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British Virgin Islands: Law and Practice

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Carey Olsen

BRITISH VIRGIN ISLANDS

Law and Practice

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Carey Olsen

Contents

Carey Olsen has a global BVI dispute resolution and insolvency practice comprising over 25 fee earners and 9 partners, with four partners based in Asia and one in London. The team represents clients across a range of contentious and non-contentious matters and is recognised for its expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, restructuring and insolvency, and fraud and asset tracing claims. From mediation to trial advocacy, the firm successfully guides its clients through the full range of disputes, from multiparty, cross-jurisdictional corporate litigation to domestic claims before the local courts. It has also represented clients before the Privy Council and many of its cases have established judicial precedents that are referred to in jurisdictions around the world. Carey Olsen advises on Bermuda, British Virgin Islands, Cayman Islands, Guernsey and Jersey law across a global network of nine international offices.

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1. General

1.1 General Characteristics of the Legal System

Sources of Law

As a largely self-governing British Overseas Territory, the legal system of the British Virgin Islands (BVI) is rooted in English common law and equitable principles, supplemented by legislation passed by the BVI's legislature and certain statutes and instruments passed by the UK Parliament historically or recently extended to the territory by Order in Council.

Judicial Process

The system is adversarial, overseen by a single judge, who considers written and oral evidence and argument before reaching a decision on the facts and the law and delivering judgment. Juries are not used for civil proceedings. Occasionally, and exceptionally, judges make decisions on papers without a hearing.

Precedent

The courts follow precedent. Decisions of higher courts are binding on lower courts. Whilst not binding, English court judgments are routinely cited in argument and, in the absence of a good reason to depart from English jurisprudence, will usually be followed.

1.2 Court System

The BVI's court system is administered by the Eastern Caribbean Supreme Court (ECSC), based in St Lucia, in common with other Caribbean countries and territories. The BVI's High Court is managed by local registries. Procedure is governed by the ECSC Civil Procedure Rules 2000 and practice directions (EC CPR).

The principal constituents of the BVI's civil court system are set out below.

The High Court (Civil Division)

The Civil Division of the High Court handles civil litigation not within the remit of the Commercial Court. There is one dedicated Civil Division judge.

The High Court (Commercial Division)

Commonly called the Commercial Court, this was established in 2009 to hear the large number of commercial cases that emanate from the BVI. Most are BVI-specific, although some are referred from other jurisdictions within the ECSC. The criteria relevant to whether a case is suitable for the Commercial Court are principally subject matter and value. Almost all international commercial cases are heard in the Commercial Court. The Commercial Court has exclusive remit over corporate insolvency matters. There are currently two Commercial Court judges.

The length of time it will take to progress a case from issuance through to trial and final judgment in the Commercial Court can vary enormously, depending on the nature and complexity of the matter, whether substantial interlocutory applications need to be dealt with, and the availability of the parties and the court for hearings. It is rare for a substantial matter to go to trial within a year of issue, and it is relatively common for substantial cases to last considerably longer than that, but trials can be expedited in appropriate cases. Further, many matters in the BVI courts can be resolved summarily without a full trial (for example, common law enforcement actions and liquidation applications) and are usually determined in a much shorter timeframe (see **7.8 General Timeframes for Proceedings**).

The Eastern Caribbean Supreme Court, Court of Appeal (ECSC Court of Appeal)

The ECSC Court of Appeal hears appeals from the High Court and Commercial Court. The

ECSC Court of Appeal is based in St Lucia but is itinerant, travelling between various countries and territories. It typically sits in the BVI three times per year, each lasting for a period of one week. If urgent, BVI appeals may be heard when the Court is sitting elsewhere.

The Judicial Committee of the Privy Council

This is the final court of appeal for the BVI, hearing appeals from the EC Court of Appeal. The Privy Council sits in London and consists of justices of the UK Supreme Court.

1.3 Court Filings and Proceedings

Filings

Almost all filings are made using the ECSC's e-filing portal, to which BVI legal practitioners have access. The Registry oversees assignment of matters to judges and listing of hearings, and issuing court orders once approved.

Documents Available to the Public

A non-party may inspect only the following on the court file:

- claim form, certain application notices (made under r. 8.1(6), or a statement of case (but not any documents filed with or attached to the statement of case);
- notice of appeal;
- judgment or order made in the case; and
- with the court's leave, any other document.

However, the following documents are not available for inspection: (i) documents in proceedings relating to the welfare of a minor, a patient, or person for whom an order has been made to protect their identity; (ii) settlement agreements; (iii) documents protected by statute from disclosure or inspection; or (iv) documents subject to an application pending made by a person identified in a statement of case to prevent non-parties from inspecting such documents. All other documents remain confidential unless referred to in open court.

For particular sensitivities, the court file may be sealed to prevent public access. The court may anonymise names to protect confidentiality, and hold private hearings. For more details, see **7.6 Extent to Which Hearings Are Open to the Public**.

Hearings

Court hearings are generally public, although the majority in the Commercial Court and Civil Division are held in chambers. Whilst chambers hearings are not necessarily private, it is unusual for anyone other than parties or their legal practitioners to attend.

Certain hearings are held in "open court" where the public or press may attend. These include trials and hearings to appoint liquidators.

Documents referred to in open court generally lose their confidentiality. For particularly sensitive or confidential documents, the judge may agree to hold hearings in private, and/or to anonymise certain information in any judgment. It is therefore possible to preserve confidentiality in certain cases.

1.4 Legal Representation in Court

Regulation

Legal practice is primarily regulated by the Legal Profession Act 2015 (LPA). This restricts practice of BVI law to persons admitted in the BVI holding a valid practising certificate, which must be renewed annually (legal practitioners). It is an offence for any other person to practise BVI law. Foreign lawyers cannot practise BVI law or conduct litigation in the BVI courts unless they

become BVI admitted and obtain a practising certificate.

Rights of Audience

The BVI generally operates a "fused" profession, although a distinction is made between barristers and solicitors for the purposes of appearing before the court.

Barristers have full rights of audience in all courts, whereas solicitors have more limited rights. An increasing number of solicitors are solicitor advocates, with the same rights as barristers.

For high-value commercial cases it is common for parties to instruct King's Counsel (KCs, senior specialist advocates) from England. A number of English KCs are admitted to practice in the BVI.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Litigation funding is permissible as a matter of BVI law so that third parties can fund litigation and other liquidation fees and expenses in appropriate cases and on appropriate terms.

2.2 Third-Party Funding: Lawsuits

Please see **2.1 Third-Party Litigation Funding**.

2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is usually available for plaintiffs, not defendants, except where a defendant has a counterclaim. Most funders will consider funding counterclaims, applying usual underwriting criteria.

2.4 Minimum and Maximum Amounts of Third-Party Funding

Different funders take different approaches but most will be reluctant to consider a case where costs are likely to exceed 10% of recoveries.

The market for funding litigation in the BVI is expanding and so a range of funding options is likely to be available.

2.5 Types of Costs Considered Under Third-Party Funding

Funders will usually fund legal fees and disbursements. Many funders will fund investigatory costs (forensic accountants, etc). Funders may be willing to fund the costs and expenses of an insolvency office-holder.

Separate arrangements usually cover risks of adverse costs, through after the event (ATE) insurance. Many funders insist on ATE insurance as a condition of funding but may fund the cost of the upfront premium.

2.6 Contingency Fees

The LPA makes provision for contingency fees for non-contentious business but not expressly for contentious business. The Code of Ethics under the LPA provides that legal practitioners can enter into a contingency fee agreement "provided that such fee is fair and reasonable". Legal practitioners may be prepared to act on a contingent basis for litigation in appropriate cases in order to allow for access to justice. No guidance is available as to what is a fair and reasonable fee.

2.7 Time Limit for Obtaining Third-Party Funding

There are no specific time limits for obtaining third-party funding. Generally, a party will seek

funding prior to issuing, but a funder may be prepared to provide funding at a later stage.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

In December 2023, a Practice Direction was issued putting in place a set of pre-action protocols which apply to four categories of claims:

- claims for a specified sum of money (defined as a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract);
- claims for motor vehicle accidents and personal injury claims;
- defamation claims; and
- administrative claims (eg, judicial review claims).

The pre-action protocols specify the steps that should be taken prior to issuing proceedings in each category of case, including pre-action letters and disclosure of documents. Where a pre-action protocol applies but has not been complied with, and non-compliance has led to the commencement of proceedings which may not otherwise have been commenced, or has led to costs being incurred in the proceedings that may not otherwise have been incurred, the court may make such orders for costs as it sees fit with a view to placing the party not at fault in no worse a position than they would have been in if the pre-action protocol had been complied with.

In addition to the specific pre-action protocols, the Practice Direction introduces an express expectation in other categories of claim on parties to follow a reasonable procedure suitable to their particular circumstances, which is intended to avoid litigation, and should "normally include" the parties corresponding and conducting "genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings". The court may penalise a claimant in costs if a claim is commenced before allowing the defendant sufficient time to engage in pre-action correspondence.

In addition, the court retains its general case management powers under the principles of the Overriding Objective to deal with cases fairly and efficiently, therefore there remains a general expectation on parties to act reasonably both before and during court proceedings to avoid unnecessary litigation and to minimise costs where possible.

3.2 Statutes of Limitations

The BVI Limitation Ordinance 1961 sets out the limitation periods for commencing particular claims. Limitation will be a complete defence.

Key limitation periods are:

- contract – six years from the date the cause of action accrued; and
- tort – six years from the date the cause of action accrued.

Specific limitation periods are set for other categories of claim, and there are provisions for suspension or extension (eg, concealment or fraud). Specific advice should be sought where limitation may be an issue.

3.3 Jurisdictional Requirements for a Defendant

A defendant domiciled in the BVI can be served with proceedings as of right.

Service of BVI proceedings outside the jurisdiction is governed by Part 7 of the EC CPR. Prior to 31 July 2023, Part 7 of the EC CPR allowed a claimant to serve a claim outside the jurisdiction only with the leave of the court. Permission to serve a BVI claim on defendants located outside the jurisdiction was generally sought at an ex parte hearing soon after the claim had been issued, and was an additional procedural step which the claimant had to factor into its costs of bringing proceedings against a foreign party or parties.

The amendments to Part 7, which apply to all cases except those where a trial has already been listed from 31 July 2023, have added to the jurisdictional gateways, expanding the scope of the rules to all court processes (including notices of application and orders for interim remedies before a claim has been filed), and largely removing the requirement to seek the permission of the court to serve out of the jurisdiction.

The amended Rule 7.2 now permits service of court processes without the court's permission where:

- service is effected in compliance with the methods of service provided by Rule 7.9 (ie, by service through foreign governments, service on a state, service in accordance with the laws of the foreign country or personal service by the claimant or the claimant's agent);
- the court process falls within one of the jurisdictional gateways listed in Rule 7.3; and
- the claimant, at the same time as filing the court process, also files and serves a certificate signed by the claimant or the claimant's legal practitioner confirming their belief that:
  (a) the case falls within one of the jurisdictional gateways;
  (b) the case is a proper one for the BVI court's jurisdiction;
  (c) the claimant has a good arguable case; and
  (d) the proposed method of serving the foreign defendant does not infringe the law of the foreign state.

The new rules also expanded the jurisdictional gateways for service out. 7.3(7)(c) has been added, expressly providing for service out of the jurisdiction of a claim relating to the insolvency of a BVI company. Rule 7.3(11) is a new provision that expressly permits service out of the jurisdiction where an application is made for interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction. Finally, a new gateway has been introduced by Rule 7.3(12) where a claim is made for a costs order against a person who is not a party to the BVI proceedings.

The new rules preserve the procedure to seek leave of the court to serve court processes abroad. Leave of the court is required where service outside the jurisdiction is not otherwise permitted under the new Rule 7.2. This will principally be the case where the claimant is seeking leave to serve by an "alternative method" under what is now Rule 7.10.

A party who is served out of the jurisdiction under the new rules may apply to the court for an order setting aside the service of the court process on the basis that (i) the court process does not fall within a jurisdictional gateway; (ii) the claimant does not have a good arguable case; or (iii) the case is not a proper one for the court's jurisdiction.

3.4 Initial Complaint

Proceedings are usually commenced by claim form, with a statement of claim, under Part 8 of the EC CPR. To commence a claim, the claim form must be filed and served on the defendant. The claim form and statement of claim are usually served together.

The claim form is brief, setting out a short summary of the claim and remedies sought. The statement of claim is detailed, setting out concisely the facts and matters upon which the claimant relies in support of its claim.

A statement of claim can be amended once, without permission of the court, prior to the first case management conference. Additional amendments can be made with permission of the court.

Certain specified proceedings can be commenced by a "fixed-date claim form". A fixed-date claim is supported by affidavit evidence. A first hearing will be listed, at which the court may determine the matter summarily or give directions for the future conduct of the case.

3.5 Rules of Service

Service Within the Jurisdiction

The claimant is responsible for the service of the claim form and statement of claim on all defendants within the jurisdiction in accordance with EC CPR Part 5. Acceptable methods of service depend on whether the defendant is a natural or legal person.

- Individuals must be served personally.
- Companies can be served by leaving the claim form at the company's registered office, but it is also possible to serve directors or officers of the company or to send the claim form by fax or prepaid post; companies are usually served by delivery to the registered office.
- Alternative methods of service may be used in particular circumstances.

Electronic service (eg, by email) is permissible by agreement, or pursuant to court rules or practice directions.

Service Out of the Jurisdiction

As explained in **3.3 Jurisdictional Requirements for a Defendant**, the rules on service out of the jurisdiction have recently changed and have largely removed the requirement to seek the permission of the court to serve out of the jurisdiction.

3.6 Failure to Respond

A defendant must file an acknowledgement of service within 14 days of service of the claim form, and a defence within 28 days of service. These time periods are extended when service is outside the jurisdiction.

Failure to respond can result in a default judgment against the defendant. The procedure for entering default judgment is governed by EC CPR Part 12 and depends on the nature of the claim and whether the defendant has failed to acknowledge service or file a defence.

3.7 Representative or Collective Actions

The EC CPR does not have any rules relating to collective or class actions.

However, where five or more persons have the same or similar interest in proceedings, the court may order the appointment of a body, or one of the persons with an interest, as a representative party (whether as claimant or defendant) in the proceedings.

The procedural rules relating to representative parties are set out in EC CPR Part 21. Provision is made for representation of unascertained beneficiaries in proceedings relating to trusts, etc.

In practice, collective or class actions are not common in the BVI.

3.8 Requirements for Cost Estimate

There is no procedural requirement for legal practitioners to provide a cost estimate to a client for potential litigation. However, non-binding cost estimates are commonly provided.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Interim applications are a common feature of commercial litigation in the BVI and a wide range of interim remedies are available. Injunctive or other protective relief may be sought prior to the issuing of a claim. In appropriate circumstances, such applications can be made without notice to the respondent (ex parte) (see **6. Injunctive Relief**).

EC CPR Part 17 sets out the framework for interim applications, supplemented by a substantial body of common law and equitable principles, derived from decisions of both the BVI and English courts.

4.2 Early Judgment Applications

There are a number of bases on which the court may give judgment in relation to all or part of a claim prior to trial. An early determination can be sought by way of:

- application for summary judgment under EC CPR Part 15;
- application for strike out under EC CPR Part 26; or
- the court's inherent jurisdiction to manage cases in the interests of justice.

Summary Judgment

An application for summary judgment may be brought at any stage of the proceedings by any party, and is available in most types of claims.

An application must be supported by evidence. The respondent is entitled to file evidence in answer. After evidence has been exchanged, the court will determine the application at a hearing, based on written evidence and submissions.

Summary judgment may be ordered where the claimant has no real prospect of succeeding in the claim (or part of the claim) or where a defendant has no real prospect of defending the claim (or part of the claim). The test for obtaining an order for summary judgment is therefore a fairly high one.

Strike Out

The court may strike out a statement of case (eg, where a party is in breach of court rules or court orders, where the statement of case "does not disclose any ground for bringing or defending a claim", or where the statement of case is an abuse of process).

Whilst the power to strike out a statement of case is exercised by the court as part of its case management powers, a party can make an application seeking strike out. The threshold for obtaining an order for strike out is a high one.

If a party's statement of case is struck out by the court, judgment can be entered against that party without trial.

4.3 Dispositive Motions

See **4.2 Early Judgment Applications**.

4.4 Requirements for Interested Parties to Join a Lawsuit

EC CPR Part 19 sets out rules governing the addition of parties.

An interested party wishing to be joined can apply for an order for joinder.

The court has broad powers to add a party where:

- it is desirable to do so to resolve all of the matters in dispute; or
- there are issues involving the party to be added that are connected to the matters in dispute in the proceedings and it is desirable to add the new party to resolve those issues.

If an order for joinder is made, the court may give directions as to the service of statements of case and other documents, and other appropriate case management.

4.5 Applications for Security for Defendant's Costs

Rules for security for costs are set out in EC CPR Part 24. An application for security for costs should be made "where practicable" at a case management conference or pre-trial review, but such applications are often brought standalone and can be made at any time, most commonly prior to or shortly after the first case management conference.

One or more of the grounds set out in EC CPR Part 24.3 must be satisfied to order security for costs. In each case, the court has discretion and will take into account the overall circumstances of the case and the parties. The grounds include where the claimant is outside the jurisdiction, and where the claimant has taken steps to place its assets beyond the court's jurisdiction.

If ordered, the proceedings will be stayed until security is provided, and if security is not provided by the date specified, the claim will be struck out. Security can be provided in a number of ways, including payments into court or a third-party bond or guarantee.

4.6 Costs of Interim Applications/ Motions

The successful party in an application is usually entitled to have its costs of the application paid by the unsuccessful party. The principles applied are as set out in **11. Costs**.

4.7 Application/Motion Timeframe

Generally, applications for interim orders must be filed and served at least seven days before the hearing. Urgent applications can have a shorter timeframe.

Urgent without notice applications can be heard at very short notice provided grounds for urgency are set out in a certificate of urgency.

In practice, most non-urgent applications in the Commercial Court are classed as "ordinary" applications and are subject to standard directions, namely:

- evidence in support of the application must be served with the application;
- evidence in answer to an application must be filed and served by the respondent within 14 days of service of the application; and
- the applicant may, if it chooses, serve evidence in reply within seven days of service of the evidence in answer.

The application will be heard after evidence exchange, on a date fixed by the court by reference to the parties' and the judge's respective availability. The parties are able to agree variations to this timetable and/or to seek bespoke directions.

The time it will take for an application to be determined by the court will depend on the length of the hearing required and the court's availability.

5. Discovery

5.1 Discovery and Civil Cases

Discovery is available in civil cases. For matters proceeding to trial, at the case management conference the court is required to consider whether to give directions for standard disclosure.

Parties are responsible for complying with their disclosure duties. Parties' lawyers are also required to ensure that disclosure is conducted by their client properly. Disclosure is administered by the parties, not the court. However, where a party is not satisfied with disclosure by another party pursuant to standard disclosure, an application for specific disclosure of a document or class of documents may be made.

The scope of standard disclosure is defined by the question of the relevance of the document in question. On an application for specific disclosure, the court retains a discretion, and should take into account the overriding objective, including to save expense and to administer cases in a manner proportionate to their value and complexity, among other things. It may therefore be a defence to an application for specific disclosure that providing the disclosure requested is disproportionate in terms of the costs incurred compared to the value of the dispute.

Apart from orders for standard disclosure and specific disclosure, asset disclosure orders are often made when a freezing order is granted.

5.2 Discovery and Third Parties

There is no provision in the EC CPR for third-party disclosure, although a witness summons can be issued to a witness in the jurisdiction to give testimony and produce documents. Otherwise, it may be possible to obtain disclosure from third parties in the BVI by Norwich Pharmacal or Bankers Trust orders. To obtain disclosure from a third party out of the jurisdiction, a party may apply for a letter of request from the BVI to the local court.

Norwich Pharmacal Orders

For a Norwich Pharmacal order, the applicant must show that:

- there is a good arguable case that a wrong has been committed;
- the third party against whom disclosure is sought is mixed up in the wrongdoing, even if innocently; and
- it is just and convenient in the circumstances to make such an order.

A BVI company's registered agent (RA), by acting as its RA, is considered to have been mixed up in the company's wrongdoing for these purposes.

In the case of a Norwich Pharmacal application against a BVI registered agent, which is relatively common, normally applicants apply ex parte for a gagging order preventing the RA from disclosing the application to its client. The Norwich Pharmacal application is then dealt with on an

inter partes basis between applicant and registered agent.

Bankers Trust Orders

A Bankers Trust order is potentially available where:

- there is a clear-cut case that the applicant has been the victim of a fraud;
- funds belonging to the claimant have passed through, or are held by, the respondent bank; and
- there is a real prospect that disclosure might lead to the location or preservation of assets to which the claimant has a proprietary claim.

5.3 Discovery in This Jurisdiction

EC CPR Part 28 sets out rules governing disclosure and inspection. Where an order for standard disclosure is made, a party must disclose all documents directly relevant to the matters in question in the proceedings. A document is directly relevant if the party with control of the document intends to rely on it, if it tends to adversely affect that party's case or it tends to support the other party's case. The rule in Peruvian Guano, requiring the disclosure of so-called train of enquiry documents, is expressly disapplied. The duty of disclosure is limited to documents that are, or have been, in a party's possession or control.

A party gives disclosure by producing a list identifying the documents that a party is disclosing. The list must identify which documents are no longer in a party's control, what has happened to them and where they are. If a party seeks to withhold disclosure or inspection, including on grounds of privilege, then it should say so in its list or in writing, including the grounds upon which it is claimed.

Once the list of documents has been served, a party wishing to inspect any documents contained in the list is required to give the party who served the list written notice of the wish to inspect documents on the list.

5.4 Alternatives to Discovery Mechanisms

This is not applicable in this jurisdiction.

5.5 Legal Privilege

Legal advice privilege is recognised in the BVI. It applies to confidential communications between a client and their lawyer which have come into existence for the dominant purpose of giving or receiving legal advice. Privilege may extend to material evidencing the substance of legally privileged communications. Privilege can extend to all members of the legal profession, including in-house lawyers.

Legally privileged communications are privileged unless that privilege is waived or inadvertently lost.

In addition, confidential communications between a lawyer and client, or between either of them and a third party, made for the dominant purpose of litigation that is pending, reasonably contemplated or existing, will be subject to litigation privilege.

5.6 Rules Disallowing Disclosure of a Document

A party need not disclose documents outside of the limits of standard disclosure. A party may apply to court on a without notice basis for that party not to disclose a document on the grounds that disclosing the existence of it would damage the public interest.

A party will have to disclose, but may withhold inspection of, documents over which privilege or confidentiality is claimed or which are no longer in that party's control.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

The BVI courts have a broad jurisdiction to grant injunctive relief when it is just and convenient to do so. That includes cases where injunctions are sought in support of foreign proceedings where there is no substantive claim in the jurisdiction. It is impossible to develop a full list of the types of injunctive relief available or the precise circumstances in which the courts will grant any particular form of such relief.

The types of injunctive relief that may be awarded include the following:

- freezing orders restraining a respondent from disposing or dealing with its assets where an applicant can show:
  (a) that it has a good arguable case on the merits of its underlying claim against the respondent;
  (b) that there is a real risk that, unless restrained, the respondent will take steps to dissipate its assets to avoid the enforcement of any judgment against it; and
  (c) that it is just and convenient to grant the relief sought; orders may direct provision of information about the location of property or assets.
- prohibitory injunctions restraining a respondent from acting in a particular way where it is shown:
  (a) that there is a serious question to be tried on the merits of its underlying claim against the respondent;
  (b) that an award of damages would not be an adequate remedy; and
  (c) that, on the balance of convenience, it is just and convenient to grant the relief sought.
- proprietary injunctions protecting property and trust assets, applying the same principles as those applicable to the granting of a prohibitory injunction and where the applicant has a proprietary interest in the relevant asset; and
- anti-suit injunctions restraining proceedings, including where parallel proceedings have been commenced in another jurisdiction where it is just and convenient to do so with the court weighing various factors depending on the circumstances of the case.

The BVI courts may grant injunctive relief on an interim or final basis.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

The BVI Commercial Court, in particular, is used to dealing with applications for injunctive relief on an urgent basis. The Registry provides BVI legal practitioners with contact details for out-of-hours applications so that urgent applications can be dealt with as required.

A certificate of urgency must be filed along with the application papers explaining why the matter is urgent. During any court vacation period, a judge will be available to hear matters certified as suitable for vacation or urgent business.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

As a matter of principle, orders will not generally be made against a person without that person having had an opportunity to be heard. There are some exceptions, including extreme urgency

where notice is not possible. An application may proceed without notice where giving notice may defeat the purpose of the application. Given the nature of freezing orders, and the requirement to prove a real risk of dissipation, they are commonly made without notice.

6.4 Liability for Damages for the Applicant

The applicant for an injunction will normally be required to give an undertaking in damages to compensate the respondent if it is subsequently determined that the respondent has suffered loss as a result of the injunction and that the respondent should be compensated for that loss. The applicant may also be required to give such an undertaking in relation to losses suffered by third parties affected by the injunction.

The court has a discretion to require fortification of the undertaking, for example, by a payment into court.

When making an application without notice, there is a duty of full and frank disclosure. The applicant must disclose all matters that may be material to the court in deciding whether or not to grant the order and its terms. This duty normally requires the offer of an undertaking in damages and to question whether fortification ought to be required.

6.5 Respondent's Worldwide Assets and Injunctive Relief

In appropriate cases, the court may grant a freezing order against a respondent's worldwide assets.

6.6 Third Parties and Injunctive Relief

In the case of a freezing order, in appropriate circumstances, it is possible to obtain relief against a third party against whom the applicant does not have a claim where that third party appears to hold assets on behalf of the defendant and if there is reason to suppose that the assets which are ostensibly those of the third party are, in truth, those of the defendant against whom the freezing order has been made (ie, the so-called Chabra jurisdiction).

It is also possible to obtain Norwich Pharmacal and Bankers Trust orders against third parties.

6.7 Consequences of a Respondent's Non-compliance

Failure to comply with the terms of an injunction may be contempt of court. A person held in contempt may be imprisoned, fined and/or have their assets seized. A company in contempt may be fined and/or have its assets seized and the directors may also be imprisoned, fined and/or have their assets seized.

7. Trials and Hearings

7.1 Trial Proceedings

The BVI is a sophisticated jurisdiction and its courts have great experience in handling major trials. Trials of significant commercial matters take place in the Commercial Court, established in 2009. Civil trials of lesser value or (for instance) relating to constitutional issues take place in the High Court.

Trials are conducted similarly to most other common law jurisdictions. The trial involves advocacy by BVI legal practitioners. Oral argument and examination of witnesses of fact and experts take place before a single judge at first instance.

Witnesses and experts may also appear via video link where the BVI court gives permission for them to do so. The BVI courts also regularly

adjust their sitting hours to take into account parties, witnesses and experts in different time zones.

The judge hands down a final judgment, usually in written form.

7.2 Case Management Hearings

Shorter hearings in relation to interim motions or applications are also conducted by oral argument before a single judge. Case management hearings usually take place shortly after the filing of a defence, and deal with timetables and other directions relating to expert reports, witness statements and disclosure.

In lengthy complex proceedings, there is usually more than one case management conference, at which interim applications (such as security for costs) are heard along with consideration of timetables and directions.

7.3 Jury Trials in Civil Cases

Jury trials are not available in civil cases. A single judge in civil cases considers issues of fact and law at trial. Jury trials are only available in criminal cases.

7.4 Rules That Govern Admission of Evidence

The admission of evidence at trial is governed by the Evidence Act 2006, Parts 29–33 of the Civil Procedure Rules, and the common law.

As noted in **5.5 Legal Privilege**, legal privilege is recognised in the BVI. Legally privileged documents are generally not admissible at trial.

7.5 Expert Testimony

Expert testimony is permitted at trial, but a party cannot submit an expert report or call an expert witness without the court's permission, usually given at the case management conference.

Although appointed by a party, the duty of an expert is to assist the court objectively and impartially, and this overrides any obligation to the party by whom the expert is instructed.

The court does not directly appoint experts, but does have oversight and management over the appointment. The court may direct, when two or more parties wish to submit expert evidence, that evidence be given by a single expert.

If the court wishes to seek expert testimony or guidance on a specific point, then it would usually indicate this to the parties and ask them to seek such evidence rather than seeking it directly.

7.6 Extent to Which Hearings Are Open to the Public

The general rule in the BVI is that hearings are open to the public. In practice, most hearings are conducted in chambers, where a non-party would normally need to obtain the court's permission to attend. Trials, appeals and some insolvency applications are heard in open court, and generally open to the public. The court may also order that hearings are held in camera (ie, in private).

The BVI courts follow the principle of open justice, and will only order that hearings be held in camera when there are issues of great sensitivity, confidentiality or privacy. In such rare circumstances, the court file may also be "sealed" to avoid inspection of any documents relating to the case by a third party, and may also anonymise the party names on the court list. It is very rare for a trial to be heard in camera.

Hearings generally take place in private if they are concerned with:

- the welfare of a minor or a person with a disability;
- an application by a trustee or court-appointed officer relating to the administration of a trust, asset or estate; or
- an arbitration.

Further, the court may direct that any other hearing (or part of it) may take place in private if:

- publicity would defeat the object of the hearing;
- the hearing relates to matters of national security;
- the hearing involves confidential information and publicity would damage that confidentiality;
- an application made without notice is being heard; or
- the court considers this to be necessary in the interests of justice.

In theory, transcripts of hearings other than ex parte or private hearings are open to the public on the payment of a fee; in practice, however, they are difficult to obtain and require the assistance of a BVI legal practitioner.

7.7 Level of Intervention by a Judge

The court has broad powers to intervene during hearings and trials, as necessary. The level of judicial intervention depends on the issues before the court and the style of the particular judge presiding over the case, which varies.

The Commercial Court is very busy, often dealing with various applications and hearings each day. As such, judgment is often given in ex tempore decisions at the end of a hearing. However, at the conclusion of lengthy and complicated applications, and certainly at the end of a trial, the judge will reserve judgment and hand down a written judgment at a later date.

7.8 General Timeframes for Proceedings

The timeframe for proceedings varies significantly depending on the nature of the claim. Some urgent claims and other applications – such as for an injunction, third-party disclosure order, or appointment of a liquidator – may be resolved within days or weeks. The court seeks to administer such claims very quickly.

More complex claims may take over a year to progress from initial filing to trial and final judgment. The trial can last for a few days or weeks, or even longer for high-value multimillion or billion-dollar claims with multiple parties. However, it is also possible for trials to be expedited in circumstances of genuine urgency, with timetables being abrogated to ensure a trial can take place more quickly than might otherwise be the case.

As discussed in **10. Appeal**, first instance decisions of the BVI courts may be appealed to the EC Court of Appeal and then the Privy Council, which can be a lengthy process.

8. Settlement

8.1 Court Approval

Parties may reach a resolution of their dispute between themselves without the involvement of the court. Court approval of the terms of such settlement is not, therefore, required, although steps will inevitably need to be taken in order to formally bring the proceedings to an end. Often, the parties embody the terms of settlement in a consent order (known as a Tomlin order), which technically "stays" (rather than ends) the pro-

ceedings other than for the purposes of giving effect to the settlement agreement.

Proceedings come to an end so long as there is compliance with the terms of the settlement agreement.

A recent addition to the EC CPR is the concept of "judicial settlement conferences" (Part 38A). The new rules contemplate judicial involvement in the settlement process (i) during the case management conference process and the stages leading up to a trial or the hearing of an appeal, and (ii) during the hearing or trial provided it is undertaken with the parties' consent. This is intended to complement mediation as ADR for promoting the early disposition of cases. This method of judicial involvement in settlement is new and untested. It is unclear to what extent judges will feel it necessary or appropriate to intervene and/or to what extent parties would welcome such involvement rather than, say, appoint an independent mediator to assist with ADR.

8.2 Settlement of Lawsuits and Confidentiality

The terms of settlement can remain confidential if agreed. The usual wording of a Tomlin order would refer to a confidential settlement agreement but would not exhibit the agreement itself.

Therefore, the settlement agreement would not be on the file or be publicly accessible. The fact that the proceedings were settled by consent, however, would be publicly accessible, recorded in the court order.

8.3 Enforcement of Settlement Agreements

Settlement agreements are usually enforced in the manner described in **8.1 Court Approval** (ie, if a party requires compliance with a term of the settlement agreement, the stay may be lifted and an application made).

If, however, the settlement is not embodied in a court order, then the settlement agreement may only be enforced by bringing a new action for breach of contract seeking the usual remedies, such as damages (or sometimes specific performance or an injunction).

8.4 Setting Aside Settlement Agreements

An application to court is required to set aside a settlement agreement. There are circumstances in which a settlement agreement (like any contract) may be ineffectual and set aside, such as if one of the parties lacked capacity, if a mistake has been made about a fundamental matter or it is impossible to perform.

If one party to the settlement agreement wishes to challenge it, it is usually necessary to commence a new action to set aside the settlement agreement or declare it invalid. However, if all parties to the settlement agree that it should be set aside, and it is embodied in a court order, then the court can set it aside in the existing proceedings with the consent of all parties. The stay would be lifted and the existing proceedings would resume.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

The wide remedies generally available in common law and equitable jurisdictions are available, including:

- damages;
- equitable compensation;
- mandatory and prohibitive injunctions;

- proprietary injunctions and property preservation orders;
- restitution and rectification remedies;
- declarations and other orders including as to status or transfer of ownership;
- valuation orders;
- property or share transfer or buyout orders; and
- those relating to the management of companies and personal or corporate insolvency proceedings or receiverships.

9.2 Rules Regarding Damages

Damages are generally compensatory, to meet or compensate for a particular identifiable loss caused by wrongdoing complained of and subject to concepts of mitigation, contributory negligence and remoteness.

Exemplary or aggravated damages are only available in limited circumstances. Exemplary damages (beyond compensation for loss suffered) tend only to be available for specific torts such as defamation or deceit where there has been deliberate oppression or calculation that the damage caused is lesser than profit gained. They are not generally available in breach of contract, negligence or inadvertent tort claims. Aggravated damages are compensatory and reflect the aggravation of injury to a claimant by the manner or motive for a tort or conduct since its commission. There is no maximum monetary limit.

9.3 Pre-judgment and Post-judgment Interest

The court has a discretion to award pre-judgment interest at such rate as it considers appropriate. In considering whether or not to grant interest, and the appropriate rate, the court will consider all the circumstances of the case, for example, whether the payment of interest was contemplated or contractually agreed.

Post-judgment interest is provided for under the Judgments Act at 5% per year from judgment until payment.

9.4 Enforcement Mechanisms of a Domestic Judgment

Domestic judgments must be complied with immediately and are enforceable as soon as made: an enforcement order should be applied for in the event of non-compliance by the judgment debtor. Modes of enforcement include:

- charging orders;
- attachment orders;
- injunctions;
- a judgment summons;
- orders for seizure and sale of goods or property; and
- appointment of liquidators or receivers.

9.5 Enforcement of a Judgment From a Foreign Country

Certain foreign judgments covered by the Reciprocal Enforcement of Judgments Act are enforceable through simple registration. The judgment has to be for a monetary sum and from one of the specified jurisdictions, which include the UK, Ireland, other countries of the Caribbean, and New South Wales in Australia. Foreign money judgments not covered by the Act are enforced by simple debt claims often determined summarily. Non-money foreign judgments can be enforced (where relevant jurisdiction exists over the defendant and the claim is one recognised in the BVI) through commencement of a mirror claim relying on issue estoppel to preclude further defence. Issues of jurisdiction, public policy and natural justice are relevant to the enforcement of a foreign judgment, but

the BVI courts will not re-examine the merits of the foreign judgment.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

Decisions of the High Court are appealed to the ECSC Court of Appeal, an itinerant court, travelling to each of its members' states and territories, sitting at various dates throughout the year to hear appeals from the High Courts. The circumstances in which appeal is possible are outlined below.

The Chief Justice of the Court of Appeal may delegate certain decisions to a master or the Chief Registrar of the Court of Appeal. Such decisions are subject to the review of a single judge of the Court of Appeal. Furthermore, certain decisions may be made by a single judge of the Court of Appeal. Any order, directions or decision given by a single judge may be varied, discharged or revoked by two judges of the Court of Appeal (in practice, such applications to vary, discharge or revoke are heard by a full court of three judges).

Decisions of the Court of Appeal may be subject to appeal to the Privy Council, sitting in London. Circumstances in which appeals may be made to the Court of Appeal are outlined in **10.3 Procedure for Taking an Appeal**.

10.2 Rules Concerning Appeals of Judgments

Final Decisions in Civil Proceedings

There is an automatic right of appeal to the Court of Appeal from the High Court of final decisions in civil proceedings. No leave to appeal is required.

In determining whether or not a decision was final, the court will apply the application test, namely, whether the determination of the matter before the High Court would have finally determined the litigation whichever way the decision was made.

Similarly, there is a right of appeal of final decisions of the Court of Appeal to the Privy Council provided that the matter in dispute is of the value of at least GBP300, or where the appeal – directly or indirectly – involves a claim to, or question respecting, property or a right of the value of at least GBP300 or upwards.

Interlocutory Decisions

No leave to appeal is required from decisions of the High Court in the following cases.

- Those concerning the liberty of the subject or the custody of infants.
- Where an injunction or appointment of a receiver is granted or refused.
- In the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability.

Otherwise, leave to appeal to the Court of Appeal is required from interlocutory decisions. Granting of leave is discretionary. In order to obtain leave to appeal, a prospective appellant will need to show reasonable prospects of success or that leave should be granted for some other reason. The latter are normally public interest reasons, for example, where the law is unclear or a new point of law has arisen, such that a decision of the Court of Appeal would be beneficial.

Leave to appeal to the Privy Council is required from a decision of the Court of Appeal on an interlocutory decision of the High Court. Leave will be granted where a prospective appellant

can show that the question involved in the appeal is one of great general or public importance or otherwise ought to be submitted to the Privy Council.

Certain Other Decisions Where Leave is Required

Leave to appeal to the Court of Appeal is required from the High Court in relation to a consent order or orders for costs only where such costs are left to the discretion of the judge.

10.3 Procedure for Taking an Appeal

High Court to the Court of Appeal – Where Leave is Required

Application for leave to appeal must be made to the High Court within 21 days of the order. If refused by the High Court, an application may be made to the Court of Appeal within seven days of the High Court's refusal.

Once leave is granted, the notice of appeal must be filed within 21 days. There is provision in the EC CPR for filing of submissions and other documents in the appeal.

High Court to the Court of Appeal – Where Leave is Not Required

In interlocutory appeals where no leave is required, such as discharging an injunction, the notice of appeal must be filed within 21 days of the decision.

In the case of a final appeal, the notice of appeal must be filed within 42 days of the decision.

In both cases, there is also provision in the EC CPR for filing of submissions and other documents in the appeal.

From the Court of Appeal to the Privy Council

An application for conditional leave should be made to the Court of Appeal within 21 days of their decision. If granted, and once conditions are met (payment of security and preparation of the record), an application for final leave is made to the Court of Appeal. Once granted, the appeal can proceed to the Privy Council.

If leave to appeal to the Privy Council is required but refused by the Court of Appeal, a prospective appellant may apply directly to the Privy Council for "special leave". The Privy Council retains complete discretion although in practice the granting of special leave is limited in civil cases.

10.4 Issues Considered by the Appeal Court at an Appeal

The appeal issues are defined by the notice of appeal and any counter-notice filed. Parties may seek permission to amend those notices, which is a matter of discretion for the Court of Appeal. The appeal is a review, not a rehearing. In general, new points not explored at first instance ought not to be taken on appeal, although there is a discretion to permit such points.

10.5 Court-Imposed Conditions on Granting an Appeal

On granting leave, the court may impose conditions; for example, the court may require payment into court in respect of any award made at first instance. It is possible for a respondent to an appeal to apply for security for its costs of an appeal.

10.6 Powers of the Appellate Court After an Appeal Hearing

Following conclusion of an appeal, the Court of Appeal has fulfilled its function, save for:

- applications for conditional and final leave to the Privy Council;
- stays of execution; or
- continuing interim relief, such as an injunction, pending determination of any further appeal.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party in any particular application or at trial, although the court retains a discretion, and the award of costs will depend on the conduct of the respective parties. The court has a power to award costs against third parties but this is only exercised in exceptional cases.

Where costs are to be assessed, the receiving party will serve the paying party with a schedule setting out the costs claimed including lawyers' fees, court fees, expenses, disbursements, etc. If unable to agree on quantum of the costs, the receiving party may then apply to have costs assessed.

On an assessment, the court will allow recovery of such costs as are fair and reasonable and take into account the amount of work reasonably required to have been done, the complexity of the dispute, the value of the claim, etc. There are restrictions on recoverability of costs of lawyers not admitted as BVI legal practitioners.

There is also provision in Commercial Court proceedings for costs to be summarily assessed at the end of a hearing, rather than having to proceed to a detailed assessment.

Where a detailed assessment is to take place, the receiving party may make an application for a payment on account of costs pending that assessment.

11.2 Factors Considered When Awarding Costs

The general rule is that the court will order the unsuccessful party to pay the costs of the successful party. The court may award only part of a party's costs or make no order. In deciding who should be liable to pay costs, the court must have regard to all of the circumstances, including:

- the conduct of the parties before and during the proceedings;
- the manner in which a party has pursued a particular allegation, a particular issue or the case.
- whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
- whether it was reasonable for a party to pursue a particular issue or raise a particular allegation; and
- whether the claimant gave reasonable notice of intention to issue a claim.

The general rule does not apply in certain situations, such as:

- applications to amend a statement of case;
- requests for an extension of time;
- applications for relief from sanctions; or
- applications that could have been made at a case management conference or pre-trial review.

In those cases, the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

11.3 Interest Awarded on Costs

Once assessed, an order for costs will be an order to pay a specific sum and will become a judgment debt. Interest is payable on judgment debts at a rate of 5% per annum from the date of judgment.

The BVI courts have ruled that interest may run on costs from the date that the order to pay costs was made, even if the costs are assessed at a later date.

12. Alternative Dispute Resolution (ADR)

12.1 Views of ADR Within the Country

The BVI has sought to increase the popularity of arbitration as a form of ADR through the BVI Arbitration Act 2013 and the launch of the BVI International Arbitration Centre (BVI IAC) (see **13. Arbitration**). However, the BVI remains a largely court-focused "front line" litigation jurisdiction in which ADR plays less of a role than elsewhere.

A BVI court cannot compel ADR; however, under Rule 27.7 of the EC CPR, it may adjourn a case management conference to enable settlement discussions or a form of ADR procedure to continue.

Mediation is often considered and has led to settlement of major cases, but the court has no specific power to require parties to mediate.

The BVI has a number of qualified mediators who can be instructed locally. However, due to the international nature of BVI disputes, mediations often take place elsewhere.

12.2 ADR Within the Legal System

Until recently, there has been no formal requirement for parties to take part in ADR and no specific sanction for refusing to do so. However, general conduct and reasonableness of parties are relevant when assessing costs. If a party unreasonably refuses to engage in ADR, this may be reflected in costs. However, as explained in **8. Settlement**, the BVI CPR now contains the concept of "judicial settlement conferences" (Part 38A), which is new and untested.

12.3 ADR Institutions

The main institution is the International Arbitration Centre (IAC), which provides excellent services and facilities for ADR, in particular arbitration. The BVI IAC is still in its early days but is promoting ADR in the BVI, the rest of the Caribbean and beyond.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

Arbitrations and the recognition or enforcement of arbitral awards in the BVI are largely governed by the Arbitration Act 2013, which came into force on 1 October 2014. It introduced the UNCITRAL Model Law on International Commercial Arbitration 1985 to the BVI with some minor exceptions.

Issues of recognition and enforcement of foreign arbitral awards are also governed by the Arbitration Act and the EC CPR.

13.2 Subject Matters Not Referred to Arbitration

Matters of corporate or individual insolvency, criminal matters, and family matters may not be referred to arbitration. Furthermore, any matters

contrary to the public policy of the BVI may not be referred to arbitration.

Aside from those exceptions, most forms of commercial dispute in the BVI are capable of being determined by arbitration, including shareholder disputes and joint ventures.

13.3 Circumstances to Challenge an Arbitral Award

There is no general right in the Arbitration Act 2013 to challenge or appeal to the court on the grounds of errors or fact of law in the arbitral award, unless the parties to the arbitration agreement have decided to "opt in" and give such rights.

If the parties do not opt in, the grounds for the court to set aside an award are narrow. The applicant must make an application to court under Section 79 of the Arbitration Act, within three months of the arbitral award, and prove that:

- a party to the arbitration agreement was under some incapacity, or the agreement was not valid;
- the applicant was not given proper notice of the arbitration and was unable to present its case;
- the award deals with a dispute that does not fall within the terms of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

The court may also set aside the award if it falls within the excluded matters listed in **13.2 Subject Matters Not Referred to Arbitration**.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

There is no distinction between domestic and foreign arbitral awards. However, there is a distinction between a New York Convention award and a non-New York Convention award.

A New York Convention award may be recognised and enforced more easily by applying to the court under Sections 84–86 of the Arbitration Act on an ex parte basis. The court does not have a discretion to refuse permission to enforce, provided that the basic parameters of the New York Convention are satisfied, and will issue an order that the arbitral award will be recognised as a judgment or order of a BVI court.

An applicant seeking to enforce a non-New York Convention Award may apply to court under Section 81 of the Arbitration Act for permission to enforce the award in the same manner as a judgment or order of the court that has the same effect. The BVI courts have broader powers to refuse such permission than in relation to a New York Convention Award.

The person against whom the arbitral award (both New York Convention and non-New York Convention awards) was given may challenge enforcement on certain grounds under Section 83 of the Arbitration Act. However, given that the burden on the defendant is to show otherwise, the starting point under the Arbitration Act (especially with regard to New York Convention awards) is that enforcement of arbitral awards is mandatory unless one of the limited exceptions can be established.

The BVI courts generally take a pro-arbitration approach to enforcement, and will not usually refuse to enforce, and will take a narrow view of public policy exceptions.

14. Outlook

14.1 Proposals for Dispute Resolution Reform

Various amendments to the EC CPR came into force on 31 July 2023, including largely removing the requirement for permission to serve a claim out of the jurisdiction. See 7.6 Extent to Which Hearings Are Open to the Public.

In January 2021, the BVI passed legislation to give statutory footing to the so-called Black Swan jurisdiction, so that the BVI courts have statutory jurisdiction to grant injunctive relief in support of foreign proceedings.

14.2 Growth Areas

The most prominent area of growth in the BVI is disputes relating to digital assets and cryptocurrency. The BVI is a popular jurisdiction for the incorporation of cryptocurrency issuers, exchanges and other intermediaries dealing in digital assets. As a result, the BVI Commercial Court is seeing an increasing number of claims concerning crypto-assets, including major insolvencies – for example, the liquidation of the Three Arrows Capital cryptocurrency hedge fund.

The courts are also seeing an increase in substantial claims arising from trust and probate disputes, which is likely the result of succession issues related to older wealth creators who set up offshore structures some time ago.

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