

BVI litigation briefing: Significant changes to court rules governing service out of the jurisdiction come into effect from 31 July 2023

Briefing Summary: This briefing summarises the key changes to Part 7. It does not deal with the changes to other aspects of the ECSC CPR.

Service Area: Dispute Resolution and Litigation, Restructuring and Insolvency

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On 31 July 2023, significant changes to the Eastern Caribbean Supreme Court Civil Procedure Rules ("**ECSC CPR**") will come into effect. Arguably the most significant changes for parties to litigation in the BVI Commercial Court are the amendments to ECSC Part 7, governing service of proceedings out of the jurisdiction. The amended Part 7 introduces a new regime whereby there will no longer be a requirement to seek the leave of the Court to serve proceedings out of the jurisdiction in the majority of cases. The new Part 7 also introduces other changes which will improve the efficiency of the commencement of claims involving foreign parties, including the introduction of new jurisdictional gateways and amendments to the rules relating to alternative service. The changes are expected to substantially improve the efficiency of progressing claims against foreign parties by removing some of the more burdensome hurdles previously encountered in the early stages of such proceedings.

Introduction

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

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The fact that leave was required before a foreign party could be served meant that the claimant would often have to wait typically 4 to 6 weeks after filing the application for leave for the application to be listed, heard and determined, before it could get on with service of the claim. The old rules were also unclear on their face as to whether they permitted service of court processes which were not "claims", in the strict sense of the word, such as the service of interim orders (e.g. injunctions) before a claim had been issued, and over the years certain gaps had been exposed in the gateways for service out.

The amendments to Part 7, which will apply to all cases except those where a trial has already been listed from 31 July 2023, seek to address these issues by adding to the jurisdictional gateways, expanding the scope of the rules to all *court processes* (including notices of application and orders for interim remedies before a claim has been filed), and largely removing the requirement to seek the permission of the court to serve out of the jurisdiction. They have also subtly changed the threshold for the test for alternative service in a way that appears to broaden the court's discretion to make an order for alternative service.

Service out without leave

The amended Rule 7.2 will permit service of court processes without the court's permission where:

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

New gateways

The new rules expand the jurisdictional gateways for service out to a significant extent:

- Rule 7.3(7)(c) has been added, expressly providing for service out of the jurisdiction of a claim relating to the insolvency of a BVI company. This will be welcomed by insolvency practitioners, as it clarifies that claims by a company in liquidation against non-resident shareholders, directors and others can more easily be served out of the jurisdiction.

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- Rule 7.3(11) is a new provision which expressly permits service out of the jurisdiction where an application is made for interim relief where proceedings have been or are about to be commenced in a foreign jurisdiction. This addresses the decision of the Privy Council in **Convoy Collateral v Broad Idea** [2021] UKPC 24 in which Lord Leggatt held that under the old ECSC CPR, it was not permissible for a claim for to be served out of the jurisdiction where the only relief sought was a freezing injunction. This new gateway is a significant development as it opens the door to BVI court granting interim relief such as freezing injunctions against parties out of the jurisdiction even where there are no substantive proceedings contemplated in the BVI court.
- Finally, a new gateway has been introduced by Rule 7.3(12) where a claim is made for a costs order against a person who is not a party to the BVI proceedings. This addresses the lacuna identified in **Halliwel Assets Inc. et al v Hornbeam Corporation et al** BVIHCMAP2015/0001 (12 October 2015) which had held that the third party against whom a costs order was sought would need to be joined to the proceedings before the application could be served out of the jurisdiction.

Service of processes other than claims

Rule 7.17 further clarifies that an application (other than an originating application), an order or notice issued, made or given in any BVI proceedings can be served on parties outside the BVI without the court's permission where the provisions of rule 7.2 apply.

Cases where leave is still required

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

As to alternative service, Rule 7.10, which replaces the old Rule 7.8A, removes the previous requirement to prove that service would be "*impracticable*", which had generally been held to be a relatively high threshold (see, for example, the Court of Appeal's decision in **Katunin v VTB Bank** BVIHCMAP 2015/0004 and 2015/0007). The new test is that the claimant must show that conventional service "*cannot reasonably be effected*". Whilst it remains to be seen how the BVI court will interpret this requirement, we consider that the "reasonableness" test is likely to be seen as giving the court a slightly broader discretion to order alternative service in appropriate cases, as compared to the old "impracticability" test.

The ability to apply for leave is also preserved where the claimant simply desires to serve a court process or document outside the jurisdiction with the leave of the court, even though the requirements of rule 7.2 are otherwise satisfied. This may be appropriate in cases where the Claimant is sufficiently uncertain that a certificate cannot be provided, but we expect that applications for leave to serve out will rarely be pursued, save where an order for alternative service is sought.

Challenging service

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

The new rules require the court to consider such applications in two stages. At stage 1, the court will have to determine (i) whether the claimant has satisfied the court that service out of the jurisdiction was permitted by the court rules (ii) that the claimant has a good cause of action and (iii) the case is a proper one for the court's jurisdiction.

Only where the claimant has satisfied stage 1, will the court go on to consider stage 2, which is where the court will determine if the defendant has satisfied the court that the case is not a proper one for the court's jurisdiction.

This procedure is separate from the procedure under Rule 9.7 to dispute the Court's jurisdiction whether or not proceedings have been served out of the jurisdiction. In practice, it is likely that many jurisdictional challenges will continue to be brought on the basis of both Part 7 and Rule 9.7, in the alternative.

Key takeaways

Applications for leave to serve court processes outside the jurisdiction are typically uncontroversial *ex parte* hearings. Once the claim falls within a jurisdictional gateway, the court routinely permits service out without significant scrutiny of the application documents. Despite that, applications for leave to serve out can be time consuming and expensive, in particular because the claimant is under a duty of full and frank disclosure, which increases the evidential burden on the applicant, and consequently the time and costs involved.

Challenges to service and/or the BVI court's jurisdiction have always been, and will continue to be, raised by foreign parties and so jurisdictional challenges will remain a common feature of litigation in the BVI. By removing the need to seek the initial leave of the court prior to service, the new rules seem to recognise this fact, and now deal with the issue of service out of the jurisdiction in a sensible and pragmatic way, without incurring costs or taking up the court's time on what is often an uncontroversial *ex parte* hearing.

The expansion of the jurisdictional gateways is also welcomed in filling some of the gaps identified in past cases, as is the potential softening of the test for alternative service.

Taken together, these changes represent a welcome development for claimants in the BVI Commercial courts, as they are likely to improve significantly the efficiency of bringing claims against foreign parties, and they remove some of the gaps in the old gateways which had led to extensive satellite litigation over issues of jurisdiction and service.

If you are considering taking action against a person located outside the BVI, please feel free to reach out to a member of our team at Carey Olsen.

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