Service out of the BVI: Revolution or Evolution?

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The 2023 amendments to the Eastern Caribbean Supreme Court Civil Procedure Rules included changes to Part 7, which sets out the rules for service out of the jurisdiction. Claimants no longer have to apply for the court's permission to serve court process out of the jurisdiction.

These amendments have been described by commentators as controversial and revolutionary. They are not. They represent a measured evolution of the court's approach to service out that is consistent with the way other courts approach the issue; do not change the substantive limits on the cases over which the ECSC will exercise jurisdiction; and do not change the claimant's burden of proof on a challenge.

In a world where national courts increasingly recognise that there is competition for international litigation, the amendments to the ECSC CPR enable the BVI court to attract claimants by making it easier to start and serve international proceedings.

The new process

First, the service out provisions now extend beyond a claim form to a statement of claim, notice of application, affidavit in support of the claim if that is required, an order for an interim remedy and any permission to serve court process without the statement of claim. The inclusion of notices of application together with a new gateway addresses the problem with which the Court of Appeal grappled in Halliwel Assets Inc v Hornbeam Corporation BVIHCMAP2015/0001 in respect of service out of the jurisdiction of a notice of application seeking a third party costs order.

Secondly, the court may set aside service of court process if the claim is not listed in rule 7.3. That rule is the same as the list of cases contained in the old rule save for the addition of cases relating to insolvency, relief in aid of foreign proceedings and costs orders against non-parties.

Thirdly, a claimant has a choice of either serving without the court's permission or applying for permission.

Where a claimant does not seek the court's permission, then it must meet the following requirements:

- The court process is listed in rule 7.3
- The claimant files and serves a certificate identifying the gateways relied upon and certifying the signatory's belief as to there being a good cause of action, that the court is the appropriate forum and that the proposed method of service does not infringe the law of the foreign state.

Where a claim either is not permitted under rule 7.2 – most obviously where alternative service is sought – or where a claimant wishes to obtain leave to serve out, a claimant can apply ex parte for leave to serve out. This process is the same as before the rule change.

Applications to set aside service

The context of an application to set aside service is now different where a claimant has taken advantage of service without leave: a court has not previously considered the service out limbs: the cause of action, the gateway and forum. That is why rule 7.8 expressly provides that on a set aside application it is for the claimant to satisfy the court on each of these elements.

The international context

In 2013 Lord Sumption identified a pragmatic approach to service out in Abela v Baadarabi [2013] UKSC 44 at [53]

"The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ("We command you ..."). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."

The English CPR generally still require a claimant to obtain permission to serve out of the jurisdiction. However where a claim is one which the Court has power to determine as a result of agreement that the English Court has jurisdiction in accordance with the Hague Convention, no permission is required: see CPR 6.33. Similarly, Australia requires a claimant to obtain permission to serve out of the jurisdiction. But other countries have taken a different approach:

the USA and Canada are longstanding examples, and Hong Kong permits service out without permission in some circumstances.

More recently, New Zealand and the DIFC have permitted claims to be served out of the jurisdiction without permission. Of these two examples the DIFC has taken a broader approach. Rule 9.53 provides:

"Given the international nature of the DIFC, permission to serve process outside the DIFC is not required, but it is the responsibility of the party serving process to ensure he complies with the rules regarding service of the place where he is seeking to effect service."

A defendant may still dispute the Court's jurisdiction or argue that it should not exercise its jurisdiction.

The New Zealand provisions for service out were considered by the Court of Appeal in Commerce Commission v Viagogo AG [2019] NZCA 472. It was argued before the Court of Appeal that "a foreigner resident abroad will not lightly be subjected to the local jurisdiction". In addressing this, Goddard J held at [83]:

"The High Court Rules in relation to service out of New Zealand are designed to achieve a balance between the need for practical justice to be done in a world where cross-border dealings are ever more common, and the burden on a foreign defendant of being required to defend proceedings in New Zealand. We do not consider that any further gloss on those rules is helpful, or appropriate in the current day."

Finally ...

To adapt Lord Sumption in Abela, the new ECSC approach to service out of the jurisdiction is pragmatic and in the interests of the efficient conduct of litigation. It has evolved from the approach adopted in England and in other offshore jurisdictions, but is consistent with the approach of other jurisdictions. The ease with which proceedings can be served out of the BVI is a factor that litigants can take into account when choosing the BVI as the jurisdiction in which to commence proceedings, but it is hardly revolution.

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