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# Litigation

British Virgin Islands  
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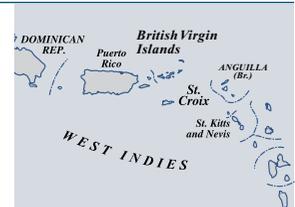
# BRITISH VIRGIN ISLANDS

## Law and Practice

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## 1. General

### 1.1 General Characteristics of the Legal System

#### Sources of Law

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

#### Judicial Process

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

#### Precedent

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

### 1.2 Court System

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

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

#### The High Court

The High Court handles civil litigation not within the remit of the Commercial Court. There are two High Court judges.

#### The Commercial Court

The Commercial Court was established in 2009 to hear commercial cases. Most are BVI-specific although some are referred from other jurisdictions within the ECSC. The criteria relevant to whether a case is suitable for the Commercial Court are principally subject matter and value. Whilst some commercial claims continue to be heard in the High Court, most international cases are heard in the Commercial Court. The Commercial Court has exclusive remit over corporate insolvency matters. There are currently two Commercial Court judges.

#### The Eastern Caribbean Court of Appeal (EC Court of Appeal)

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

#### The Judicial Committee of the Privy Council

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

### 1.3 Court Filings and Proceedings

#### Filings

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

#### Documents Available to the Public

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

- claim form;
- notice of appeal;
- judgment or order made in the case; and
- with the court's leave, any other document.

All other documents remain confidential unless referred to in open court.

For particular sensitivities, the court file may be sealed to prevent public access. The court may anonymise names to protect confidentiality, and hold private hearings.

#### Hearings

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

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

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

## 1.4 Legal Representation in Court Regulation

Legal practice is primarily regulated by the Legal Profession Act 2015 (LPA). This restricts practice of BVI law to persons admitted in the BVI holding a valid practising certificate (legal practitioners). It is an offence for any other person to practise BVI law. Foreign lawyers cannot conduct cases unless BVI admitted.

### Rights of Audience

Legal practitioners are divided between barristers and solicitors.

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

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

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

Litigation funding is permitted in appropriate cases, where it serves the interests of justice.

The Commercial Court recently approved litigation funding but there is little relevant BVI jurisprudence. Each funding agreement needs to be considered in context. The primary concern is to ensure access to justice rather than interference with it, and that the funding agreement does not cede control of the litigation to the funder or provide for extortionate returns. Other parties should not be unfairly prejudiced by the arrangement.

### 2.2 Third-Party Funding: Lawsuits

The only published decision of the BVI Commercial Court approving third-party funding related to funding for claims by liquidators of an insolvent company. It is generally accepted that where a claimant is insolvent, third-party funding will be approved.

There is no reason to believe that third-party funding should not be permitted for any form of claim, but each case will need to be considered on its facts, under the test referred to in **2.1 Third-Party Litigation Funding**.

### 2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is usually available for plaintiffs not defendants, except where a defendant has a counterclaim. Most funders

will consider funding counterclaims, applying usual underwriting criteria.

### 2.4 Minimum and Maximum Amounts of Third-Party Funding

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

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

### 2.5 Types of Costs Considered under Third-Party Funding

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

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

### 2.6 Contingency Fees

The LPA makes provision for contingency fees for non-contentious business but not expressly for contentious business.

The Code of Ethics under the LPA provides that legal practitioners can enter into a contingency fee agreement "provided that such fee is fair and reasonable".

It is not certain whether contingency fees may be used for litigation, but the Commercial Court has approved their use where there would otherwise be limited access to justice. Legal practitioners may be prepared to act on a contingent basis in appropriate cases.

No guidance is available as to what is a fair and reasonable fee.

### 2.7 Time Limit for Obtaining Third-Party Funding

There are no specific time limits for obtaining third-party funding. Generally, a party will seek funding prior to issuing, but a funder may be prepared to provide funding at a later stage.

## 3. Initiating a Lawsuit

### 3.1 Rules on Pre-action Conduct

There are no specific rules relating to pre-action conduct, and no requirement to send a letter before action prior to issuing a claim.

Litigation is required by the EC CPR to be conducted consistently with the “Overriding Objective”, which provides that cases must be disposed of fairly and proportionately with a view to saving expense where possible.

That creates an expectation that parties should attempt to resolve a dispute prior to issuing a claim. The court may exercise case management powers to sanction a party (usually in costs) if a party’s pre-action conduct is inconsistent with the Overriding Objective.

### 3.2 Statutes of Limitations

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

Key limitation periods are:

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

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

### 3.3 Jurisdictional Requirements for a Defendant

Jurisdiction is conferred by service.

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

A defendant not domiciled or ordinarily resident in the BVI can usually only be served out of the jurisdiction with the court’s leave. Exceptions include where a foreign party has contractually agreed to accept service in the BVI and has appointed an agent in the BVI to accept service.

EC CPR Part 7 governs circumstances in which service can be effected outside the jurisdiction and sets “gateways”, one of which must be satisfied to obtain leave to serve out. Gateways include:

- where the foreign defendant is a necessary or proper party to a claim against a person who has been served within the jurisdiction;
- where the claim relates to a contract conferring the BVI courts with exclusive jurisdiction, or to a contract governed by BVI law, or to a contract made within the jurisdiction, or where a breach of contract was committed in the BVI;

- where a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction;
- where a claim is made to enforce any judgment or arbitral award which was made by a foreign court or tribunal and is amenable to be enforced at common law;
- where the whole subject matter of the claim relates to property within the BVI;
- where the subject matter of the claim relates to the constitution, administration, management or conduct of the affairs, or the ownership or control of, a company incorporated within the BVI;
- where 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, or a claim is made in relation to the administration or other questions relating to a BVI law trust;
- where a claim is made for restitution where the defendant’s alleged ability 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; and
- where a claim is made under an enactment which confers jurisdiction on the court.

If a claim falls into one of the above, the claimant can apply for permission to serve out. The court has discretion whether to grant it, but needs to be satisfied that the BVI is the most appropriate forum for determination of the claim and that the claimant can establish a good arguable case.

A defendant served outside the jurisdiction is entitled to apply to the court to have service set aside, and/or to seek a stay on jurisdictional grounds. In making that application, the defendant is not deemed to submit to the jurisdiction.

### 3.4 Initial Complaint

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

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

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

Certain proceedings can be issued by a “fixed date claim form”, generally used for proceedings which can be determined summarily, without full trial, and certain specified claim categories. A fixed date claim is supported by affidavit evidence.

### 3.5 Rules of Service

#### Service within the Jurisdiction

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

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

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

#### Service out of the Jurisdiction

Service on defendants out of the jurisdiction generally requires the leave of the court and is governed by EC CPR Part 7 (see **3.3 Jurisdictional Requirements for a Defendant**).

Once leave has been granted, the method of service will be subject to local rules in the relevant jurisdiction where the claim is to be served, and/or international treaties that may apply. The BVI is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

### 3.6 Failure to Respond

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

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

### 3.7 Representative or Collective Actions

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

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

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

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

### 3.8 Requirements for Cost Estimate

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

## 4. Pre-trial Proceedings

### 4.1 Interim Applications/Motions

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

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

### 4.2 Early Judgment Applications

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

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

#### Summary Judgment

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

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

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

## Strike Out

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

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

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

## 4.3 Dispositive Motions

See 4.2 Early Judgment Applications.

## 4.4 Requirements for Interested Parties to Join a Lawsuit

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

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

The court has broad powers to add a party where:

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

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

## 4.5 Applications for Security for Defendant’s Costs

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

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

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

## 4.6 Costs of Interim Applications/Motions

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

## 4.7 Application/Motion Timeframe

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

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

In practice, most non-urgent applications in the Commercial Court are classed as “ordinary” applications (requiring a hearing of less than two hours) and are subject to standard directions, namely:

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

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

Most ordinary applications are determined within four to eight weeks of issue.

Applications expected to require a hearing of more than two hours are “special” applications, and may be subject to case management directions with a different timetable. Special applications can take longer to be determined because more court

time is required and the supporting documentation is likely to be more voluminous.

## 5. Discovery

### 5.1 Discovery and Civil Cases

Discovery is available in civil cases.

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

Disclosure may also be ordered pursuant to the court's exercise of its jurisdiction in accordance with the principles set out in *Norwich Pharmacal Company & Ors v Customs and Excise* [1973] UKHL 6 and (less commonly) *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274 CA, as set out in **5.2 Discovery and Third Parties**.

Asset disclosure orders are often ordered when making a freezing order.

Discovery is separate process from taking witness testimony. Witness evidence is given by a witness statement, or sometimes affidavit.

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

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

### 5.2 Discovery and Third Parties

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

### Norwich Pharmacal Orders

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

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

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

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

### Bankers Trust Orders

A Bankers Trust order is potentially available where:

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

### 5.3 Discovery in This Jurisdiction

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

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

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

## 5.4 Alternatives to Discovery Mechanisms

Not applicable.

## 5.5 Legal Privilege

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

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

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

## 5.6 Rules Disallowing Disclosure of a Document

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

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

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

The BVI courts have a broad jurisdiction to grant injunctive relief when it is just and convenient. It is impossible to list of the full types of injunctive relief available or the precise circumstances in which the courts will grant any particular form of such relief.

Types of injunctive relief which may be awarded include:

- freezing orders restraining a respondent from disposing or dealing with its assets where an applicant can show that it has a good argument, on the merits of its underlying claim against the respondent, that there is a real risk that unless

restrained the respondent will take steps to dissipate its assets to avoid the enforcement of any judgment against it, and that it is just and convenient to grant the relief sought - orders may direct provision of information about the location of property or assets;

- prohibitory injunctions restraining a respondent from acting in a particular way where shown that there is a serious question to be tried on the merits of its underlying claim against the respondent, that an award of damages would not be an adequate remedy and that on the balance of convenience it is just and convenient to grant the relief sought;
- proprietary injunctions protecting property and trust assets, applying the same principles as those applicable to the granting of a prohibitory injunction; and
- anti-suit injunctions restraining proceedings, including where parallel proceedings have been commenced in another jurisdiction where it is just and convenient to do so with the court weighing various factors depending on the circumstances of the case.

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

### 6.2 Arrangements for Obtaining Urgent Injunctive Relief

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

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

### 6.3 Availability of Injunctive Relief on an Ex Parte Basis

As a matter of principle, orders will not generally be made against a person without that person having had an opportunity to be heard. There are some exceptions including extreme urgency where notice is not possible. An application may proceed without notice where giving notice may defeat the purpose of the application. Given the nature of freezing orders, and the requirement to prove a real risk of dissipation, they are commonly made without notice.

### 6.4 Liability for Damages for the Applicant

The applicant for injunction will normally be required to give an undertaking in damages to compensate the respondent if it is subsequently determined that the respondent has suffered loss as a result of the injunction and that the respondent should be

compensated for that loss. The applicant may also be required to give such an undertaking in relation to losses suffered by third parties affected by the injunction.

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

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

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

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

## 6.6 Third Parties and Injunctive Relief

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

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

## 6.7 Consequences of a Respondent's Non-compliance

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

# 7. Trials and Hearings

## 7.1 Trial Proceedings

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

Trials are conducted similarly to most other common law jurisdictions. The trial involves advocacy by BVI legal practitioners.

Oral argument and examination of witnesses of fact and experts takes place before a single judge at first instance.

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

## 7.2 Case Management Hearings

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

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

## 7.3 Jury Trials in Civil Cases

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

## 7.4 Rules That Govern Admission of Evidence

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

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

## 7.5 Expert Testimony

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

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

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

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

## 7.6 Extent to Which Hearings are Open to the Public

The general rule in the BVI is that hearings, including trials, are open to the public. However, ex parte hearings (relating to injunctions, for instance) are not open to the public, and the court may also order that other hearings are held in camera.

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

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

## 7.7 Level of Intervention by a Judge

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

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

## 7.8 General Timeframes for Proceedings

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

More complex claims may take over a year to progress from initial filing to trial and final judgment. The trial can last for a few days or weeks, or even longer for high value multimillion or billion dollar claims with multiple parties.

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

## 8. Settlement

### 8.1 Court Approval

Parties may reach an acceptable resolution of a dispute, which is no less binding and final than if the court had determined the dispute at trial.

Court approval of the terms of settlement is not required, but the court must make an order recording the settlement and bringing the proceedings to an end. Usually the parties embody the terms of settlement in a consent order (known as a Tomlin order) which technically “stays” (rather than ends) the proceedings other than for the purposes of giving effect to the settlement agreement.

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

### 8.2 Settlement of Lawsuits and Confidentiality

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

Therefore, the settlement agreement would not be on the file and be publicly accessible. That the proceedings were settled by consent, however, would be publicly accessible, recorded in the court order.

### 8.3 Enforcement of Settlement Agreements

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

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

### 8.4 Setting Aside Settlement Agreements

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

If one party to the settlement agreement wishes to challenge it, it is usually necessary to commence a new action to set aside the settlement agreement or declare it invalid. However, if all parties to the settlement agree that it should be set aside, and it is embodied in a court order, then the court can set it aside

in the existing proceedings with the consent of all parties. The stay would be lifted and the existing proceedings would resume.

## 9. Damages and Judgment

### 9.1 Awards Available to the Successful Litigant

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

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

### 9.2 Rules Regarding Damages

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

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

### 9.3 Pre and Post-Judgment Interest

Pre-judgment interest's availability depends on the nature of the claim and, for example, whether loss to judgment is compensated for by another means (within damages awarded) or if payment of interest was contemplated or contractually provided for in the circumstances giving rise to the claim.

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

### 9.4 Enforcement Mechanisms of a Domestic Judgment

Domestic judgments are enforceable as soon as made: an enforcement order should be applied for. Modes of enforcement include:

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

### 9.5 Enforcement of a Judgment from a Foreign Country

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

## 10. Appeal

### 10.1 Levels of Appeal or Review to a Litigation

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

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

Decisions of the Court of Appeal may be subject to appeal to the Privy Council, sitting in London. Circumstances in which appeals may be made to the Court of Appeal are outlined below.

## 10.2 Rules Concerning Appeals of Judgments

### Final Decisions in Civil Proceedings

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

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

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

### Interlocutory Decisions

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

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

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

Leave to appeal to the Privy Council is required from a decision of the Court of Appeal on an interlocutory decision of the High Court. Leave will be granted where a prospective appellant can show that the question involved in the appeal is one of great general or public importance or otherwise ought to be submitted to the Privy Council.

### Certain Other Decisions Where Leave Is Required

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

## 10.3 Procedure for Taking an Appeal

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

Application for leave to appeal must be made to the High Court within 14 days of the order. If refused by the High Court, an application may be made to the Court of Appeal within seven days of the High Court's refusal.

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

### High Court to the Court of Appeal – Where Leave Is Not Required

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

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

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

### From the Court of Appeal to the Privy Council

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

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

## 10.4 Issues Considered by the Appeal Court at an Appeal

The appeal issues are defined by the notice of appeal and any counter-notice filed. Parties may seek permission to amend those notices, which is a matter of discretion for the Court of Appeal.

The appeal is a review, not a rehearing.

In general, new points not explored at first instance, ought not to be taken on appeal, although there is a discretion to permit such points.

## 10.5 Court-Imposed Conditions on Granting an Appeal

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

## 10.6 Powers of the Appellate Court after an Appeal Hearing

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

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

## 11. Costs

### 11.1 Responsibility for Paying the Costs of Litigation

The court has broad discretion to award costs and may order costs against third parties.

In the Civil Division of the High Court there are regimes for fixed costs and prescribed costs calculated in accordance with the CPR. The Civil Division may also make orders for costs to be assessed, the regime that operates in the Commercial Court.

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

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

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

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

### 11.2 Factors Considered When Awarding Costs

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

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

The general rule does not apply:

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

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

### 11.3 Interest Awarded on Costs

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

It is possible that the court may order pre-judgment interest on costs, from the date on which the costs order was made, but there is no clear authority on that.

## 12. Alternative Dispute Resolution

### 12.1 Views of Alternative Dispute Resolution within the Country

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

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

Mediation is often considered and has led to settlement of major cases, but less so than in cases before the English Commercial Court.

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

## 12.2 ADR within the Legal System

There is no formal requirement for parties to take part in ADR and no specific sanction for refusing to do so. However, general conduct and reasonableness of parties is relevant when assessing costs. If a party unreasonably refuses to engage in ADR, this may be reflected in costs.

## 12.3 ADR Institutions

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

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

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

Issues of recognition and enforcement are also governed by the EC CPR.

### 13.2 Subject Matters Not Referred to Arbitration

Matters of corporate or individual insolvency, criminal matters, and family matters may not be referred to arbitration. Furthermore, any matters contrary to the public policy of the BVI, (such as gambling) may not be referred to arbitration.

Most commercial disputes in the BVI may be determined by arbitration, including shareholder disputes and joint ventures.

### 13.3 Circumstances to Challenge an Arbitral Award

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

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

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

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

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

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

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

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

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

tion awards) is that enforcement of arbitral awards is mandatory unless otherwise shown.

The BVI Court is generally pro-arbitration and will not usually refuse to enforce, and takes a narrow view of public policy exceptions.

## 14. Recent Developments

### 14.1 Proposals for Dispute Resolution Reform

Various amendments to the CPR are under consideration following the establishment of a Rules Review Committee in 2019. Amendments under consideration include whether to remove the requirement for permission to serve a claim out of the jurisdiction.

Statutory amendments which are currently under consideration include provision that the BVI Court has jurisdiction to grant injunctive relief in support of foreign proceedings.

### 14.2 Impact of COVID-19

The impact of COVID-19 has been limited. After a short hiatus, when anything other than urgent hearings were put off, the High Court and Commercial Court began operating remotely almost as normal and have since conducted all hearings, including urgent injunction hearings and full trials, by video link with appearances of counsel and witnesses from within the territory and outside it. Filing and service rules have temporarily been relaxed to allow for extended use of electronic means during physical lockdown periods. There has been no exceptional suspension of limitation periods.

**Carey Olsen** has a global BVI dispute resolution and insolvency practice comprising 14 fee earners, including five partners, with two based in Asia and one in London. The team represents clients across a range of contentious and non-contentious matters and is recognised for its expertise in both international and domestic cases, including investment funds, corporate, commercial and civil disputes, banking, financial services and trusts litigation, restructuring and insolvency, and fraud and asset tracing claims. From mediation to trial advocacy, the firm

successfully guides its clients through the full range of disputes, from multiparty, cross-jurisdictional corporate litigation to domestic claims before the local courts. It has also represented clients before the Privy Council and many of its cases have established judicial precedents that are referred to in jurisdictions around the world. Carey Olsen advises on Bermuda, British Virgin Islands, Cayman Islands, Guernsey and Jersey law across a global network of nine international offices.

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