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British Virgin Islands

Scott Cruickshank & Matthew Freeman
Lennox Paton

Efficiency of process

The Territory of the Virgin Islands (as it is officially known) is a largely self-governing British Overseas Territory comprising several islands located approximately 60 miles due east of Puerto Rico at the north-eastern corner of the Caribbean Sea. The islands are referred to as the British Virgin Islands in order to distinguish them from their US neighbour. The principal islands of the British Virgin Islands (the "BVI") are Tortola and Virgin Gorda, between them housing a population of around 22,000. The BVI has become one of the world's leading financial centres, with over 800,000 international business companies ("BVIBCs") registered in the BVI, as well as significant numbers of mutual and hedge funds, captive insurance and trust companies.

Integrity of process

The Islands' success rests largely upon an efficient and modern legislative regime for corporate activity and insolvency, the absence of taxation on BVIBCs, and the existence of a politically stable climate, with an independent and incorruptible judiciary. It is common to speak of the "twin pillars" of its economy being financial services and tourism. The BVI retains the Privy Council as its final appeal court.

The legal system

The BVI has a common law system, based upon English law. It has its own legislative framework and has adopted some UK legislation (particularly with respect to the implementation of international treaties). English common law was extended to the BVI by the Common Law (Declaration of Application) Act (Cap. 13). The result is that English authorities, whilst not strictly binding as precedents, are persuasive and, subject to there being any differing Eastern Caribbean Supreme Court authorities, are routinely relied upon by the BVI Court. Authorities of other Commonwealth or common law jurisdictions, such as Canada and Hong Kong, are also frequently cited.

The Superior Court of Record for the BVI is the Eastern Caribbean Supreme Court ("ECSC"), which also serves as the Superior Court of Record for two other British Overseas Territories (Anguilla and Montserrat) and six independent Member States of the Organisation of Eastern Caribbean States ("OECS") (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint Lucia and St Vincent and the Grenadines). For some time, moves have been afoot to integrate the Magistracy within the ECSC court system.

The ECSC consists of:

1. the High Court of Justice;
2. the Commercial Division of the High Court of Justice. The BVI became home to this

new Division in 2009, its first judge being the highly regarded English QC, Mr Justice Edward Bannister QC (Mr Justice Bannister retired in March 2015 and was replaced by Mr Justice Barry Leon. Mr Leon was previously a leading international arbitration practitioner in Canada and his appointment epitomises the commerciality of the court system in Tortola); and

3. the Court of Appeal. This is an itinerant court, whose sittings rotate between the nine members of the OECS. Typically, the Court of Appeal will sit three times a year in Tortola (BVI), in January, May and September, although more urgent matters may be dealt with when the Court is sitting in other jurisdictions as the need arises.

The Commercial Court judge being a notable exception, the judges of the Eastern Caribbean Supreme Court are drawn from the Caribbean Islands. They are appointed by the Chief Justice, with the concurrence of the heads of every OECS State. To ensure their independence, a protocol has developed of judges being deployed in jurisdictions other than those in which they practised or were raised. From time to time, deputy judges of the Eastern Caribbean Supreme Court will be appointed, usually drawn from the practising Bar and they, too, are required to sit in jurisdictions in which they do not practise.

Beyond litigation before the Eastern Caribbean Supreme Court, other forms of dispute resolution exist, but these are encountered infrequently in international practice. For instance, persons dissatisfied with decisions of the BVI Financial Services Commission may bring an appeal to the Financial Services Appeals Board. Alternatively, small contractual claims of under US$10,000 in value may be litigated before the Magistrate's Court.

Enforcement of judgments/awards

Enforcement of local judgments

The court has a wide armoury of powers which enable it to enforce local judgments. Writs of Possession or Execution are available, which enable the Bailiff to be instructed to enforce against land, or against goods, as the case may be. Attachments of debts or charging orders are also available, as are oral examinations, which permit the debtor to be examined in relation to their assets. In addition, the Judgment Summons procedure remains in wide use.

However, the reality of international commercial practice is that it is very rare to see BVIBCs which are either controlled or have assets within the jurisdiction. Even where assets exist within the jurisdiction, they will commonly be limited to shareholdings in other BVIBCs. In such cases, a local judgment will enable the judgment creditor to take advantage of the provisions of Part 48 of the Eastern Caribbean Supreme Court Civil Procedure Rules ("CPR"). This provides the court with the power to grant charging orders (and associated stop notices). However, it is more common to see creditors making an application to appoint a liquidator over a defaulting BVIBC debtor in the alternative.

It is open to a creditor to apply for appointment of a liquidator over a defaulting debtor company where the debt is not the subject of a *bona fide* dispute on substantial grounds (*Sparkasse Bregenz Bank v. Associated Capital Corporation* [2003] ECSC JO618-5). In any case where a judgment (local or foreign) has first been obtained, this is usually easily established. In addition, the debtor company must not have the benefit of a counterclaim which would extinguish its own liability or reduce it to below the statutory minimum of US$2,000.00 (Rule 149 of the Insolvency Rules, 2005).

Enforcement of foreign judgments

Attempts to enforce foreign judgments and to convert them into judgments of the BVI

Court are relatively uncommon. Where it is desired to do so, perhaps in order to obtain a charging order, foreign judgments may be enforced in the BVI at common law, or in one of the limited instances provided for by statute.

The statutory machinery is to be found in:

1. the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964; and
2. the Reciprocal Enforcement of Judgments Act (Cap 65) 1922.

The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964

Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964 provides that the Governor in Council may nominate the High Courts of jurisdictions in which he is satisfied that "*substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court*". To those jurisdictions, the intention was that an application for registration of the foreign judgment might be made under Section 4.

Certain jurisdictions have purportedly been designated, but some doubt exists as to whether or not the designation exercise was carried out effectively.

The Reciprocal Enforcement of Judgments Act (Cap 65) 1922

No such doubts exist in relation to the earlier Reciprocal Enforcement of Judgments Act (Cap 65) 1922. However, as originally enacted, it applied only to judgments given in the High Court of England and Wales, Northern Ireland and the Court of Session in Scotland. It has since been extended to additional jurisdictions, but they are relatively few in number (currently the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia)).

Section 3(1) provides that any such application for registration may be made within 12 months of the date of the judgment where it is just and convenient for the court to do so. Section 3(2) of the Act excludes judgments from the system of registration where: they were obtained by fraud (section 3(2)(d)); an appeal is pending or the time for appealing has not expired (section 3(2)(e)); or it would be contrary to public policy to enforce the award. The BVI court would generally look to English decisions as to the types of conduct which may affront public policy; as a matter of policy, the courts of the BVI will not enforce, directly or indirectly, foreign tax claims. In *JSC BTA Bank v. Mukhtar Ablyazov* (2014) the Court of Appeal held that it was not open to a defendant to use the test of just and convenient in section 3(1) to challenge the underlying processes of the English Court where the tests set out in section (3)(2) had been met. In that case, the defendant wished to challenge the validity of the English judgment on the basis that he had filed an appeal with the European Court of Human Rights ("ECHR"). The court rejected the defendant's argument that his appeal to the ECHR represented an appeal of the English judgments and, noting that the criteria in section 3(2) had been met, held that the judge had been correct to refuse to consider the defendant's case pursuant to a separate consideration of section 3(1).

Section 3(2)(a) of the Act excludes from the system of registration judgments obtained where the original court lacked jurisdiction, or where:

1. in the case of a judgment debtor present within that jurisdiction, he was not served with the proceedings (section 3(2)(c)); or
2. in the case of a judgment debtor not ordinarily resident or carrying on business within the jurisdiction of the home court, he did not submit to the jurisdiction of the court.

This takes a narrow view of jurisdiction. Many common law jurisdictions will assert

jurisdiction over parties not present within the jurisdiction on the discretionary grounds that they are "necessary and proper" parties to ongoing litigation within that jurisdiction. However, in the BVI this does not apply and judgments obtained in the circumstances described above will be excluded from the system of registration.

Where the Act does apply, it has the undoubted advantage of simplicity. All that is required before a judgment may be registered and enforced as if it were a Judgment of the BVI court, is an application under Part 72 of the CPR. The application may be made without notice, but must be supported by evidence. The application must contain certain prescribed information and must exhibit:

1. a duly authenticated copy of the judgment; and
2. details of any interest which has become due under the law of the country in which judgment has been entered.

The simplicity of the without notice application is to be contrasted with the common law route, which is to sue on the judgment itself. The result is much the same, but it can take longer.

Enforcement at common law

At common law, the courts in the BVI will treat any final and conclusive monetary judgment as being a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction in which the judgment was obtained. There is no requirement of reciprocity.

The judgment creditor must:

1. prove the judgment; and
2. show that it is a final and conclusive monetary judgment for a specified sum.

If those matters are established, a retrial of the issues in the action will not be necessary. The creditor may instead apply for summary judgment under Part 15 of the CPR.

However, since the judgment creditor is proceeding by way of a fresh action, he will only be able to proceed in the BVI if he is able to serve the proceedings upon the judgment debtor by a means permitted by Parts 5 and 7 of the CPR.

It will still be possible to defeat an application for summary judgment, or indeed an action founded upon a foreign judgment, even one which is conclusive and made in respect of a specific sum, if:

1. the foreign court did not have jurisdiction in the matter (i.e. the judgment debtor either did not submit to the jurisdiction, or was resident or carrying on business within the jurisdiction and was not duly served with the process);
2. the foreign judgment includes penalties, taxes, fines or similar fiscal or revenue obligations;
3. the judgment was obtained by fraud;
4. recognition or enforcement of the judgment in the BVI would be contrary to public policy; or
5. the foreign proceedings were conducted in a manner which infringes the rules of natural justice.

The position is more complex in relation to foreign judgments which are not for a specified sum of money. In those circumstances, the common law doctrine will not strictly engage, but the creditor may instead seek to avoid a re-trial of the issues by relying upon the equitable principles of estoppel, in essence by arguing that it would be an abuse of the process of the court:

1. to re-litigate matters previously decided in a court of competent jurisdiction. Even where the judgment of the foreign court cannot be enforced at common law, it may nevertheless be possible to argue that the losing party should not re-litigate those issues that were decided by the foreign judgment; and
2. to litigate matters in subsequent proceedings which ought to have been advanced in the original proceedings. As a rule, the courts will expect a party to advance all of his case at the same time, so as to prevent the other party being vexed twice by the same matter (see the rule in *Henderson v. Henderson* 1843-60 All ER Rep 378).

Enforcement of arbitral awards

The BVI is a dependent territory of the United Kingdom which is a party to the New York Convention.

However, on 23 January 2014, the BVI passed the Arbitration Act 2013, which came into force in October 2014. The 2013 Act repealed the Arbitration Ordinance 1976. The New York Convention was also extended directly to the BVI from 24 May 2014.

The 2013 Act seeks to address a number of difficulties in the previous law. The 1976 Ordinance was based on a mixture of old English statutes and is widely considered to be unsuitable to deal with modern commercial litigation. The 2013 Act introduces the UNCITRAL Model Law on Arbitration (as amended on 7 July 2006) to the Territory with some minor exceptions. In addition, the fact that the New York Convention had not previously been extended to the territory meant that BVI arbitral awards had been largely unenforceable outside of the jurisdiction. Until now the BVI has rarely been the seat of arbitration hearings. This is addressed by the establishment of the BVI International Arbitration Centre (or the BVI IAC).

That said, the 2013 Act is likely to have only a limited impact on the enforceability of foreign arbitration awards from New York Convention states that were already capable of enforcement pursuant to the 1976 Ordinance. One important change is that the definition of a Convention State is now wide enough to include the United Kingdom, which will permit enforcement of awards from, for example, the London Court of International Arbitration which had previously been excluded from the former legislation. The 2013 Act also includes provision for the enforcement of arbitral awards from Non-Convention States, which may be refused where it is not just to do so.

Privilege and disclosure

The CPR is loosely modelled on the civil procedure rules currently in force in England. The rules in relation to the disclosure of documents once proceedings have started are similar but with important differences. The court will usually order the parties to provide "standard disclosure". This requires the parties to disclose all of those documents which are "directly relevant" to matters in question in the proceedings (compare with the position in England and Wales which requires disclosure of all documents which adversely affect or support each party's case).

As in England and Wales, there is an obligation to produce a list of documents. The signatory must certify that he accepts responsibility for identifying any individuals who might be aware of any documents, and to list the individuals from whom directly relevant documents have been sought. However:

1. beyond identifying those individuals from whom documents have been sought, there is no express duty to conduct a search, as there is in England; and

2. the standard form list of documents contains none of the questions to be found on the English form in relation to electronic data.

An order may also be made for "specific disclosure". This is an order which requires a party to do one or more of the following things:

1. disclose documents or classes of documents specified in the order;
2. carry out a search for documents to the extent stated in the order; and/or
3. disclose any document located as a result of that search.

The position in relation to disclosure before proceedings have started is more complex. Subject to any argument that sections 7 or 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80 import jurisdiction from England, the BVI has no statutory provision which confers jurisdiction upon the court to order pre-action disclosure.

However, the rule in *Norwich Pharmacal v. Commissioners of Customs & Excise* [1974] AC 133 is alive and well. It was relied upon extensively by JSC BTA Bank in its quest to recover the fruits of the fraud said to have been perpetrated by its former chairman, Mukhtar Ablyazov. In *JSC BTA Bank v. Fidelity Corporate Services & others* [2011] 2 JBVIC 2101, the Court of Appeal reversed a judgment of the Commercial Court judge which doubted whether Registered Agents had the necessary degree of participation to found jurisdiction to obtain relief against them. However, the BVI court will not permit a party to apply for a Norwich Pharmacal order simply to strengthen its own case, and will be less inclined to grant such relief if the applicant already knows of the location of assets, or the identity of a requisite party. The court will be especially slow to make such an order if the effect of it would be to pre-empt the disclosure that is likely to be given in the ordinary course under the CPR. These principles were espoused in *Morgan & Morgan Trust Corporation Limited v. Fiona Trust & Holding Corporation* [2006] ECSC J0403-5 and *TSJ Engineering Consulting Limited v. (1) Al-Rushaid Petroleum Investment Company (2) Al-Rushaid Parker Drilling Limited* [2010] ECSC J0727-3.

The receivers appointed at the behest of JSC BTA Bank by the English Commercial Court over certain of the assets of Mukhtar Ablyazov, established before the Court of Appeal in *Jeremy Outen et al v. Mukhtar Ablyazov* [2011] ECSC J1110-1 in November 2011 that it was within the arsenal of the court, when recognising a foreign receivership order, to order a wide class of third parties to provide such unspecified information or documentation to the receivers as they might reasonably request.

CPR 28.14 provides that a person ordered to provide disclosure who claims a right to withhold disclosure or inspection of documents, must make that claim within the list of documents. Into this category fall documents which are privileged from production. English common law, in relation to the entitlement to maintain a claim for privilege, is followed.

Privilege attaches principally to those documents that have been prepared for the purpose of seeking or providing legal advice, and those documents prepared in contemplation of litigation (see *The Canada Trust Company v. Royal Trust Corporation of Canada* [1998] JBVIC 0801). Documents which were properly marked "without prejudice" or "without prejudice save as to costs" will generally also be exempted from the obligation to produce copies of them. This is a matter of public policy designed to protect genuine negotiations from being admissible in court.

Costs and funding

CPR 64.6(1) provides that the general rule is that the court must order the unsuccessful

party to pay the costs of the successful party. Provisions similar to the Rule 44.3 of the English civil procedure rules appear in CPR 64.63(3) to (6) – permitting the court to make a percentage award and to have regard to the parties' conduct during the course of the proceedings. The court has a wide discretion in relation to the application of these principles, which will not be lightly interfered with on appeal.

The position is much the same with interlocutory applications. Where the interlocutory application is a "procedural application" of a type falling in CPR 65.11(3), the rules provide that the court "*must*" order the applicant to pay the costs of the respondent, "*unless there are special circumstances*". The specified applications are: (a) applications to amend a statement of case; (b) an application for an extension of time; (c) an application for relief from sanctions; and (d) an application which could have been made at a case management conference ("CMC").

Similarities with the English model end at the point of quantification. CPR 65.2 provides that:

> *"if the Court has a discretion as to the amount of costs to be allowed to a party, the sum allowed is to be (a) the amount which the court deems to be reasonable were the work to be carried out by a legal practitioner of reasonable competence; and (b) which appears to the Court to be fair both to the person paying and the person receiving such costs."*

The fairness criterion is an obvious departure from the English model, but is yet to feature prominently in decided local case law.

The CPR provides for no less than five general categories of cost:

1. fixed costs (CPR 65.4);
2. prescribed costs (CPR 65.5);
3. assessed costs on "procedural" applications (CPR 65.11);
4. assessed costs (CPR 65.12); and
5. costs in the Court of Appeal (CPR 65.13) (as amended by the ECSC Civil Procedure (Amendment) Rules 2011 ("the Amendment Rules")).

This leaves aside budgeted costs (CPR 65.8), which operate a little like a "costs cap" in England.

Prescribed costs

Except now in relation to claims within the Commercial Division, the starting point is that where the fixed costs rules do not apply (they apply only to claims for a sum of money in which judgment has been entered in default), the prescribed costs rules apply. CPR 65.5 speaks of it being "the general rule" that those costs should be calculated in accordance with the appendices against the appropriate value. Where the claim is not for a sum of money, the value by default is deemed to be US$50,000, which produces a maximum costs recovery of US$7,500 under the Amendment Rules. It would formerly have been US$14,000.

The court is then invested with a discretion to determine the value of the claim. Such an application should usually be made at the CMC (see CPR 65.6(1)), but it seems that the court will be prepared to entertain such an application even after the conclusion of the proceedings, when the claim for costs comes to be assessed: *Asiacorp v. Green Salt* [2006] 5 JBVIC 3102.

Prescribed costs in the Eastern Caribbean operate to cap the costs which may be recovered *inter partes* to a proportion of the value of the claim (if awarded to the defendant), or to the sum recovered (if awarded to the claimant). By way of example:

- A claim worth US$50,000 will produce a costs recovery of US$7,500, assuming it concludes at trial, and only US$3,375 if it settles when the defence is served.
- A US$1m claim will produce a costs recovery of US$70,000, assuming it concludes at trial.

The position in the commercial division

It can readily be seen that the application of the prescribed costs rules are apt to result in significant under-recovery in relation to the question of costs.

On 15 May 2009 new rules and practice directions governing procedure in the Commercial Division were gazetted, which abolished the application of CPR 65.4 to 65.11 (and in particular, the prescribed costs rules) to litigation in the Commercial Division. (The Court of Appeal confirmed in *Westford Special Situations Fund v. Barefield Nominees BVICVAP* 2010/014 that these changes also have the effect of altering the rules to the quantification of costs in appeals from the Commercial Division.) Instead, a simple mechanism to assess those costs was adopted. This development was widely welcomed: it had been a familiar refrain of the courts, in the BVI in particular, that:

> "*the question of costs in big commercial cases in this Territory is sometimes more protracted and litigious as the cases themselves [sic]. The present application to assess costs is one such example. It took two days to be argued, whereas the application for an anti-suit injunction took one day*" (*Finecroft v. Lamane Trading Corp* [2006] 8 JBVIC 3101).

A similar complaint was made in *Michael Wilson & Partners v. Tigerkhan* [2008] ECSC J0620, where Charles J observed:

> "*Some critics feel that the present costs rules are grossly inadequate for the British Virgin Islands and that large, complex, multi-jurisdictional commercial matters were not sufficiently considered when the rules were drafted. Others consider the costs regime particularly prescribed a windfall. For my part, there appears to be one or two difficulties with the Rules...*"

Until the changes brought into force by the new Commercial Practice Direction, the courts in the BVI had been at the forefront of seeking to construe the rules in a manner which met the justice of cases such as these. For instance, in *Asiacorp***,** Charles J was prepared to work backwards and to fix the value of the claim by reference to the level of costs which she considered to be fair and reasonable. The submission that she should do so was met with an excitable response from the respondent: it is "*preposterous and makes a mockery of the court*", but it was plainly the only way in which substantial justice could be done to the receiving party.

In *Tigerkhan***,** Charles J was again persuaded to meet the justice of the case by holding that if she were wrong in her view that CPR 65.12 applied, she would, in any event, have disapplied the cap. Interestingly, in this context, she held that there was nothing in CPR 65.11 which required the court to limit the costs to between 10% and 100% of the prescribed costs. In an appropriate case, there could be no objection to costs of, say, 200% and 300% being awarded.

Maintenance of litigation and funding

The BVI follows the English common law position in relation to the maintenance of litigation. Except to the extent that it has arguably been disapplied by the rules in relation to prescribed costs, the indemnity principle applies to litigation in the BVI. A litigant will, therefore, be able to recover from his opponent only to the extent that he was contractually liable to his solicitor.

Statutory developments in England in relation to conditional fee and contingency agreements do not apply within the context of contentious business in the BVI, and as such the common law rules against maintenance currently prevent lawyers practising in the BVI from entering into such agreements.

Insurers can and do indemnify their insured in relation to litigation costs, but there is a very limited market for after-the-event litigation products.

Interim relief

Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80 provides that:

> "*an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or a judge thereof, in all cases in which it appears to the Court or judge to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or judge directs*."

CPR Part 17 provides that amongst the interim remedies that the court can grant are interim declarations, interim injunctions, orders directing a party to file and prepare accounts, and orders to deliver up goods. In practice, it is the power at CPR 17.1(j) to make a freezing order which is encountered most frequently. There also exists a power to make search orders.

These wide powers are qualified by the common law rules which have developed in England. In relation to litigation proceedings before the Courts of the BVI, relief may be obtained where:

1. the applicant has a good, arguable case on the merits, meaning "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success" (see *Ninemia Maritime Corporation v. Trave Shiffahrgesellschaft GmBH* [1983] 2 Lloyd's Rep 600);
2. the applicant can establish, with solid evidence, a real risk that the judgment or award may otherwise go unsatisfied;
3. the respondent has some assets, even if it cannot be proved that those assets are within the jurisdiction of the court: see Gee on Injunctions at 12-042; or
4. it is just and convenient to make the order.

The court will always expect the applicant to provide an undertaking in damages, and it may require that the undertaking be fortified with the provision of some form of security.

A nuance particular to litigation offshore is that the courts of its various jurisdictions have taken different approaches to the application of the rule in *The Siskina* [1979] AC 20. *The Siskina* appeared to confine the availability of injunctive relief to cases where substantive proceedings could be tried and finally determined within the jurisdiction.

In England, the effect of the decision has been whittled away – first by legislation (see section 25 Civil Jurisdiction & Judgments Act 1982, subsequently extended by Order in Council to proceedings in other jurisdictions: the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997 No 302); and secondly, by case law. In *Channel Tunnel Group v. Balfour Beatty Construction* [1993] AC 334, the House of Lords was prepared to accept that the court did have jurisdiction to grant interlocutory relief in substantive proceedings brought in England, even if those proceedings had to be stayed to facilitate arbitral proceedings abroad.

In *Mercedes Benz v. Leiduck* [1996] AC 284, the Privy Council held that the Hong Kong Court had *no* jurisdiction to grant a freezing injunction against a foreign defendant in aid

of foreign proceedings, but left open the question as to whether or not such relief might be available where the defendant fell within the territorial jurisdiction of the court. More recently, the House of Lords clarified in *Fourie v. Le Roux* [2007] UKHL 1 what was meant by "jurisdiction" in this context.

Unfortunately, the courts of the offshore world have taken divergent approaches to these developments. The Courts of Guernsey and Jersey refused to follow *The Siskina* (see *Solvalub v. Match Investments* [1998] ILPr 419). Despite initial success at first instance, that trend has not been adopted in the Bahamas (*Grupo Torres SA v. Mees Pierson (Bahamas) Ltd and others* (1998) 2 O FLR 16), nor in Belize (*Securities & Exchange Commission v. Banner Fund International* 1996 54 WIR 123). Draft legislation has been circulated which would bring the position in the BVI more in line with that now prevailing in England, but there is no sign that it will be enacted soon.

The position in the BVI had appeared to be that *The Siskina* was alive and well (see *Alfa Telecom Turkey v. Telisonera* [2009] ECSC J0928-1 and *Sibir Energy Plc v. Gregory Trading SA* [2005] 12 JBVIC 2001). Presumably for similar reasons, in *Pacific International Sport Clubs Limited v. Comerco Commercial Limited* [2005] ECSC J1223-1, Olivetti J observed: "*without deciding the point, as it does not fall for determination, I also understand that the law governing Norwich Pharmacal orders is such that it does not permit an order to be made requiring anyone to disclose information for use in foreign proceedings (a different regime covers this) but in aid of suit in this jurisdiction*".

However, in *Black Swan Investment v. Harvest View* [2010] 3 JBVIC 2301 the opportunity came before the Commercial Division judge to consider the issue afresh. Echoing the approach of the Jersey court in *Solvalub,* Bannister J. decided in *Black Swan* that it would be "highly detrimental" to the interests of important offshore financial centres such as the BVI not to have within its armoury the jurisdiction to grant injunctive relief in aid of foreign proceedings where appropriate. The judge held that it was open to him to resolve the question left open by the Privy Council in *Mercedes Benz* and to "*fill it in this jurisdiction by respectfully adopting the [dissenting] reasoning of Lord Nicholls in Mercedes Benz*". The position of defendants not subject to the territorial jurisdiction of the BVI court did not directly arise on the facts.

Black Swan was settled before an appeal in that case reached the Court of Appeal. However, in *Yukos CIS Investments v. Yukos Hydrocarbons* [2011] ECSC J0926-3, the Commercial Court judge refused to grant injunctive relief, on a number of grounds. The majority of the Court of Appeal upheld this refusal. Materially, he took the view that the *Black Swan* jurisdiction did not engage. *Black Swan*, he explained, "*rests upon the willingness of the Court, in a case where the defendant to foreign proceedings had assets within its jurisdiction, to act in aid of the claimant's prospective entitlement to a money judgment, if successful in the foreign proceedings. It depends upon the assumption that the foreign money judgment will be enforceable by registration or otherwise, in the court within whose jurisdiction the assets are situated. It is this last feature which founds the jurisdiction*."

In *Yukos*, the position was different. Although a claim had been made in the alternative for a money judgment, upon which little or no reliance had been placed during the course of argument, Bannister J. held that there was never likely to be any enforcement activity at all:

> "*if Yukos CIS succeed in the Dutch proceedings, they will not be coming to this jurisdiction to register their judgment because there will be nothing to register. Wincanton will have become indirectly entitled to the shares in the defendants by virtue of its entitlement to the shares in FPH [one of the Dutch vehicles to which the BVI subsidiaries were transferred] and there will be neither need nor reason*

> *for it to trouble this court to assist it to obtain redress. For this reason alone, it seems to me that the Black Swan principle has no application to the present case.*"

In the Court of Appeal, the appellant argued that the judge had confined the *Black Swan* jurisdiction too narrowly, whilst the respondent argued that *Black Swan* was wrongly decided. The court decided that:

1. the BVI court plainly has territorial jurisdiction over the defendants, each of whom were BVI companies (this much was common ground);
2. the judge was wrong (*per* Kawaley, Redhead and Gordon JA) to the extent that he held that he had no jurisdictional (or subject matter) competence to grant interim relief in support of a foreign cause of action which was not designed to obtain a money judgment;
3. however, it did not follow from the preliminary finding that jurisdictional competence exists that it was right to grant interim relief in support of an anticipated foreign non-money judgment (Redhead JA dissenting);
4. Bannister J was right (Redhead JA dissenting) to go on to hold that there was an insufficient factual nexus between the appellant's asserted rights of ownership over the shares of the Dutch parent and the asserted right to freeze and/or appoint a receiver over the assets of the BVI subsidiaries. The appellants claimed merely a right to indirect control of the respondents; the foreign cause of action did not give rise to potential BVI proceedings to enforce such a judgment; and
5. Bannister J was therefore right in substance to hold (Redhead JA dissenting) that the *Black Swan* decision was inapplicable. Indeed, since *Black Swan* relied for its validity upon the proposition of Lord Nicholls that injunctions were granted in aid of prospective judgments, not causes of action, a contrary finding would have been perverse.

The decisions in the cases of *Black Swan* and *Yukos* were explored and followed in the recent case of *Gold Seal Holdings Limited and others v. Paladin Limited and others* [2014] Bda LR 81. Whilst this case was heard in the Supreme Court of Bermuda the decision is of interest, as it related to a company that was resident in the BVI. The presiding judge (Kawaley CJ) summarised in his judgment the issues of jurisdiction (referring in particular to the principles set out in the case of *Mercedes Benz AG v. Leiduck*) and interlocutory relief (paying particular attention to the decisions in *Black Swan* and *Yukos*). The judgment provides in-depth consideration on both points and is certainly worth a read.

In relation to interlocutory relief, the judge followed the principles set out above and assessed whether the applicant had a good arguable case, could demonstrate a risk that he would suffer damage which only an interim injunction could adequately prevent, and/or demonstrate that justice and convenience favoured granting the injunctive relief. The judge ultimately refused to grant interim relief and held that the second defendant's imminent claim in the BVI did not disclose a good and arguable case and (perhaps more importantly) that the most appropriate forum in which to seek both interim and final relief in connection with a dispute over who should control a BVI company is the BVI Court.

The judgment highlights not only the importance of properly preparing evidence to support each claim but is also a good guideline when considering in which jurisdiction to bring a claim and/or apply for interlocutory relief.

International arbitration

As set out above, the Arbitration Ordinance (Cap 6), 1976 was repealed and replaced by the Arbitration Act 2013, which came into force in October 2014.

Due to the infancy of the Act there is very little in the way of authorities that show how the court will approach the new provisions. However, in the recent case of *Sonera Holding B.V. v. Cukurova Holding S.A.* (BVIHC (Com) No. 119 of 2011), Bannister J did consider how the Act has affected the jurisdiction of the court when dealing with cases that have an arbitral element.

In the case in question, Sonera had previously obtained a Convention award against Cukurova and Cukurova had failed to pay as ordered. Sonera applied to the BVI Court to enforce the award and duly obtained judgment. Cukurova applied to set aside the judgment on the principal ground that in making the award of damages, the First Tribunal had exceeded its jurisdiction. This argument was rejected by the BVI court and the Court of Appeal and Privy Council followed suit.

Cukurova then sought to attack the decision of the First Tribunal by commencing further arbitral proceedings, and Sonera applied to the BVI court for an anti-arbitration injunction in an attempt to prevent Cukurova from undermining previous decisions.

When considering the case Bannister J noted that Section 3(2) of the Act confirmed that the court shall not interfere in the arbitration of a dispute, save as provided expressly in the Act. In his judgment, Bannister J gives full consideration to the provisions of the Act, noting that the general provisions (Sections 7-9 and 11-16) apply to domestic arbitrations only. He therefore found that these provisions are incapable of having extra-territorial effect.

In short, Bannister J found that section 10 of the Act has no application in relation to an arbitration with a foreign seat, and decided that the overriding nature of the prohibition contained in Section 3(2)(b) of the Act prevented him from interfering with the arbitration process at all, and he therefore dismissed the application.

The case does give some indication as to the approach of the court. However, the appointment of a former arbitrator as the new commercial judge may lead to differing judgments in the future.

At present, it is, in practice, virtually unheard of to encounter an arbitration clause within commercial contracts which provide for the BVI to be the seat of any arbitration. It is more common to encounter arbitration clauses which provide for a foreign seat of arbitration. In such an event, the foreign arbitral award may then subsequently be enforced or recognised within the BVI, in accordance with the principles and rules set out in the sections above.

Mediation and ADR

The Courts of the Eastern Caribbean have long encouraged mediation and other forms of alternative dispute resolution. By Rule 27.7 of the CPR the court may adjourn a case management conference to enable settlement discussions, or a form of ADR procedure to continue.

A process of court-connected mediation was instituted by Practice Direction 1 of 2003 which created, in each ECSC territory, a national mediation committee. The Practice Direction confers upon the court jurisdiction to refer a dispute to mediation, and provides that the parties "*will not be allowed to opt out of the referral order to mediation, except by order of the Master or Judge and upon adducing good and substantial reasons*".

The BVI now has a growing number of qualified mediators. However, their services are infrequently (if ever) used in international commercial litigation.

Scott Cruickshank
Tel: +1 284 494 6864 / Email: scruickshank@lennoxpaton.com

Scott is the Managing Partner and Head of Litigation of the BVI office. He has considerable experience in areas such as shareholder disputes, insolvency, fraud and asset-tracing, trust litigation, and corporate and commercial disputes generally. Prior to relocating to the BVI in 2008, Scott was a Barrister at the Scottish Bar where he built up a sizeable and successful practice as a corporate and commercial litigator. Scott routinely works with large city law firms, financial institutions and corporate and commercial clients based throughout the world with respect to large multi-jurisdictional disputes and transactions. He has considerable courtroom experience matched with an acute commercial acumen. Chambers Global has variously described Scott as being "very thorough and professional, and provides fantastic client care"; that he has "extensive experience in insolvency and trust litigation"; and that he is "always on the ball, very thorough, very personable and very easy to work with". Scott is a Fellow of INSOL International, being the only BVI practitioner to have successfully completed the INSOL Global Insolvency Practice Course.

Matthew Freeman
Tel: +1 284 494 6864 / Email: mfreeman@lennoxpaton.com

Matthew is an Associate in the Litigation Department of the BVI office. He has considerable experience of corporate and commercial litigation including insolvency, shareholder disputes, trust litigation, fraud and asset tracing. Matthew also has a broad experience of ADR procedures including mediation and arbitration.

He qualified as a solicitor in England and Wales in 2007 (now non-practising), having completed a training contract with a reputable regional firm. In 2013 he moved to a niche practice and continued to advise corporate clients, partnerships and high net worth individuals, and partnerships in relation to a wide range of corporate and commercial disputes. He took up partnership in October 2014 before joining Lennox Paton in April 2015.

Lennox Paton

Flemming House, Wickhams Cay, PO Box 4012, Road Town, Tortola VG1110, British Virgin Islands
Tel: +1 284 494 6864 / Fax: +1 284 494 6048 / URL: http://www.lennoxpaton.com

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