procedure and timescales for making an ancillary claim are set out in Part 18 CPR. A defendant who has filed an acknowledgment of service or a defence may make an ancillary claim for contribution or indemnity against another defendant by filing a notice containing a statement on the nature and grounds of the claim and serving the notice on the other defendants.

A counterclaim may be made without the court's permission if it is filed with the defence. In the instance of any other ancillary claim, this can be made without the court's permission if the ancillary claim form is filed before the first CMC. In other circumstances, a defendant will need to seek the permission of the court to make an ancillary claim.

In considering whether the ancillary claim should be dealt with separately from the claim, the court will consider a number of factors. These factors will include the connection between the ancillary claim and the claim, whether the facts in both claims are the same or substantially connected, and whether the ancillary claimant is seeking substantially the same remedy that another party is claiming from the ancillary claimant.

Avoiding trial

How can a defendant avoid trial?

A defendant may apply to the court for summary judgment against a claimant. With the exception of certain types of proceedings (such as admiralty proceedings in rem, probate proceedings and defamation proceedings), the court may give summary judgment on a claim or a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue (CPR 15.2(a)).

A defendant may also apply for a statement of claim (or part thereof) to be struck out. The bases upon which this application may be brought are:

- that there are no reasonable grounds for binging the claim;
- that allowing the claim to proceed would constitute an abuse of process;
- that not striking out the relevant pleading is likely to obstruct the just disposal of the proceedings; or
- non-compliance with the CPR or an order or direction given in the proceedings (CPR 26.3).

In circumstances where the claimant has failed, unreasonably, to take steps to bring the case to trial, the defendant may also make an application to the court to have the matter disposed of without trial.

It is always open to a defendant to attempt to settle a dispute. An offer to settle may be made in accordance with the regime set out in Part 35 CPR or otherwise. ADR and mediation are encouraged by the court, although they remain relatively uncommon in the jurisdiction. CPR 27.7 contains provisions for the court to adjourn a CMC if satisfied that the parties are attending or have arranged to attend a form of ADR procedure, or are in the process of negotiating or are

likely to negotiate a settlement.

Matters pertaining to jurisdictional challenges are discussed in question 23.

Case of no defence

What happens in the case of a no-show or if no defence is offered?

If a defendant fails to file an acknowledgement of service (in accordance with CPR Part 9) or a defence (in accordance with CPR Part 10), a claimant may obtain default judgment against the defendant. Once a default judgment has been entered, unless the defendant applies for and obtains an order for the judgment to be set aside, a defendant will only be heard in relation to the assessment of damage (provided that it has given appropriate notice in the prescribed form), the form of any other remedy, costs, the enforcement of the judgment and the time period for payment of the judgment (CPR 12.13).

In the case of a no-show at trial by all parties, the judge may strike out the claim. If one or more but not all parties appear at trial, the judge may proceed in the absence of the party or parties that do not appear, provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with the CPR (CPR 39.4). A party who was not present at a trial at which judgment was given, or an order made, may apply to set aside that judgment or order. This application must be made within 14 days of the date on which the judgment or order was served on the applicant, and must be supported by affidavit evidence showing that the applicant had a good reason for not attending the hearing and that it is likely that, had the applicant attended, some other judgment or order might have been given or made (CPR 39.5). Where a party's conduct constitutes the breach of a court order, this may lead to proceedings for contempt of court.

Claiming security

Can a defendant claim security for costs? If so, what form of security can be provided?

Yes. The security for costs regime is set out in Part 24 CPR. A defendant or defendant to a counterclaim may apply for an order requiring the claimant to give security for the defendant's costs in the proceedings. This application must be made, where practicable, at a CMC or pretrial review and must be supported by affidavit evidence. For the court to grant security for costs, it must be satisfied that it is just to make the order and that one of the conditions set out in CPR 24.3 has been satisfied. The court has a broad discretion as to the amount and nature of the security to be provided.

Once an order for security for costs is made, the court must stay the claim until such time as security for costs is provided in accordance with the terms of the order. If security is not provided by a specified date in accordance with the terms of the order, the court must order that the claim or counterclaim be struck out (CPR 24.5).

PROGRESSING THE CASE

Typical procedural steps

What is the typical sequence of procedural steps in commercial litigation in this country?

Commercial litigation in the BVI usually follows the following sequence.

First, proceedings in the Commercial Division of the High Court may proceed by way of claim form, fixed-date claim form or originating application. Originating applications are used most commonly in cases where the appointment of a liquidator is sought. The claim form is the most common type of originating process and is used in most contentious disputes. A fixed-date claim form must be used in cases concerning hire purchase or credit-sale agreements,

proceedings for possession of land, whenever specifically required by the CPR, and where legislation requires proceedings be brought by originating summons or motion.

Depending on the particular proceedings, the action commences when the claim form, originating application or fixed-date claim form is filed. In cases proceeding by way of claim form, the claimant should also file a statement of claim setting out the grounds of the claim. In cases proceeding by way of originating application or fixed-date claim form, the claimant should also file and serve an affidavit setting out the grounds on which the application or fixed-date claim is brought.

The claim must then be served on the defendant or respondent.

If the claim is to be served on a defendant or respondent who is ordinarily resident or incorporated outside the jurisdiction, permission to serve that defendant out of the jurisdiction should be sought and obtained at this stage. If the court grants permission, the claim should be served together with a copy of the order permitting service out of the jurisdiction and the evidence relied on to obtain the permission; and the order permitting it should be served on that defendant or respondent, as he or she has a right to apply to have the order granting permission set aside.

Domestic defendants or respondents have 14 days from the date of service of the statement of claim (or the originating application or fixed-date claim form and affidavit) to file an acknowledgment of service. Defendants or respondents who have been served out of the jurisdiction in accordance with the court's permission have 35 days from the date of service to file their acknowledgment (unless service is effected in one of a number of other Caribbean states, in which case the period is 28 days from service).

A defendant or respondent who wishes to challenge the court's jurisdiction over him or her or to bring a forum challenge does not lose his or her right to do so by filing an acknowledgment of service. It is not necessary to indicate in the acknowledgment of service whether a jurisdiction or forum challenge will be brought, but some practitioners choose to do so.

Domestic defendants or respondents have 28 days from the date of service to file either a defence or a jurisdiction or forum challenge. Overseas defendants or respondents have 56 days from the date of service to file a defence, or a jurisdiction or forum challenge, or an application to set aside the order granting leave to serve proceedings on the defendant outside of the jurisdiction (unless service is effected in one of a number of other Caribbean states, in which case the period is 42 days from service).

If there is any jurisdiction, forum or service challenge, this will be determined before the matter proceeds. The time frame for filing a defence (or, in cases commenced by originating applications, evidence in response) for any defendant or respondent who brings such a challenge is paused. If there are other defendants or respondents, it is likely that the court will consider staying proceedings until the jurisdiction, forum or service challenges have been determined.

If the BVI court dismisses any jurisdiction, forum or service challenge, it must specify a date by which defences or evidence in response must be filed.

Once a defence or evidence in response has been filed, the claimant may wish to file a reply or evidence in reply, and if there is a counterclaim, a defence to the counterclaim may also be filed. There may also be further exchanges of pleadings, and parties may make requests for further information.

Within 14 days after the last of the defences or the last of the pleadings or affidavits in response have been filed, the claimant or applicant must file an agreed written statement of the parties' best estimate of how long they think the trial will last. If the estimated trial length is greater than a day, the court will list a CMC.

Three days before the date of the CMC, the claimant or applicant must lodge a CMC bundle with the court.

In any case proceeding other than by way of originating application, at the CMC the court will give directions as to:

- the nature, extent and timing of disclosure of documents;
- whether witness statements are required, and if so, the timing of exchange of witness statements;

- whether expert evidence is to be permitted, and if so, on what matters and to what extent;
- whether any particular measures are needed at trial, such as the services of an interpreter or video-link facilities;
- whether a pretrial review (PTR) should be held, and if so, when; and
- when trial should be listed.

In cases proceeding by way of originating application, at the CMC the court will give directions as to:

- whether any points of claim and defence should be served, and if so, when;
- whether any disclosure should be given, and if so, when and how;
- whether any witnesses should attend trial for cross-examination;
- whether expert evidence is required, and if so, on what issues and how such evidence should be taken; and
- when the trial should be listed.

If a PTR is listed, the claimant should file an updated CMC bundle three days before the listing, together with an agreed trial timetable. At the PTR, the court will give directions as to the trial timetable.

If no PTR is held, the parties must agree a trial timetable and file it no later than three weeks before the first day of trial. If parties cannot agree, they must file separate trial timetables. The judge will then decide what timetable is to be adopted.

Not less than six weeks before the first day of trial, the claimant or applicant must begin the process of agreeing what should be included in the trial bundles with the other parties. The claimant or applicant must serve the completed trial bundles on the other parties no later than two weeks before the first day of trial. Not less than 10 days before the first day of trial, the claimant or applicant must lodge copies of the trial bundles with the court.

Bringing in additional parties

Can additional parties be brought into a case after commencement?

The claimant may add a new defendant to proceedings without permission at any time before the CMC. To do so, the claimant must file an amended claim form and an amended statement of claim. If the new party is an overseas defendant, the claimant must obtain permission to serve the claim on the new defendant out of the jurisdiction as in every other case.

A defendant may add new parties to a claim by bringing an ancillary claim, which is:

- a claim by a defendant against any person or persons (whether or not they are already party to the claim) for a contribution or indemnity or some other remedy;
- a claim by an ancillary defendant against any other person or persons (whether or not they are already party to the claim); or
- a counterclaim by a defendant against the claimant alone, or against the claimant and any other person or persons (whether or not they are already party to the claim).

Defendants may bring an ancillary claim in the following circumstances:

- in the case of a counterclaim, by filing their counterclaim together with their defence;
- in the case of a claim for a contribution or indemnity against a person who is already a defendant to the claim, by filing a notice containing a statement of the nature and grounds of the claim and serving the notice on the other defendants; and
- in the case of any other type of ancillary claim, by filing and serving an ancillary claim form setting out the nature of the claim before the CMC; or

- in the case of any ancillary claim that is not made in accordance with the any of the above reasons (eg, because the defendant has omitted to file his or her counterclaim at the same time as the defence, because the new ancillary claim is to be brought by another ancillary defendant; or because the CMC has already taken place), by applying to the court for permission to bring an ancillary claim.

The CPR applies to ancillary claims in the same way as to normal claims, with a small number of exceptions in relation to the time of service, default judgments and admissions. It follows, therefore, that the court's permission is required to serve an ancillary claim on a person who is out of the jurisdiction.

The court may add a new party to the claim without there being an application by any person if it considers that it is desirable to add the new party to the claim so that it can resolve all the matters in dispute; or if there is an issue involving the new party that is connected to any matter or issue in dispute, and it is desirable to add the new party so that it can resolve that issue.

Generally, the court will make orders for the addition, removal or substitution of parties at the CMC. It will only do so after the CMC if it is satisfied that there has been a significant change in circumstances that only became known after the CMC.

Consolidating proceedings

Can proceedings be consolidated or split?

The court has very broad powers of case management and can:

- direct the separate trial of any issue;
- order that part of any proceedings (such as a counterclaim or other ancillary claim) be dealt with as separate proceedings;
- exclude an issue from determination;
- direct the trial of two or more claims on the same occasion; or
- take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

Court decision making

How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

At trial, both parties generally get an opportunity to make an opening statement in which they will set out the nature of their case, summarise the legal principles on which they rely, and explain what the court will hear during the trial.

The claimant's evidence will be heard first, and the defendant's second. Evidence that has been given in the form of affidavits or witness statements will generally be accepted on the papers, and then the other party's legal representative will have an opportunity to question his or her opponent's witnesses in cross-examination.

The instance of the burden of proof depends on the issue in question. Generally, every element of the claim must be proved by the claimant on the balance of probabilities (ie, the court must be satisfied that it is more likely than not that the claimant's case is correct). If the claimant fails to do this, the claim will fail. If the claimant manages to satisfy the judge that his or her case is probably true, the burden of proof passes to the defendant, who must then rebut the claim, again on the balance of probabilities.

The elements the claimant must prove will depend on the subject matter of the claim. If, for example, the claim is for

breach of a contractual term, the claimant must prove the existence of the contract between the parties, the nature and scope of the contractual term, the fact that the defendant breached the term in question, and that he or she has suffered loss as a result of the defendant's breach. The claimant must also establish that he or she is entitled to the remedy sought in respect of the loss.

How does a court decide what judgments, remedies and orders it will issue?

The nature of the remedy the court will order will depend on the nature of the claim that has been brought and the circumstances of the particular case. The court will refer to established rules of common law or equity to determine what remedies are available in relation to a particular claim.

In claims for most breaches of contract, the court will consider damages or specific performance, or both. In most tort claims, the court will award damages. In breach of trust cases, the court may order the taking of an account and the surcharge or falsification of trust accounts, restitutionary remedies, or declarations as to the ownership of certain property or funds. In unjust enrichment claims, the court will generally order that the party who is enriched make restitution of his or her gain to the claimant. If the claim is a statutory claim, the relevant legislation may indicate what remedies are available. In some cases, it may be appropriate for the court to order a party to do or refrain from doing a particular act or class of acts.

The claimant will generally indicate the remedies he or she seeks in the claim form, and will have to persuade the court that he or she is entitled to that remedy. Even if the defendant fails to persuade the court that he or she is not liable, he or she may be able to persuade the court either that the claimant is not entitled to the remedy sought or the claimant is not entitled to the remedy sought to the extent that it is sought.

For example, the claimant may seek specific performance of a contractual obligation that has been breached and seek a specific sum of damages in the alternative; although the defendant may fail to persuade the court that there has been no breach, the defendant may nevertheless be able to satisfy the court that it should not award specific performance, and that a lesser sum should be recovered in damages.

Evidence

How is witness, documentary and expert evidence dealt with?

For the most part, witnesses of fact are required to attend trial to give oral evidence, except in the case of proceedings commenced by way of originating application, in relation to which the court will consider whether oral evidence and cross-examination are required.

As stated above, witness statements or affidavits prepared by witnesses will generally stand as their evidence-in-chief, meaning that the oral evidence they give before the court will generally consist of what they say in cross-examination and reexamination (if there is any).

It is generally thought that the judge and counsel for the parties are better able to assess a witness's honesty and reliability if that witness attends trial. This may have a bearing on whether a party wishes to rely on a witness's evidence: if he or she considers that the witness may come across poorly at trial, this may be a factor in deciding whether his or her evidence is to be used.

It is open to the parties to narrow the scope of evidence that is required to be heard orally at trial by agreeing evidence or making admissions. This may be easier in relation to expert evidence; however, if no agreement can be reached, the witnesses in question must attend unless the court orders otherwise.

How does the court deal with large volumes of commercial or technical evidence?

The court relies on the parties and their witnesses (including expert witnesses) to present complex evidence in as useful a manner as possible. Cases in the Commercial Division of the BVI High Court frequently turn on complicated technical points, requiring judges to get to grips with large amounts of evidence. Sometimes documents can be exchanged or scrutinised electronically; however, this practice is relatively new to the BVI.

Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

In cases where it is thought that a witness may refuse or otherwise fail to attend trial, the court may issue a witness summons, either on its own motion or on the application of a party. The witness summons may either require the witness to attend trial or to give evidence by deposition before an examiner. A deposition taken in such circumstances may be used as evidence at trial unless the court orders otherwise.

A failure to comply with such an order is subject to the court's powers to make orders against people who are in contempt, although if the person is outside the court's in personam jurisdiction, contempt proceedings may be difficult to enforce.

If the person to be examined is outside the jurisdiction, the court may direct that a letter of request be issued to the judicial authorities of a court in the jurisdiction where the person is located, seeking that the person's evidence be taken by the foreign court. If the assistance sought is provided by the foreign court, the witness will be subject to that court's jurisdiction, and failure to comply with its orders may result in sanctions under that court's contempt jurisdiction.

It is open to foreign courts to send letters of request to the BVI courts for assistance in gathering evidence from witnesses who are subject to the in personam jurisdiction of the BVI court. This may result in the appointment of an examiner in the BVI to take evidence from a witness, though the BVI court is unlikely to require the attendance of a BVI witness at proceedings taking place in another jurisdiction.

How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Witness evidence is generally contained either in affidavits or witness statements. Any documentary or original evidence a party wishes to rely on must be exhibited to an affidavit or witness statement, unless it is attached to a statement of case.

Leading up to trial, witness statements will be exchanged and the parties will have an opportunity to reply to facts and matters alleged in other parties' evidence.

At trial of a claim commenced by claim form or fixed-date claim form, the general rule is that witnesses must attend to give oral evidence unless the court orders otherwise. As stated above, witness statements or affidavits stand as evidence-in-chief and, after a witness has been sworn in, the other parties' legal representatives are able to cross-examine the witness. The judge is also at liberty to ask any questions he or she thinks appropriate.

By contrast, in cases proceeding by way of originating application, the general rule is that witnesses do not attend to give oral evidence, although the court has the power to require witnesses to attend to undergo cross-examination.

Time frame

How long do the proceedings typically last, and in what circumstances can they be expedited?

The length of proceedings varies dramatically. Some matters may be very short, such as an application for a Norwich Pharmacal order, which (if urgent) may be filed and resolved in a matter of days, or an application for the appointment of a liquidator, which may be resolved within a few weeks of filing.

At the other end of the scale is a sophisticated and complex commercial trial involving multiple parties. As one would expect in most jurisdictions, this sort of dispute may take in excess of a year to progress from the first filing of the claim form to a decision on costs following trial.

In addition, parties to proceedings in which a final decision is made on the merits of the claim have a right of appeal to the Eastern Caribbean Court of Appeal. While this availability safeguards parties' positions, it can mean that proceedings are extended beyond the determination of the first instance judge. Final decisions of the Court of Appeal are also subject to a right of appeal (where the value of the subject matter of the claim exceeds £300) to the Privy Council.

Gaining an advantage

What other steps can a party take during proceedings to achieve tactical advantage in a case?

If a defendant fails to acknowledge or defend the claim or bring a jurisdiction, forum or service challenge within the relevant periods, the claimant can enter default judgment against that defendant. If default judgment is ordered against a defendant, that defendant may have grounds for applying to the court to have the default judgment set aside.

The Commercial Court has jurisdiction to strike out a party's statement of case if:

- the party in question has failed to comply with a rule, practice direction, order or direction of the court in the proceedings; or
- the statement of case:

Because default judgment and strike-out are procedural decisions, there is no right of appeal, so any party wishing to appeal the court's order must obtain leave either of the Commercial Court or the Court of Appeal. This is also true of any subsequent appeal from the Court of Appeal to the Privy Council.

Any party can apply for summary judgment at any time in proceedings, including at the time the claim is issued and before a defence is filed. In practice, litigants in the BVI often prefer to seek summary judgment instead of default judgment, because a summary judgment, being a final determination on the merits of the claim, is generally easier to enforce in other jurisdictions. Applications are generally made before or at the CMC. There is no provision for setting aside summary judgment in the same way as default judgment; however, because summary judgment is a final decision on the merits of the claim, a defendant against whom summary judgment is ordered has a right of appeal to the Court of Appeal.

In circumstances where default judgment, summary judgment or strike-out is ordered, the matter will not proceed to trial, unless there are issues between the parties that are unresolved, such as:

- if there are other defendants against whom default judgment is not ordered;
- if summary judgment is awarded as to liability but not as to quantum of damages; or
- if a defence is struck out but a counterclaim survives.

Impact of third-party funding

If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Third-party funding makes little discernible difference to the outcome of a case. It may provide otherwise unfunded or underfunded but meritorious cases with further durability and longevity, but there is no evidence that the availability of third-party funding affects the underlying merits of the case. Naturally, third-party funders will apply their own strict criteria to each stage and phase of the litigation in question. The availability of funds will generally turn on the ongoing and prospective success of the case, and BVI counsel are familiar with working to such budgetary vicissitudes.

Impact of technology

What impact is technology having on complex commercial litigation in your jurisdiction?

The introduction of the ECSC E-litigation Portal in both the Commercial Court and the Court of Appeal in late 2018 has been a notable technological development in the jurisdiction. The web-based portal, which integrates electronic filing and a number of case management features, has further streamlined the filing process as well as improving efficiency and access to court documents for practitioners.

Parallel proceedings

How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

A private individual or legal person is able to file a complaint to commence criminal proceedings in the BVI, and generally speaking it is possible to privately prosecute those proceedings unless and until the Attorney General (AG) or the Director of Public Prosecutions (DPP) (or both) decide to take over or discontinue (or both) such proceedings should they consider it to be in the public interest to do so.

On the facts, it may be possible to commence criminal proceedings in the BVI, although further consideration will need to be given to whether the connection between the criminal wrongdoing and the BVI is sufficiently strong.

While conducting a private prosecution has certain advantages over criminal proceedings being progressed by public authorities, there is no provision by which private entities can compel defendants or witnesses to produce documents or evidence (whether in the BVI or overseas). Indeed, if information is sought from overseas, an application would need to be made by the AG or the DPP or as part of a financial crime investigation by a body such as the Financial Investigation Agency (FIA) pursuant to which documents could be obtained and shared by a foreign authority or public body.

The use of documents obtained pursuant to criminal investigations or proceedings will generally be restricted to use in the criminal investigation or proceedings unless and until the documents are referred to in open court. If an entity seeks to use them for a different purpose it will need the express consent of whichever body has obtained and disclosed them.

In light of the above, criminal proceedings do not necessarily provide an overly quick or convenient mechanism by which further evidence could be obtained to support civil proceedings. However, any criminal investigation or prosecution would present any defendants with additional obstacles to overcome and may stretch their resources more thinly. In practice and over time, it could also help to yield information and results that it would not be possible to

obtain through civil proceedings alone, and there may be scope to cooperate with the AG, DPP or FIA in this regard.

It is important to note that the existence of parallel criminal and civil proceedings may present the defendants subject to both proceedings with an abuse of process argument that the existence of dual proceedings will seriously prejudice them and lead to an incurable injustice. While we do not consider that defendants will necessarily succeed in having any parallel civil proceedings stayed on this basis, one should anticipate that they will seek this relief and use it as an opportunity to make an application that may add some further delay to any parallel civil proceedings.

If the primary advantage of commencing criminal proceedings is to use them to obtain further evidence that cannot be obtained in civil proceedings, then consideration should be given to having an initial information discussion with the FIA to see if it would have interest in commencing an investigation.

TRIAL

Trial conduct

How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The BVI Commercial Court is a specialist regional mercantile court within the Queen's Bench Division of the High Court in the BVI and is based in its own building in Road Town, Tortola. A Commercial Court trial in the BVI is conducted along similar principles to the English Commercial Court, and trial proceedings bear a strong similarity to English trial practice.

A High Court judge sitting in the Commercial Division will be appointed to hear the matter, and the CPR 69A and its associated PD 69A(5)-(10) and CPR 69B.8-69B.12 contain specialised procedures and guidance designed to facilitate dealing with trials in the Commercial Court, although a significant proportion of the general provisions of the CPR apply to cases proceeding in the Commercial Court.

Hearings in the Commercial Court are usually held in public, and trial sitting days do not normally include Fridays.

The sequence of evidence is usually as follows:

- the judge's reading time (for example, a day); but note that most judges prefer to read in at least three to five days before hearing opening submissions;
- oral opening submissions (claimant). In heavy, complex cases, it is common for the judge to request written opening submissions as well as or instead of oral ones;
- evidence of the claimant's witnesses of fact;
- evidence of the defendant's witnesses of fact;
- evidence of the claimant's expert witnesses;
- evidence of the defendant's expert witnesses;
- oral closing submissions (claimant);
- oral closing submissions (defendant); and
- the claimant's reply.

In the Commercial Court, it is common for the defendant to have the last word, although the claimant has the right of reply. In heavy, complex cases, it is common for the judge to request written closing submissions. The general rule is that witness order is a matter for parties and their advisers. This is subject to a direction of the court as it sees fit, particularly post-CPR, because of the provisions allowing the court to control evidence and costs. However, it is rare that the court will exercise such discretion, and it is likely to need something out of the norm to persuade it to do so (Global Energy v Gray [2015] EWHC 3275 (Ch)).

In the BVI Commercial Court, trials can last anywhere between a few days to a few months. The longest trial the

Commercial Court has handled was the long-running joined Chemtrade Limited v Fuchs Oil et al (BVIHC (COM) 158/2010) and Alhamrani v Alhamrani (BVIHC (COM) 89/2011) high-value litigation, involving a trial that lasted 29 days and involved multiple parties. It is not atypical for BVI Commercial Court trials to run for several weeks and involve multiple parties, and extremely high-value claims are often worth many millions, if not billions, of US dollars.

Use of juries

Are jury trials the norm, and can they be denied?

Jury trials are not the norm, and there is no provision for this mode of trial in the Commercial Court procedural rules. The BVI Commercial Court appoints single judges to perform the function of both tribunal of fact and law when determining the issues at trial.

Confidentiality

How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Commercial Court hearings, including trials, are publicly accessible save for those hearings that are either ex parte or held (only upon order) in camera.

Rarely are trials held in camera unless the court exercises its discretion upon application or on its own motion to hold the proceedings in camera. The court also has jurisdiction to seal the court file so that the party names do not appear on the court record and the court list anonymises the party names to the action. This, when combined with an in camera order, achieves a high degree of privacy if not total confidentiality.

Evidence filed in the BVI Commercial Court cannot be accessed by the general public.

CPR 3.14 provides that any person may only inspect a claim form, a notice of appeal and a judgment order made in court. For any other documents, any person may make an ex parte application with cause to the court to obtain further documents.

The courts in the BVI give great weight to the principle of open justice. In practice, this means that the other party should have access to the relevant information and that the proceedings should be held in public.

Consequently, in considering what protections to put in place, the courts look to impose the minimum possible interference with the open justice principle. Parties should therefore be proportionate and targeted in their applications.

The risk of information becoming public increases as trial approaches. It is far easier to obtain protections early on in proceedings. The most difficult task is obtaining orders that keep the trial confidential.

Any application to protect confidential information should be fully supported by evidence explaining why the order is required.

The relevant party seeking to restrict access to its sensitive commercial information may apply to the court and ask that the court seal the court file; however, disclosed documents are subject to an implied undertaking that they will only be used for the purpose of the proceedings in which they are disclosed. Sensitive commercial information found to be disclosable is still at risk of being disclosed in the course of trial proceedings both to the parties, and subsequently publicly at trial. This could breach the implied undertaking.

To minimise or prevent disclosure, an application will have to be made to the court pursuant to CPR 28.14, which gives a party the opportunity to apply to the court to assert its right to withhold the disclosure or inspection of a document or part of a document.

Alternatively, unless undertakings can be extracted, parties are advised to seek to form a 'confidentiality club'. If a confidentiality club is ordered, it will be necessary to consider who is to have access to the disclosed documents. Clearly, the solicitors and counsel will need access to the documents. There may be others working on the case who will also need access, such as experts or foreign lawyers.

In some circumstances, a client may be excluded from the confidentiality club. In IPCom GmbH & Co KG v HTC Europe Co Ltd [2013] EWHC 52 (Pat), the Patent Court gives a helpful indication of the sorts of factors that the court will consider, and the BVI court will most likely follow these principles.

With regard to public access, as described above, the BVI courts prize highly the principle of open justice and, as such, the public is granted access to the courts unless the court orders that proceedings or parts of proceedings should be heard in private.

Media interest

How is media interest dealt with? Is the media ever ordered not to report on certain information?

There is a small but active media in the BVI. They will often cover public interest cases and cases of interest to the local community. In the Commercial Court, there are no recorded cases of reporting restrictions applied on a case that was not sealed or ex parte, or anecdotal evidence of such reporting restrictions being applied for and granted.

Proving claims

How are monetary claims valued and proved?

Monetary claims in the BVI are commenced in the same manner as any other claim in the Commercial Court, that is, under Rule 8.1(1), whereby a claim is started when the claimant or creditor files at the court office the original and one copy of the claim form and the statement of claim, or, if any other rule or practice direction requires it, an affidavit or other document.

The claim form and statement of claim must include a description of the nature of the claim, the need to specify any remedy that the claimant seeks, an address for service and details relating to any interest sought. The Judgments Act 1907 provides in section 11 that every judgment debt shall carry interest at a rate of 5 per cent per annum, and a claim should also be made for this, if appropriate, although in Leriche v Maurice [2008] UKPC 8, the Privy Council suggested that a trial judge has a general discretion to award interest in appropriate cases, irrespective of whether it is claimed in the pleadings.

The value of the claim is proven on the common law standard of proof (the balance of probabilities) and will involve an assessment either at trial or in a summary judgment of the weight of the evidence and the law pertaining to the monetary claim.

In addition to compensatory damages, the court has the jurisdiction to award aggravated damages, usually if the defendant is shown to have acted deliberately or out of malice towards the claimant, and, in limited instances, exemplary or punitive damages. The assessment of damages is carried out in accordance with accepted common law principles pursuant to the detailed rules set out in CPR Rules 16.3 and 16.4 that allow a judgment creditor to apply for a hearing or trial to deal with quantum.

POST-TRIAL

Costs

How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

In the BVI, Commercial Court costs are determined by the common law principle that costs follow the event.

Pursuant to CPR 69B(12)-(14), a simple mechanism to determine costs liability and assess costs has been adopted: at the conclusion of an application, or of the trial, the court will (in the absence of agreement) determine which party should pay costs to another party and how much of the costs of the receiving party, in principle (taking into account the provisions of Rule 64.6 and any other matter appearing to the court to be relevant in the circumstances), are to be paid by the paying party.

Once the judge has determined these questions, the matter will then be sent for assessment on the basis of those principles (CPR Rule 69B.12 and Olive Group Capital Limited v Gavin Mark Mayhew BVIHC (Com) 2015/115). A similar process is undertaken in respect of applications in the Commercial Division, but these costs are to be assessed summarily unless the application lasted in excess of one hearing day (CPR Rule 69B.11).

Some anomalous cost assessment judgments have inadvertently created an assessed costs regime for the benefit of the receiving party (see Gudavadze et al v Chkhartishvili BVIHC (COM) 2012/0011). We expect, however, that a more balanced approach to the assessment of costs will return in time.

Judgments are written by the judge hearing the matter: their length varies depending on the complexity of the issues of fact and law to be decided. Judgments are publicly accessible and are published on the Eastern Caribbean Supreme Court website: www.eccourts.org/category/judgments.

Judgments are written in the same style as English Commercial Court or Chancery Division judgments, such as in this sample judgment outline:

Introduction

- Preliminary issues;
- summary of the claimant's case;
- summary of defence or the defendant's case; and
- issues to be determined.

Evidence and factual findings

- The claimant or claimants' allegation on issue A:
- the claimant or claimants' allegation on issue B:
- the claimant or claimants' allegation on issue C:

Applicable law

- A statement of the law on issue A:
- a statement of the law on issue B:
- a statement of the law on issue C:
- applying the law to the facts. These facts (in issue A, B or C), when viewed in the context of this section of either the Constitution, law, regulation, contract, precedent, or principle of equity, logically lead to:

Appeals

When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

Where an appeal may be made only with the leave of the High Court or the Court of Appeal, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. Where an application for leave to appeal has been refused by the High Court, an application for leave may be made to the Court of Appeal within seven days of such refusal (CPR Rule 62.2). An application for leave to appeal may be considered by a single justice of appeal, who may give leave without hearing the applicant. However, if the judge considering an application for permission to appeal minded to refuse leave, he or she must direct that a hearing be fixed and whether that hearing is to be heard by a single judge or the court (CPR Rule 62.2).

An appeal is made in the case of an appeal from the High Court by filing a notice of appeal (CPR Rule 62.3). The notice of appeal must be filed:

- in the case of an interlocutory appeal where leave is not required, within 21 days of the date the decision appealed against was made;
- in an interlocutory appeal where leave is required, within 21 days of the date when such leave was granted; or
- in the case of any other appeal, within 42 days of the date when judgment is delivered or the order is made, whichever is the earlier.

An appeal from the Court of Appeal lies to the Judicial Committee of the Privy Council, which is located in the United Kingdom. Such appeals are governed by the Judicial Committee (Appellate Jurisdiction) Rules 2009 (PC Rules) and accompanying practice directions. In cases where permission to appeal is required, no appeal will be heard by the Privy Council unless permission has been granted by the Court of Appeal or the Privy Council (PC Rule 10). An application to the Privy Council for permission to appeal must be filed within 56 days of the date of the order or decision of the Court of Appeal or the date when the Court of Appeal refused permission. The Privy Council will normally consider permission applications on paper but may direct an oral hearing (PC Rules 15 and 16). Where the Privy Council grants permission to appeal an appellant must, within 14 days of the grant of permission, file a notice of intention to proceed with the appeal in the appropriate form (PC Rule 17). Where permission has been granted by the Court of Appeal, an appellant must file a notice of appeal within 56 days of the date of the order or the decision of the court below granting permission or final leave to appeal (PC Rule 18). Readers are directed to the PC Rules and Practice Directions, which govern the content and numbers of copies of documents that must be filed.

Appeals can take anywhere between a few months to up to several years, depending on the issues. On average, from start to finish, appeals from a full trial to the Privy Council can take up to four years for the final Judicial Committee decision.

Enforceability

How enforceable internationally are judgments from the courts in your jurisdiction?

BVI Commercial Court judgments are easily portable, and particularly within the common law world. Their enforceability will, however, turn on the law of the relevant foreign state.

How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The BVI Commercial Court is modern, creditor-friendly and efficient at recognising and enforcing foreign judgments.

There are three different methods of enforcement of foreign judgments and awards in the BVI:

- the enforcement of money judgments (by statute under the Reciprocal Enforcement of Judgments Act 1922 and at common law);
- the indirect enforcement of non-money judgments using issue estoppel; and
- the enforcement of arbitration awards.

A cautionary note needs to be made with respect to the Foreign Judgments (Reciprocal Enforcement) Act 1964. Notwithstanding that certain jurisdictions have purportedly been designated, it does not appear that the purported designation was carried out properly, and therefore the statute has not been effectively extended to any jurisdiction. This follows from a decision of the English Court of Appeal in Yukon Consolidated Gold Corp v Clark [1938] 2 KB 241. Accordingly, it appears that this statute cannot be used in relation to the enforcement or registration of foreign judgments in the BVI at the present time. The Insolvency Act 2003 offers an alternative basis in which to seek enforcement of foreign awards and debts (and, of course, domestic awards and debts) by seeking the appointment of a liquidator in the BVI. This is considered further below.

Practicalities

Enforcement of a foreign judgment or award in the BVI is only of use if a defendant has assets within the jurisdiction, which may include shares in a subsidiary company. Obtaining information about a company is not always straightforward in a jurisdiction that still attaches a great deal of importance to corporate confidentiality. The information available to the judgment creditor from the Registry of Corporate Affairs is limited; there are usually no publicly available details of assets. Before taking steps to enforce a judgment in the BVI, the judgment creditor will first need to consider whether the judgment debtor has assets within the BVI upon which the judgment can be enforced.

Usage of foreign judgments or arbitral awards

The judgment of a foreign court has no direct operation in the BVI but may be enforceable by claim or counterclaim at common law or under statute, or be recognised as a defence to a claim or as being conclusive of an issue in a claim. The foreign judgment can, therefore, operate both positively and negatively, and partially or wholly.

Money judgments

The enforcement of foreign money judgments depends on the country from which the judgment emanates. There are two schemes (although, in practice, many of the requirements for enforcement are identical under both): the Reciprocal Enforcement of Judgments Act 1922 (selected countries); and common law principles (judgments from the majority of the world).

The Reciprocal Enforcement of Judgments Act 1922

The Reciprocal Enforcement of Judgments Act 1922 is the principal statute in the BVI relating to enforcement of foreign monetary judgments. However, it only applies to judgments from the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland, and a selection of other collected jurisdictions (of which the one of main commercial significance is New South Wales, Australia).The judgment must be final and conclusive and for a specified sum of money. The Reciprocal Enforcement of Judgments Act 1922 provides for certain judgments to be registrable in the BVI, and it applies to judgments of superior courts (which is to say, courts of inherent jurisdiction) obtained in:

- the United Kingdom from:
- the Bahamas;
- Barbados;
- Bermuda;
- Belize;
- Trinidad and Tobago;
- Guyana;
- St Lucia;
- St Vincent and Grenada;
- Jamaica (however, note that the relevant Act does not extend to the Cayman Islands, even though at the time of the Act, Jamaica was responsible for the administration of the Cayman Islands);
- New South Wales (Australia); and
- the Federal Supreme Court of Nigeria and the High Courts of the Western, Northern and Eastern Regions and Lagos (Nigeria); however, note that the relevant Act does not cover the High Courts of the Nigerian region formerly known as the Northern Cameroons, while the Southern Cameroons (which are included in the Act) do not form part of the Federal Republic of Nigeria.

A judgment is described in section 2(1) of Reciprocal Enforcement of Judgments Act as:

Section 3 of the Reciprocal Enforcement of Judgments Act 1922 provides that the judgment shall be registrable within 12 months of the date of the judgment (or such longer period as may be allowed by the court) if in all the circumstances of the case the court thinks it is just and convenient that the judgment should be enforced in the BVI.

The judgment shall not be registered if any of the conditions in section 3(2) exist. These are broadly similar to the common law principles (identified below), namely:

- if the original court acted without jurisdiction;
- if the judgment debtor, being a person who was neither carrying on business, nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- if the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he or she was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- if the judgment was obtained by fraud;
- if the judgment debtor satisfies the High Court either that an appeal is pending, or that he or she is entitled and intends to appeal against the judgment; or
- if the judgment was in respect of a cause of action that, for reasons of public policy or for some other similar reason, could not have been entertained by the High Court. The BVI courts will not enforce the public laws of another state.

From the date of registration, the foreign judgment has the same force and effect as if it had originally been entered in the BVI High Court.

The fact that the judgment debtor has no connection with the BVI that is sufficient to found jurisdiction to hear a fresh claim against him or her in the BVI is probably not a bar to the registration of a foreign judgment that complies with the requirements of Reciprocal Enforcement of Judgments Act 1922.

The Act makes no requirement that the judgment debtor is subject to the personal jurisdiction of the BVI court. Enforcement is by registration, not action (see Hunt v BP Exploration Co (Libya)). An application for registration is made pursuant to Part 72 of the CPR. This may be made without notice but must be supported by affidavit evidence complying with Rule 72.2, exhibiting the judgment or a copy of it and specifying, inter alia, the amount of interest that

has become due. The court has the power to order security for costs. Any application to set aside registration may only be made on the grounds set out in Rule 72.7: that it is not just or convenient that the judgment should be enforced within the jurisdiction, or the judgment falls within any of the cases listed above under which a judgment may not be registered.

Enforcement at common law

In relation to judgments issued by courts to which the Reciprocal Enforcement of Judgments Act 1922 does not apply (which is to say, the courts of every country other than those listed above, and the inferior courts of those countries), any final and conclusive money judgment for a definite sum obtained against the debtor in the courts of a foreign jurisdiction may be treated by the BVI courts as a cause of action for debt in itself such that no retrial of the issues is necessary if fresh proceedings are brought in the BVI to enforce that judgment debt (as the action brought in the BVI is brought to enforce the judgment debt rather than the original cause of action).

This is the position at common law that applies in the BVI. Accordingly, where the judgment debt arises in a country or court other than one regulated by the Reciprocal Enforcement of Judgments Act 1922, it is possible to enforce the judgment debt by suing upon it as a cause of action at common law, and the judgment creditor will usually make an application for summary judgment on the basis that there is no defence open to the judgment debtor to plead. The rules of common law largely mirror the provisions of the Reciprocal Enforcement of Judgments Act 1922 in relation to the parameters within which foreign judgments will be enforced, and the limitations listed above will apply, in a largely commensurate fashion, to any application to enforce a foreign judgment at common law.

In relation to enforcement under the common law rules, the claimant must therefore commence new proceedings on the defendant in accordance with Parts 5 and 7 of the CPR.

OTHER CONSIDERATIONS

Interesting features

Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

Interesting features or tactical advantages include:

- quality that matches the English Commercial Court, but without the media interest, leading to relatively low-profile litigation;
- speedy judgments and specialist, highly regarded commercial courts, equivalent to the English Commercial Court;
- highly qualified English trained lawyers and judges;
- common law jurisdiction that complements global strategies;
- access to a cadre of English commercial silks; and
- the final appellate tribunal being the Privy Council in London.

Further, most BVI commercial litigators are familiar with US bankruptcy laws and complex cross-border litigation tactics. This makes the BVI a real gem for big ticket common law litigation away from the limelight.

Jurisdictional disadvantages

Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

The only limitations are geography and limited airlift.

Special considerations

Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

The only special considerations to take into account are what strategic defences might arise through conflicts of law points and forum non conveniens considerations.

UPDATES AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgements and policy and legislative developments of the past year?

56 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In a major development in BVI insolvency law and practice, the BVI Commercial Court held in the case of Constellation Overseas Limited and 5 others (BVIHC (Com) 2018/0206 - 2012) that provisional liquidation is available to facilitate a restructuring. In appropriate circumstances, a moratorium on creditors' actions may also be imposed, allowing a company room to breathe while undergoing restructuring. The decision has brought the BVI broadly into line with the position in the Cayman Islands and Bermuda, where restructuring provisional liquidations have been used to support a number of landmark cross-border restructurings in recent years. This has added to the range of effective procedures available in the BVI to facilitate cross-border restructurings.

The jurisdiction continues to see a focus on fraud litigation and asset tracing and the ongoing evolution of the suite of tools available to litigants in this area.

We eagerly await the outcome of the Privy Council appeal of JSC MCC Eurochem et al v Livingston Properties Equities Inc et al scheduled to be heard in March 2020, which will decide two questions critical to the jurisdiction's ability to combat fraud and corruption.

The first goes to the question of whether BVI law should, in the absence of any applicable foreign law pleaded to the contrary by the defendant (Rule 25 of Dicey and Morris), be the applicable law of a cause of action in fraud.

If decided in favour of the BVI law being the governing law by default, then this will provide a strong factor in favour of the BVI being the most appropriate forum for resolving the fraud litigation.

Second is the question of whether the fact that BVI companies were used or caught up in a fraud should be a weighty factor in favour of the BVI court being the most appropriate forum to determine a dispute.

The implementation of the electronic litigation portal has further facilitated and streamlined the process for filing and management of court cases in the jurisdiction of the Eastern Caribbean Supreme Court.

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.