British Virgin Islands

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Territory of the Virgin Islands (as it is officially known) is a largely self-governing British Overseas Territory. 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 jurisdiction 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 differing authorities from the Eastern Caribbean Supreme Court, are routinely relied upon by the courts in the BVI. Authorities of other Commonwealth or common law jurisdictions, such as Canada and Hong Kong, are also frequently cited.

Civil procedure before the BVI courts is governed by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the CPR"), as amended from time to time, and Civil Practice Directions. The CPR is largely based on the original Civil Procedure Rules of England and Wales with important differences.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The superior court of record in 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).

The ECSC consists of:

1. the High Court of Justice; and
2. the Court of Appeal.

The Commercial Division of the High Court of Justice sits permanently in the BVI. The Commercial Court will hear claims and applications brought by litigants of any of the nine members of the ECSC, and they will then provide the criteria for a matter to be placed on the commercial list and proceed to the Commercial Court. The conditions are set out in CPR rule 69A.1:

(1) The matter must be a "*commercial claim*". This means any claim or application arising out of a transaction of trade and commerce and includes any claim related to:
   (a) the law of business contracts and companies;
   (b) partnerships;
   (c) the law of insolvency;
   (d) the law of trusts;
   (e) the carriage of goods by sea, air or pipeline;
   (f) the exploitation of oil and gas reserves;
   (g) insurance and re-insurance;
   (h) banking and financial services;
   (i) collective investment schemes;
   (j) the operation of markets and exchanges;
   (k) mercantile agency and usages; and
   (l) arbitration.

(2) The claim or value of the subject matter to which the claim relates must be at least US$500,000. However, a judge of the Commercial Division has the discretion to include in the commercial list a claim which does not satisfy the condition as to monetary value if they consider the claim to be of a commercial nature and it warrants being placed in the commercial list.

The Court of Appeal is an itinerant court, whose sittings rotate between the nine members of the ECSC. The Court of Appeal usually sits three times a year in Tortola (BVI) in January, May and September of each year, although more urgent matters may be dealt with in other jurisdictions as the need arises. Appeals from the Court of Appeal are sent to the Privy Council in the United Kingdom.

Other forums for 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 Appeal Board. Alternatively, small contractual claims of under US$10,000 may be litigated before the Magistrates' Court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

A civil suit is commenced by the court issuing a claim form, which is served on a defendant along with a statement of claim. The general rule is that a claim form must be personally served on each

defendant (CPR rule 5.1) within six months of the date of issue for service within the BVI and for service of a claim form outside of the jurisdiction, the period is 12 months. An application can be made to extend the time for service.

A defendant who disputes the claim or the BVI court's jurisdiction must file a defence and/or an acknowledgment of service containing a notice of intention to defend within 14 days after the date on which the claim form was served (CPR rules 9.1 and 9.3). Where a defendant has filed an acknowledgment of service, they have 28 days after the date of service of the claim form to file a defence (CPR rule 10.3). Where a defendant fails to file either an acknowledgment of service or a defence within the time periods set out above then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)). Where the court has given permission to serve the claim form and statements of case outside the jurisdiction, it will also make provisions for the dates by which filing and service of the acknowledgment of service and defence have to take place by.

So far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference ("CMC") or a pre-trial review ("PTR"). If an application is made which could have been dealt with at a CMC or PTR, the court must order the applicant to pay the costs of the application unless there are special circumstances (CPR rule 11.3). However, this rule does not apply to matters heard in the Commercial Division (CPR rule 69B.5).

Upon the filing of a defence to a civil claim in the High Court, the court office will fix a CMC to be held no less than four weeks and no more than eight weeks after the defence is filed (CPR rule 27.3). If a party is represented by a legal practitioner, that legal practitioner, or one who is authorised to negotiate on behalf of the client and competent to deal with the case, must attend the CMC and any pre-trial review ("PTR") (CPR rule 27.4). The general rule is that at a CMC the court must consider whether to give directions for: (a) service of experts' reports; (b) service of witness statements; or (c) standard disclosure and inspection. The court must fix a date for a PTR unless it is satisfied that, having regard to the value, importance and complexity of the case, it may be dealt with justly without one. The court must in any event fix: (a) the date on which a listing questionnaire is to be sent out by the court office to the parties; and (b) the trial window period or the trial date (CPR rule 27.5). The above rules do not apply to claims in the Commercial Court. Instead, the claimant must, no later than 14 days after the last party has served his defence, provide to the High Court Registry's Commercial Division Case Management Unit ("the Unit") an agreed written statement of the parties' best estimate of the length of the trial. If no agreement can be reached then separate estimates must be provided by each party. If the longest estimate is more than one full hearing day, the Unit will fix a CMC for the first available date six weeks after the last defendant who intends to defend the claim has filed his defence. At the CMC, in addition to any orders or directions given pursuant to the court's general powers of management conferred by CPR rule 26.1, the court will ordinarily give directions as to:

(a) the nature and extent of any disclosure to be given;

(b) whether and to what extent witness statements are required and whether in all the circumstances certain issues or factual matters can be more conveniently and economically dealt with by witness summaries (whether or not a party is or is not able to obtain a witness statement from the witness in question);

(c) the nature of any expert evidence to be called and the identity of the respective parties' experts and the timetable for exchange of experts' reports;

(d) whether it is appropriate for evidence on one or more matters in issue to be given by a single expert pursuant to rules 32.9 and 32.11;

(e) whether the services of an interpreter will be necessary at trial;

(f) whether or not a pre-trial review should be held; and

(g) such other matters that appear appropriate.

Provided that a party has sufficiently indicated to the other parties and to the court his intention to apply at the CMC, it is not necessary for a party to make an application under CPR rule 28.5 for the disclosure of specific documents or under rule 32.6 for permission to call expert evidence (CPR rule 69B.7).

For urgent matters a party may file a certificate of urgency to seek an early hearing date or request the same at the case management conference stage. The certificate of urgency procedure is, on the whole, used for urgent applications. Apart from these regimes there are no expedited trial procedures.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The BVI court's jurisdiction is based on the proper service of a claim form. To serve outside of the jurisdiction permission must be sought pursuant to CPR rule 7.3. Subsection (3) deals with claims about contracts. This provides that "*A claim form may be served outside of the jurisdiction if*:

(a) a claim is made in respect of a breach of contract committed within the jurisdiction;

(b) a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract (in either case) the contract;

(i) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract;

(ii) is by its terms or by implication governed by the laws of any Member State or Territory;

(iii) was made by or through an agent trading or residing within the jurisdiction;

(iv) was made within the jurisdiction; *or*

(c) the claim is for a declaration that no contract exists."

In *OBM Limited v LSJ LLC*, Indra Hariprashad-Charles, J. cited the dicta of Farwell L.J. in *The Hagen* [1908] P 189 at page 201, holding that the "jurisdiction to subject a foreigner to the jurisdiction of the court has been described as extraordinary and should only be exercised with great care and it remains open to the court to stay a case on the basis of *forum non conveniens*". Hariprashad-Charles, J. held that, in deciding the *forum conveniens*, the court will look first to see what factors there are at which point in the direction of another forum. In that case it was noted that there was no exclusive jurisdiction clause, but rather a choice of law clause. Nevertheless, the court declined jurisdiction, citing the dicta of Brandon, J., in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at page 246, where the court held:

"It seems to be clear, however, that, in general and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the courts of that country. That would be my view, as a matter of common sense, apart from authority."

From the above it can be seen that the BVI court is likely to demure to the provisions of an exclusive jurisdiction clause agreed to by the parties to a contract – a recent application of this can be seen in *Garkusha v Yegiazaryan and Others* BVIHCMAP 2015/0010. Subject to the general principle that agreements cannot be made to oust the jurisdiction of the court, the choice of jurisdiction agreed by contracting parties is on the whole respected. In appropriate cases a choice of law clause may support an argument that the BVI is not the appropriate forum.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The costs of pursuing civil proceedings in the BVI depend on the level of court in which the claim is conducted. The Magistrates' Court, the High Court and the Commercial Division of the High Court each have their own costs regimes and court fees which are payable. In the case of fees, the Commercial Division is the most expensive requiring, for example, the claimant to pay a fee of US$1,000 for each day of a trial.

CPR rule 64.6(1) provides the general rule – the court must order the unsuccessful party to pay the successful party's costs. The position is much the same with interlocutory applications. Where the interlocutory application is a procedural application of a type falling within CPR rule 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 reasonably have been made at a CMC.

CPR rule 65.2 provides for no less than six categories of costs:

1. fixed costs (CPR rule 65.4);
2. prescribed costs (CPR rule 65.5);
3. budgeted costs (CPR rule 65.8) (a party may apply to the court to set a costs budget);
4. assessed costs on "procedural" applications (CPR rule 65.11);
5. assessed costs (CPR rule 65.12); and
6. costs in the Court of Appeal (CPR rule 65.13 (as amended)).

In the High Court, 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) then the prescribed costs rules apply. CPR rule 65.5 says that "the general rule" is that costs should be calculated in accordance with the appendices against the appropriate value of the claim. 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 amended rule. Formerly it would have been US$14,000. The court is invested with the discretion to determine the value of a claim. Such an application should usually be made at the CMC (see CPR rule 65.6(1)), but it appears 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 (see *Asiacorp v Green Salt* [2006] 5JBVIC 3102).

Prescribed costs 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 that it concludes at trial, and only US$3,375 if it settles when the defence is served; and
- a US$1.1 million claim will produce a costs recovery of US$96,750, assuming that it concludes at trial.

CPR rules 65.4 to 65.11 (and in particular the prescribed costs rules) do not apply to cases in the Commercial Division. Instead, a simple mechanism to assess costs has been adopted: at the conclusion of the trial the court will (in the absence of agreement) determine (a) which party should pay costs to another party; and (b) how much in principle (taking into account the provisions of rule 64.6 and any other matter appearing to the court to be relevant in the circumstances) of the costs of the receiving party are to be paid by the paying party. Once the Judge has determined these questions the matter will then be sent for assessment on the basis of those principles (CPR rule 69B.12 and *Olive Group Capital Limited v Gavin Mark Mayhew* BVIHC (Com) 2015/115). A similar process is undertaken in respect of applications in the Commercial Division but these costs are to be assessed summarily unless the application lasted in excess of one hearing day (CPR rule 69B.11).

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The BVI follows the English common law position in relation to the maintenance of litigation. The statutory developments in England in relation to conditional fees and contingency agreements do not apply within the context of contentious business in the BVI. Therefore, at present the common law rules against maintenance prevent lawyers practising in the BVI from entering into such agreements.

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 lawyers. Since the introduction of the Legal Professional Act 2015 the ability of a successful litigant to recover foreign lawyers' fees incurred in litigation had been challenged and precise scope for recoverability was uncertain until the *Garkusha v Yegiazaryan and Others* BVIHCMAP 2015/0010 case which was confirmed in *Shrimpton and Pitcairn Limited v Scriven and Others* BVIHCMAP 2016/0031.

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.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

It is not possible to assign legal title to a chose in action in the BVI. It remains possible for such rights to be transferred in equity. However, to do so, it will usually be necessary to join the assignor of the claim or cause of action to the claim.

As set out above, it is not possible for lawyers to enter into conditional or contingency fee agreements. There is uncertainty about whether it is lawful for non-lawyer third parties to fund litigation. Insurers can and do indemnify their insured in relation to litigation costs.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The security for costs regime in the BVI is governed by CPR Part 24. A defendant, including a defendant to a counterclaim, may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings. On a successful application the amount and nature of the security to be provided is in the court's discretion. Before making an order the court must be satisfied on evidence that it is just to make the order and one or more of the following are established: (a) some other person has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property recovered; (b) the claimant failed to give his address in the form, entered an incorrect address or has changed his address since the claim was commenced with a view to evading the consequences of litigation; (c) the claimant has taken steps with a

view to placing its assets beyond the jurisdiction of the court; (d) the claimant is acting as a nominal claimant and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so; (e) the claimant is an assignee of the right to claim and the assignment was made with a view to avoiding the possibility of a costs order against the assignor; (f) the claimant is an external company; or (g) the claimant is ordinarily resident out of the jurisdiction. On making an order for security for costs the court must also stay the claim until such time as security for costs have been provided in accordance with the terms of the order and if security is not provided by the date specified in the order the claim or counterclaim is struck out. A claimant may invite the Court, as part of its case management functions under CPR rule 26.1, to make a conditional order requiring a defendant to pay into Court part or all of the claimant's estimated costs; such orders are rare.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no specific requirements in the CPR which must be complied with. However, it should be noted that, when making an order concerning costs, both the High Court and the Commercial Division are to have regard to "the conduct of the parties both before and during the proceedings" (CPR rule 64.6(6)(a)). There is support from English authority that this includes the conduct of the parties before proceedings were issued (see e.g., *Groupama Insurance Co Ltd v Overseas Partner Re Ltd* (*Costs*) [2003] EWCA Civ 1846). In practice it is normal in the BVI for parties to engage in pre-litigation correspondence prior to initiating a claim.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In the BVI, limitation periods are treated as a substantive rather than a procedural issue and may provide a complete defence to a claim. They are governed by the Limitation Ordinance (Cap 43). Section 4(1) of the Ordinance provides a limitation period of six years from the date on which the cause of action accrued in respect of actions based on simple contract or tort. Section 4(3) provides a limitation period of 12 years from the date on which the cause of action accrued in respect of actions upon a specialty. Further, Section 4(4) provides that an action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Proceedings are commenced in the BVI by issuing and serving a claim form. The claim form is issued at the High Court Registry and service is effected by the claimant. The general rule is that the claim form must be served personally on each defendant (CPR rule 5.1). A claim form is served personally on an individual by handing it to, or leaving it with, the person to be served (CPR rule 5.3). Personal service must be proved by affidavit (CPR rule 5.5). Service must be effected on a party's legal practitioner where they have been authorised to accept service on behalf of that party and the legal practitioner has notified the claimant in writing that he or she is so authorised (CPR rule 5.6). Service may be effected on a limited company in the following ways:

(a) by leaving the claim form at the registered office of the company;

(b) by sending the claim form by telex, fax or prepaid post or cable addressed to the registered office of the company;

(c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;

(d) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company; or

(e) in any other way allowed by any enactment (CPR rule 5.7).

Service may be effected on a firm or partnership in the following ways:

(a) by serving the claim form personally on a manager of the firm at any place of business of the firm or partnership which has a real connection with the claim;

(b) by serving the claim form personally on any partner of the firm; or

(c) in any other way allowed by any enactment.

However, if the claimant knows that a partnership has been dissolved when the claim is issued, the claim form must be personally served on every person within the jurisdiction whom the claimant seeks to make liable (CPR rule 5.8).

Service by post is proved by affidavit of service by the person responsible for posting the claim form to the person to be served (CPR rule 5.11).

There are also rules governing service on minors and patients.

A party may apply to the court for an order that an alternative form of service be permitted (CPR rules 5.13 and 5.14). In addition, a contract may provide for an agreed form of service (CPR rule 5.16).

The service of foreign proceedings is governed by CPR Part 7. *Nilon Limited and Others v Royal Westminster Investment S.A and ORs* [2015] 4 LRC 584 is the leading decision on service out of the jurisdiction in the BVI and has recently been applied in *Chi Hung Andy Chan and Others v Noble More Group Limited and Others* BVIHC 228 of 2016. A claimant has to satisfy the court of the following three requirements for service out:

(1) In relation to the foreign defendant, there is a serious issue to be tried on the merits (a substantial question of fact or law, or both).

(2) There is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given i.e., the gateways. A good arguable case connotes that one side has a much better argument than the other.

(3) In all the circumstances the forum being seised is clearly or distinctly the appropriate forum for the trial of the dispute and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. Lord Wilberforce in *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1984] AC 50 said: "*In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense*".

The gateways under CPR rule 7.3 are for claims made:

(a) against someone on whom the claim form has been or will be served and:
  (i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
  (ii) the claimant now wishes to serve the claim form on another person who is outside of the jurisdiction and who is a necessary or proper party to that claim;

(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or

(c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction.

And also in relation to:

(a) claims in contract (where the contract provides for the BVI court to have jurisdiction or it was made within the jurisdiction or made by or through an agent trading or residing in the jurisdiction);

(b) claims in tort (where the act causing the damage was committed within the jurisdiction or the damage was sustained in the jurisdiction);

(c) claims concerning property if the whole subject matter of the claim relates to property within the jurisdiction;

(d) claims about companies if the subject matter of the claim relates to:
  (i) the constitution, administration, management or conduct of affairs; or
  (ii) the ownership or control of a company incorporated within the jurisdiction;

(e) claims about trusts if:
  (i) a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction;
  (ii) a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of, or in probate proceedings as defined in Part 68 relating to, a person who died domiciled within the jurisdiction; or
  (iii) a claim if made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument and the trusts ought to be executed according to the law of the BVI and the person on whom the claim form is to be served is a trustee of the trusts;

(f) claims for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction;

(g) claims under an enactment conferring jurisdiction on the court; and

(h) claims to enforce any judgment or arbitral award which was made within the jurisdiction or by a foreign court/tribunal and is amenable to be enforced at common law.

An application may be made to the court for permission to serve out of the jurisdiction without notice but must be supported by affidavit evidence setting out the grounds on which the application is made, the deponent believes that the claimant has a claim with a realistic prospect of success and in what place, within what country, the defendant may probably be found (CPR rule 7.5).

A claim form may be served out of the jurisdiction by the methods provided for in CPR rule 7.9 (service through foreign governments, etc.), rule 7.11 (service on a state), in accordance with the law of the country in which it is to be served or by the claimant or the claimant's agent personally (CPR rule 7.8). Where such service is impracticable, the claimant may apply for an order under CPR rule 7.8A for an order that the claim form be served by a method specified by the court.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

A party may apply for, and the court has the jurisdiction to grant an interim remedy such as an injunction at any time, including after judgment has been given or before a claim has been made. The court may only grant an interim remedy before a claim has been made if the matter is urgent or it is otherwise necessary to do so in the interests of justice. However, unless the court orders otherwise, a defendant may not apply for an interim order before filing an acknowledgment of service (CPR rule 17.2).

CPR rule 17.1 sets out the list of interim remedies available to the court which include:

(a) an interim declaration;

(b) an interim injunction;

(c) an order authorising a person to enter any land or building in the possession of a party to the proceedings;

(d) an order directing a party to prepare and file accounts relating to the dispute;

(e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;

(f) an order for a specified fund to be paid into the court or otherwise secured where there is a dispute over a party's right to the fund;

(g) an order for interim costs;

(h) an order for the:
  (i) carrying out of an experiment on or with relevant property;
  (ii) detention, custody or preservation of relevant property;
  (iii) inspection of relevant property;
  (iv) payment of income from relevant property until a claim is decided;
  (v) sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly; or
  (vi) taking of a sample of relevant property;

(i) an order permitting a party seeking to recover personal property to pay a specified sum of money into the court pending the outcome of proceedings and directing that, if the party does so, the property must be given up to the party;

(j) an order restraining a party from:
  (i) dealing with any asset whether located within the jurisdiction or not; and
  (ii) removing from the jurisdiction assets located here;

(k) an order to deliver up goods;

(l) an order requiring a party to admit another party to premises for the purposes of preserving evidence, etc., (search order); and/or

(m) an order for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay (order for interim payment).

Each interim remedy has its own criteria which needs to be met by an applicant. In relation to interim injunctions, the BVI court applies the test set out in the English authority of *American Cyanamid v Ethicon Ltd* [1975] AC 396: there must be a serious issue to be tried, damages would be an inadequate remedy, and on

the "*balance of convenience*" test an injunction should be granted particularly having regard to preserving the *status quo*.

In relation to freezing injunctions, the court will look to apply the principles set out in English authority, namely that the applicant can show that he has a good arguable case, failure to obtain an injunction would involve a real risk that any judgment would not be satisfied, and that it is just and convenient to grant the injunction (see *Polly Peck International plc v Nadir* [1992] 4 All ER 769). Following the Commercial Court's decision in *Black Swan Investments ISA v Harvest View Limited* (BVIHCV (Com) 2009/399), free-standing freezing injunctions in support of foreign proceedings may be obtained without the need for the same to be tied to a domestic cause of action in the BVI. Applicants for both ordinary and freezing injunctions will normally be required to provide an undertaking in damages and will often have to provide fortification of the undertaking.

3.3 What are the main elements of the claimant's pleadings?

Pursuant to CPR rule 8.6, the claim form must include a short description of the nature of the claim, specify any remedy that the claimant seeks and give an address for service in accordance with CPR rule 3.11. The claimant must set out in the claim form or in the statement of claim an account of all of the facts on which he relies which must be as short as practicable. In addition, the claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case and, in respect of the recovery of any property, the claimant's estimate of its value must be stated. Finally the statement of claim must include a certificate of truth in accordance with rule 3.12. (CPR rule 8.7).

3.4 Can the pleadings be amended? If so, are there any restrictions?

Part 20 of the CPR (as amended by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) (No 2) rules (No 48 of 2014)) governs changes to statements of case. CPR rule 20.1(1) provides that a statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference. However, CPR rule 20.1(3) provides that a statement of case may not be amended without permission if the change is sought to be made after the end of a relevant limitation period. This includes adding or substituting parties after such a period. In such circumstances the court, on an application, may allow an amendment to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as the claim for which the party wishing to change the statement of case has already claimed a remedy in the proceedings (CPR rule 20.2). The court will only allow an amendment to correct a mistake as to the name of a party where the mistake was genuine and not one which would in all of the circumstances cause reasonable doubt as to the identity of the party in question (CPR rule 20.2).

CPR rule 20.1(2) provides that the court may otherwise give permission to amend a statement of case at a case management conference or at any time on an application to the court. CPR rule 20.1(3) sets out the factors to which the court must have regard to when deciding whether to grant such an application. These are:

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and/or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

There is no limit as to when the claimant can abandon all or part of its claim. As a general rule a claimant may discontinue all or part of a claim without the permission of the court. However, where an element of the claim has required any party to give an undertaking to the court or the court has granted an interim injunction the permission of the court is required before the claimant can discontinue. Likewise, where a claimant has received an interim payment in relation to a claim, the claimant may discontinue only with the permission of the court or the where the defendant who made the payment consents in writing. If there is more than one claimant, every claimant has to consent in writing or the court's permission is required to discontinue. If there is more than one defendant the claimant may discontinue all or part of the claim against all or any of the defendants.

To discontinue, a claimant must serve a notice of discontinuance on every other party to the claim and file a copy of it following CPR rule 37.3. Discontinuance takes effect on the date when the notice of discontinuance is served and a claim or that part of the claim is brought to an end on that date. The incidence of discontinuance does not affect any proceedings relating to costs or the defendant's right to apply to have the notice set aside.

Unless the parties agree or the court orders otherwise, a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued up to or before the date on which the notice of discontinuance was served. If only part of the claim is discontinued, the claimant is liable for the costs relating to the part discontinued and unless the court orders otherwise, the costs for which the claimant is liable will not be quantified until the conclusion of the rest of the claim. If a claimant discontinues a claim after the defendant has filed a defence and then makes a subsequent claim against the same defendant arising out of facts which are the same or substantially the same but has failed to pay the defendant's costs of the discontinued claim, the court may stay the subsequent claim until the outstanding costs have been paid.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The requirements of a defence are set out at CPR rule 10.5. It must set out all of the facts on which the defendant relies to dispute the claim in a statement which must be as short as practicable. A defendant must say which (if any) allegations in the claim form or statement of claim:

(a) are admitted;

(b) are denied;

(c) are neither admitted nor denied, because the defendant does not know whether they are true; and

(d) the defendant wishes the claimant to prove.

If a defendant denies any of the allegations in the claim form or the statement of claim he or she must state the reason for doing so,

and if the defendant intends to prove a different version of events from that given by the claimant, the defendant must set out his or her own version in the defence. In relation to any allegation which a defendant does not admit or deny and put forward a different version of events, the defendant must state its reasons for resisting the allegation. A defendant must also identify in or annex to the defence any document which is considered to be necessary to the defence.

A defendant is not permitted to rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there unless the court gives permission or the parties agree to the same (CPR rule 10.7).

It is also possible for a defendant to rely on a defence of set-off or to bring an ancillary claim against either the claimant (i.e., a counterclaim) or a claim against an additional party. A counterclaim or additional claim should be pleaded in the same way as a claim (CPR Part 18).

4.2 What is the time limit within which the statement of defence has to be served?

Generally a defendant who disputes the claim or the BVI court's jurisdiction must file a defence in the period of 28 days after the service of the claim form. An acknowledgment of service containing a notice of intention to defend can be filed within 14 days after the date of service of the claim form (CPR rules 9.1 and 9.3). If no acknowledgment of service is filed within 14 days or no defence is filed within the prescribed time periods then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes, it is possible for a defendant to bring an ancillary claim against a third party. This is pleaded in the same way as a counterclaim (see CPR Part 18).

4.4 What happens if the defendant does not defend the claim?

CPR Part 12 contains provisions under which a claimant may obtain default judgment by an application in Form 7 made to the court office without trial where the defendant has failed to file a defence within the prescribed time periods or an acknowledgment of service.

Pursuant to CPR rule 12.4, a claimant may only obtain judgment for a failure to file an acknowledgment of service in respect of a claim for a specified sum of money. CPR rule 12.5, deals with judgments for a failure to defend, in all claims where the claimant has proved service of the claim form and statement of claim or an acknowledgment of service has been filed but the period for filing a defence and any extension agreed by the parties or ordered by the court has expired.

Pursuant to CPR rule 12.9, a claimant may apply for default judgment on a claim for money or on a claim for delivery of goods against one or more defendants and proceed with the claim against the other defendants. However, if the claim cannot be dealt with separately from the claim against the other defendants, the court may not enter judgment against that defendant and must deal with the application at the same time as it disposes of the claim against the other defendants.

Following default judgment, unless the defendant applies for and obtains an order for the judgment to be set aside pursuant to CPR Part 13, the defendant will only be heard on the assessment of damages (provided that they give the appropriate notice in Form 31), the form of any other remedy, costs, the enforcement of the judgment and the time period for payment of the judgment debt (CPR rule 12.13).

4.5 Can the defendant dispute the court's jurisdiction?

CPR rule 9.6 provides that a defendant will not lose any right to dispute the court's jurisdiction by filing an acknowledgment of service. Further, CPR rule 9.7 provides that a defendant who disputes the court's jurisdiction may apply to the court for a declaration to that effect but he must first file an acknowledgment of service. Such an application must be made within the period for filing a defence, which includes any period of extension granted by the court, or by agreement of the parties.

Where the defendant has been served outside of the jurisdiction and contends that the court should not exercise its jurisdiction in respect of any proceedings, the defendant may apply to the court for a stay and a declaration to that effect. Again, before doing so the defendant must first file an acknowledgment of service if he or she has not previously done so (CPR rule 9.7A).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The addition and substitution of parties is governed by CPR Part 19. CPR rule 19.2 provides that a claimant may add a new defendant to proceedings without permission at any time prior to the CMC. The claimant does so by filing at the court office an amended claim form and statement of claim. The same rule also provides that the court may add a new party to the proceedings without an application if: (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue. In addition, the court may order a new party to be substituted for an existing one if: (a) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or (b) the existing party's interest or liability has passed to the new party. The court may add, remove or substitute a party at the CMC. However, the court may not add a party (except by substitution) after the CMC on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the CMC.

Special provisions apply in relation to adding or substituting parties after the end of a relevant limitation period. The court may only do so if: (a) the addition or substitution is necessary; and (b) the relevant limitation period was current when the proceedings were started. The same is only "necessary" if the court is satisfied that:

(a) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;

(b) the interest or liability of the former party has passed to the new party; or

(c) the new party is to be substituted for a party that was named in the claim form by mistake for the new party (CPR rule 19.4).

A person may not be added or substituted as a claimant unless that person's written consent is filed with the court office (CPR rule 19.3(4)).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, CPR Part 26 provides the court with broad case management powers including the power to consolidate proceedings. In so doing, the court is to have regard to "the overriding objective" set out in CPR rule 1.1(1) to "enable the court to deal with cases justly". CPR rule 1.1(2) provides that dealing justly with the case includes:

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the:

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues; and

(iv) financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

5.3 Do you have split trials/bifurcation of proceedings?

It is not unusual for the BVI court, and in particular for the Commercial Division, to order a split trial. This typically arises where an assessment of damages is likely to involve different evidence from that to be advanced on the issue of liability and the court is of the view that a trial on the latter first is likely to save costs in the event that the claimant is unsuccessful. Again, the court has the power to order a split trial pursuant to its broad case management powers in CPR Part 26 and specifically CPR rule 26.1(3). In making any such order, the court is required to have regard to the overriding objective in CPR Part 1 as set out above (see, for example, *Moorjani Caribbean Limited v Ross University School of Medicine School of Veterinary Medicine (St. Kitts) Limited* SKBHCV 2013/0204).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The majority of civil cases are heard in the High Court, for which there is no specific case allocation system. In order for a claim to be placed in the Commercial List of the High Court, the claim must be a "*commercial claim*" within the meaning set out in CPR rule 69A.1(2) and the claim or the value of the subject matter to which the claim relates must be at least US$500,000. However, the court has the discretion to include a matter in the commercial list notwithstanding that it has not satisfied the required monetary value if it "considers the claim to be of a commercial nature and warrants being placed in the commercial list" (CPR rule 69.1A(4)).

A commercial claim may be placed in the commercial list at the time that it is filed or on an application by a party at any time before the first CMC. In the former case, the legal practitioner for the claimant or applicant filing a claim must file a certificate to the effect that the claim is appropriate to be treated as a commercial claim and setting out facts relating to the claim that demonstrate this (CPR rule 69A.4). In addition, the court may place in the commercial list any claim or application of its own motion where it appears that the claim or application is a qualifying claim and that it is appropriate for the claim to be placed in the commercial list. Where a claim is allocated in this way, any party may apply and in the case of a claim proceeding by way of claim form, at any time before the close of pleadings for the claim to be transferred to another list (CPR rule 69B.2).

The Magistrates' Court also has jurisdiction to determine small contractual claims of under US$10,000.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts in the BVI have a broad range of case management powers set out in CPR Part 26 which they exercise to meet the overriding objective. See the answer to question 3.2 above regarding interim applications and the court's case management powers more generally. The general rule is that costs follow the event such that, depending on the applicable costs regime, at least some of the successful party's costs will be met by the losing party.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The BVI courts have a wide discretion to impose sanctions on a party that has failed to comply with a court order. These may include adverse costs orders against a party and/or a party's legal representatives and the striking out of pleadings. In extreme cases it may be possible to bring committal proceedings against a defaulting party pursuant to CPR Part 53.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Yes, CPR rule 26.3 provides that "*in addition to any other power under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that:*

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings; *or*

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of CPR Part 8 or 10" (form and content of claim form, statement of case and defence).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, this is governed by CPR Part 15. Pursuant to CPR rule 15.2, the court may give summary judgment on the claim or on a particular issue if it considers that:

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue.

However, CPR rule 15.3 prevents summary judgment being given in certain types of proceedings, such as admiralty proceedings *in rem*, probate proceedings and defamation.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The general rule is that a claimant may discontinue all or part of a claim without the permission of the court (CPR rule 37.2). See the answer to question 3.5.

The court has broad powers to "*stay the whole or part of any proceedings generally or until a specified date or event*" (CPR rule 26.1(q)). In so doing the court will look to meet the Overriding Objective set out in CPR Part 1, as discussed above.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The rules governing the disclosure and inspection of documents are set out in CPR Part 28. The usual direction given by the court at a CMC is that the parties should give "*standard disclosure*". This means that a party must disclose all documents which are directly relevant to the matters in question in the proceedings (CPR rule 28.4). Pursuant to CPR rule 28.1(4), a document is "directly relevant" if:

(a) the party with control of the document intends to rely on it;

(b) it tends to adversely affect that party's case; or

(c) it tends to support the other party's case.

However, the rule in the English authority of *Peruvian Guano* is expressly disapplied.

As in England and Wales, there is an obligation to produce a list of documents by way of disclosure. A person who claims the right to withhold inspection of documents must make that claim within their list, for example, documents which are privileged.

Applications for pre-action disclosure and specific disclosure for a document or class of documents can also be made (*Yao Juan v Kwok Kin Kwok and Crown Treasure Group Limited* BVIHC(COM) 2013/0162).

There are no special rules concerning the disclosure of electronic documents nor any special practices for conducting e-disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The rules have been codified in the Evidence Act, 2006 ("the Evidence Act") and largely follow English law. A party will not be required to disclose the contents of confidential documents or communications which were created for:

(a) the dominant purpose of providing legal advice;

(b) the dominant purpose of providing or receiving legal services in relation to anticipated or pending legal proceedings; or

(c) the dominant purpose of preparing or conducting legal proceedings.

A party will also generally be exempt from disclosing documents which are marked "*without prejudice*" or "*without prejudice save as to costs*".

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The English common law rule in *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133 (disclosure orders against third party wrong-doers) is followed in the BVI. It was relied upon extensively by JSC 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] 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 the found jurisdiction to obtain relief against them. It has recently been applied in *PT Ventures SGPS SA v Tokeyna Management Limited* (BVIHC (Com) 2015/0134 and *UVW v XYZ* (*A Registered Agent*) BVIHC(COM) 108 of 2016. 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. Bannister J emphasised that it is not open for litigants in foreign proceedings to seek to obtain information from BVI entities about their assets which ought to be sought in the foreign jurisdiction where the main proceedings were under way (*Bascuñan and others v Elsaca and others BVIHC2015/0128 applying Osetinskaya v Usilett Properties Inc* BVIHC(Com) 2013/0037).

The receivers appointed at the behest of JSC BTA Bank by the English Commercial Court over certain 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.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The courts in the BVI, as part of their case management functions or upon application by a party for specific disclosure or a *Norwich*

Pharmacal Order, may make orders for disclosure of documents or classes of documents. *QVT Fund V LP et al v China Zenix Auto International Group Ltd et al* BVIHC(COM) 0026 of 2014 is a recent case example demonstrating the role the court plays in disclosure within civil proceedings.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

CPR rule 28.17(1) provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless: (a) the document has been read to or by the court, or referred to in open court; or (b) (i) the party disclosing the document and the person to whom the document belongs; or (ii) the court, gives permission. In any event the court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to in open court. Such an application may be made by any party or person to whom the document belongs.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The rules governing the form of evidence in the BVI are set out in Parts 29–33 of the Civil Procedure Rules, the Evidence Act 2006, the Oaths Act, 1911 and the common law. As set out above, under the CPR the parties are normally required to provide advance disclosure of all "*directly relevant*" material before trial. In the usual course, the court will give directions at a CMC for the exchange of expert reports and witness statements on which the parties seek to rely at trial. Hearsay evidence is admissible at trial provided that adequate notice identifying the hearsay notice is given to the other parties in advance.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The types of evidence which are admissible include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence provided adequate notice is given.

Pursuant to CPR rule 29.1, the court may control evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means, as to:

(a) the issues on which it requires evidence; and

(b) the way in which any matter is to be proved.

Subject to the control exercised by the court set out above, expert evidence is permitted pursuant to CPR Part 32. This is generally required to be in written form and should be seen to be the independent product of the expert uninfluenced as to the form or content by the demands of the litigation. CPR rule 32.9 provides that the court may direct expert evidence on a particular issue to be given by a single expert.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Written witness statements of fact for each witness of fact are generally exchanged by the parties prior to trial and stand as the evidence-in-chief of the witnesses to be called. Witnesses giving evidence at court are normally cross-examined before the court. Reluctant witnesses may be compelled to attend court upon the issue and service of a witness summons (CPR Part 33).

The court may give leave for witnesses to give evidence by videolink.

The rules governing the form of witness statements and affidavits are set out in CPR Parts 29 and 30. A party may apply for an order for a person to be examined before the trial or the hearing of any application (CPR rule 33.7). Generally (and subject to any directions given by the court), the examination must be conducted in the same way as if the witness were giving evidence at trial. With the consent of the parties, the court may order that the evidence of a witness be taken as if before an examiner, but without an examiner being appointed or present (CPR rule 33.9).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Part 34 sets out the rules governing experts and assessors. Pursuant to CPR rule 32.2, expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. CPR rule 32.3 provides that it is the duty of an expert witness to help the court impartially on matters relevant to his or her expertise and that this duty overrides any obligation to the person by whom he or she is instructed or paid. CPR rule 32.13 provides that an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions.

CPR rule 32.4 sets out the way in which the expert is to carry out his or her duty. The expert must:

(a) provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness's expertise;

(b) state the facts or assumptions upon which his or her opinion is based, and must consider and include any material fact which could detract from his or her conclusion;

(c) state if a particular matter or issue falls outside his or her expertise;

(d) state if the opinion of an expert witness is not properly researched with an indication that the opinion is no more than a provisional one;

(e) state if the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without qualification and give that qualification; and

(f) communicate to all parties any change of opinion on a material matter after service of the expert's report.

An expert may apply to the court for directions to assist them in carrying out their functions (CPR rule 32.5). Further, the court may direct a meeting of experts instructed by the parties and specify the issues which the experts must discuss (CPR rule 32.15). Thereafter, expert witnesses must prepare for the court a statement setting out which issues they agree and which issues they disagree, with the reasons for disagreeing. The court may direct expert witnesses to prepare an agreed statement of the basic 'science' which applies to matters relevant to their expertise. There is no provision in the CPR for what is colloquially known as "*hot tubbing*" experts – the process of calling expert witnesses to give evidence and be cross-examined concurrently.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court has the power to make summary and default judgments (see above).

The court's judgment can be for damages (e.g., lost contractual profits) or an order that a defaulting party perform their obligations under a contract (equitable remedy of specific performance). The BVI court also has the power to give declaratory relief.

A wide variety of orders may be made by the court in the BVI including but not limited to:

(a) injunctions (both prohibitory and mandatory);

(b) consent orders (agreement between the parties as to the terms of the order); and

(c) Tomlin orders (a form of contractual consent order the terms of which are set out in a schedule which remains confidential to the parties save for enforcement in the event of breach).

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court may award damages for loss, including economic loss. As in most other common law jurisdictions, damages are generally aimed at compensating a victim rather than at punishing a wrongdoer. Where the loss suffered is negligible, nominal damages are normally awarded. Every judgment debt carries interest at a rate of 5% *per annum* from the time judgment is entered until it is satisfied (s7 Judgments Act Cap 35).

See above in relation to the powers of the court relating to costs.

9.3 How can a domestic/foreign judgment be recognised and enforced?

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 companies registered in the BVI ("BVICs") 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 BVICs. In such cases, a local judgment will enable the judgment creditor to take advantage of the provisions of Part 48 of the CPR. This provides the court with the power to grant charging orders (and associated stop notices). But it is more common to see creditors making an application to appoint a liquidator to the defaulting BVIC debtor.

It is open to a creditor to apply for the appointment of a liquidator to 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 exceeds its own liability to the creditor or reduces it to below the statutory minimum of US$2,000 (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 have been relatively uncommon in the past. Where it is desired to do so, perhaps in order to obtain a charging order over shares or apply for a receiver to be appointed by way of equitable execution to recover a judgment debt, foreign judgments may be enforced in the BVI at common law, or in limited instances, 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*". 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, and Northern Ireland and the Court of Session in Scotland. It has since been extended to the Bahamas, Barbados, Belize, Bermuda, Trinidad & Tobago, Guyana, St Lucia, St Vincent, Grenada, Jamaica, Nigeria and New South Wales (Australia).

Section 3(1) provides that an application for registration may be made within 12 months of the date of the judgment and the court may make an order when it is just and convenient for it to do so. Section 3(2) of the Act excludes judgments: which were obtained by fraud (Section 3(2)(d)); where 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 but as a matter of policy in the BVI the courts 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 registration of 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.

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 infringed 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 decided before 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).

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

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

An appeal is made in the case of an appeal from the High Court by filing a notice of appeal (CPR rule 62.3). The notice of appeal must be filed: (a) in the case of an interlocutory appeal where leave is not required within 21 days of the date the decision appealed against was made; (b) in an interlocutory appeal where leave is required, within 21 days of the date when such leave was granted; or (c) in the case of any other appeal, within 42 days of the date when judgment is delivered or the order is made, whichever is the earlier.

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

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

No, there are not.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently encountered method of alternative dispute resolution in the BVI is arbitration. However, at present, parties normally conduct their arbitrations in other jurisdictions (such as the London Court of International Arbitration) and then seek to enforce the terms of the awards in the BVI. Until now the BVI has rarely been the seat of arbitration hearings but this has been addressed by the establishment of the BVI International Arbitration Centre (the BVI IAC) and recent changes to the BVI legislation.

On 23 January 2014, the BVI passed the Arbitration Act 2013 which came into force on 1 October 2014. The 2013 Act repeals and replaces the previous 1976 Ordinance. The New York Convention was also extended 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 older English statutes and was widely considered to be unsuitable to deal with modern commercial litigation. The 2013 Act introduces the UNICITRAL 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 directly to the territory meant that BVI arbitral awards were largely unenforceable outside of the jurisdiction.

An 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 ("LCIA"), which had previously been excluded under 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 just to do so.

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.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Please see the answer to question 1.1 above.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In the BVI virtually all commercial matters are capable of being referred to arbitration or mediation. At present, however, very little ADR takes place within the jurisdiction.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Please see the answer to question 1.1 above.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

An arbitral award is binding and final. Parties can only appeal on a point of law and will not be able to do so where the right to appeal is not expressly provided for in an arbitration agreement as the 2013 Act does not automatically provide for such a right.

Settlement agreements which are reached through mediation are contracts and are, therefore, enforceable as such if the requirements for a valid contract are satisfied. Where the court orders mediation, there is a requirement for the mediator to lodge a certificate of non-compliance if a party to the claim fails to attend the mediation session, whether or not its legal practitioners attend. In such circumstances costs penalties may apply.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The BVI International Arbitration Centre is the main alternative dispute resolution institution.

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Scott is the Managing Partner and Head of Litigation of the British Virgin Islands 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" (2013); that he has "extensive experience in insolvency and trust litigation" (2014); that he is "always on the ball, very thorough, very personable and very easy to work with" (2015); and that he is an "experienced practitioner who is well regarded, with sources highlighting his combination of detailed legal knowledge and good commercial judgement" (2016). Scott is also a Fellow of INSOL International, being the first BVI Practitioner to have successfully completed the INSOL Global Insolvency Practice Course.

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Matthew is a Senior 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 appears frequently before the BVI Commercial Court and the Court of Appeal and 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 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.

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Lennox Paton is a leading offshore commercial law firm with offices in The Bahamas, the British Virgin Islands, and London. It is widely recognised for its expertise, professionalism, responsiveness and commitment to excellence. We have a team of multi-faceted lawyers whose diverse backgrounds and talents contribute valuable knowledge, experience and creativity to the firm and its clients.

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