Will the BVI follow the DIFC USA and New Zealand?

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Civil Procedure Rules Review

The Eastern Caribbean Supreme Court, including the BVI, is conducting its most wide-ranging review of its Civil Procedure Rules in 20 years.

Towards the end of 2019 the Chief Justice appointed Justice of Appeal Webster to chair a Rules Review Committee which included a representative of each of the bar associations in the ECSC jurisdiction and a number of appointees. The recommendations of the Committee were outlined last week by Webster JA and Ventose J, who also served on the Committee, to a conference organised by the ECSC Bar Association, the OECS.

Service out of the jurisdiction

One of the recommendations that is most likely to affect the BVI Commercial Court is the recommendation for the removal of the requirement in CPR Part 7 that the court's permission is required before a claim form can be served out of the jurisdiction. Since so much of the BVI's Commercial Court caseload involves service out of the jurisdiction, such a move would make the commencement of proceedings before the BVI Commercial Court significantly simpler.

Other jurisdictions

The removal of leave to serve out would represent a departure from the English practice, although a different approach is identifiable now in England. As Lord Sumption observed in Abela v Baadarani[1]:

> "It should no longer 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 ECSC would be far from the first jurisdiction to adopt this approach. Obvious examples that have adopted this approach are the Dubai International Financial Centre, New Zealand and the

United States. The New Zealand Court of Appeal recently endorsed the approach in Commerce Commission v Viagogo AG[2] :

> "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."

The approach that jurisdictions have taken to the removal of the permission stage differs. For example, both the US Federal Rules of Civil Procedure and the DIFC Rules simply enable a defendant to challenge jurisdiction or forum after service. The DIFC Rules provide simply:

> "9.53 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."

The New Zealand Rules provide some safeguards up front in the form of a requirement that the case come within a list of gateways and a notice to a defendant identifying the grounds relied on by the plaintiff in serving without leave. The rules set out the burdens on the parties on a challenge to jurisdiction or forum.

The BVI

A significant proportion of BVI Commercial Court cases involve a foreign defendant. Whilst the removal of leave to serve out would make the issue and service of proceedings significantly easier in some cases it would not be a blanket removal of safeguards.

First, there is no reason why the ECSC should not follow the New Zealand approach of focusing the mind of the claimant on merits, gateways and forum by an appropriate certificate.

Secondly, where a claimant also seeks interim relief to be served on a foreign defendant then it is likely that the Court would consider the strength of the case against the service out criteria as one of the factors going to the discretion whether or not to grant relief. That was the approach adopted by the New Zealand Court of Appeal in Commerce Commission v Viagogo AG.

Thirdly, where the claimant seeks to serve by alternative means, the proposed changes to the rules would not remove the need for an application to the court for permission in that regard.

Next steps

There is certainly an argument that the old rules on forum should no longer apply to an offshore jurisdiction. Focus on the *forum non conveniens* factors, such as location of witnesses, as part of the rules identified by onshore jurisdictions is obviously less apt now. Courts around the world have identified technological solutions, making it possible to see and hear witnesses by video link. That

is not something yet addressed in the review of the ECSC CPR.

Webster JA identified that further consultation will take place on the Committee's recommendations before changes are made. At present it is not clear how long the process of consultation and finalising amendments will take, but it is to be hoped that it will reach a conclusion as quickly as possible and that there will be resources to carry out regular reviews to develop the rules further.

Nicholas Burkill is the BVI office head of dispute resolution at Ogier and was appointed by the Chief Justice to the ECSC Rules Review Committee, having previously served two terms on the English Rule Committee.

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[1] [2013] UKSC 44 at [53]

[2] [2019] NZCA 472 per Goddard J at [83]

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