

A Landmark for BVI Litigation – the Commercial Court

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WHEN THE ANNALS OF HISTORY are recorded, 2009 ought, in a very real sense, to be regarded as a landmark year for commercial litigation in the British Virgin Islands (BVI). For the year saw not only the establishment of a dedicated Commercial Court in the jurisdiction, but the arrival of its first judge and the opening of a brand new, state-of-the-art court building to house the new facility.

First, some background. The BVI is a member of the Eastern Caribbean Supreme Court (the ECSC), which comprises nine jurisdictions, each of which is served by one or more permanent High Court judges. A common Court of Appeal, which sits in each of the jurisdictions in rotation, serves the ECSC.

Several years ago, following negotiations between the ECSC and the BVI government, the decision was made to establish a dedicated Commercial Court to serve the entire system, but with its physical presence within the BVI, in a reflection of the quantity and quality of commercial litigation in the territory.

In his speech to mark the opening of the new 2009/2010 law year, the

Honourable Chief Justice Hugh Rawlins said of the Commercial Division:

“This Division is intended to specialise in and bring a new and dynamic dimension to cross-border litigation ... The aim of this division of the Court is to facilitate the speedy and efficient resolution of commercial cases in our system, in a manner that permits the Court to maintain a competitive international profile.”

Hitherto, the ECSC countries have adopted a common set of procedural rules – the Civil Procedure Rules (CPR), governing all key aspects of the procedural steps in litigation. The Commercial Court, quite sensibly, has sought to amend these rules in order to provide a procedural framework specifically designed to meet the needs of modern commercial litigation, principally through the introduction of a new Part 69A of the CPR.

Part 69A was added to the CPR by the Eastern Caribbean Supreme Court Civil Procedure Rules (Application to the Virgin Islands) (Amendment) Order, 2009. Aside

from a few notable exclusions, Part 69A for the most part mirrors Part 58 of the English Civil Procedure Rules, 2009. The definition of a ‘commercial claim’ is a wide one, and means any claim or application out of the transaction of trade and commerce, and includes claims relating to:

- the law of business contracts and companies;
- partnerships;
- the law of insolvency;
- the law of trusts;
- the carriage of goods by sea, air or pipeline;
- the exploitation of oil and gas reserves;
- insurance and re-insurance;
- banking and financial services;
- collective investment schemes;
- the operation of markets and exchanges;
- mercantile agency and usages; and
- arbitration.

Although not expressed, one would assume that ‘claim’ in this context includes counterclaims. Further, the use of the expression ‘and includes’ necessarily suggests that the foregoing list is not exclusive. It is notable that the Commercial

Court is available to parties from any member of the ECSC, although it remains to be seen the extent to which other jurisdictions make use of the facility.

In addition to passing the definitional test in order to qualify as a commercial claim, a claim must also satisfy the monetary value test. The claim or the value of the subject matter to which it relates must be at least USD500,000. The commercial judge retains the discretion to include in the list a claim that has not satisfied the monetary value test notwithstanding the definitional and monetary value test, if he considers that the claim is of a “commercial nature and warrants being placed on the commercial list”. There is no guidance as to when a claim will “warrant being placed on the commercial list”. No doubt, a highly material consideration must be that the substance of the dispute is sufficiently specialised to justify being heard by a judge with expertise in the area.

There is also a positive obligation on the part of the legal practitioner for the claimant to file a certificate to the effect that the claim is an appropriate one for treatment as a commercial claim. Even with this certificate, the commercial judge may require that a claim be transferred to any other list if he is not satisfied that the claim is commercial. In practice, it is not anticipated that difficulty will arise in relation to allocation of BVI-based cases to the Commercial Division.

Other noteworthy changes introduced by Part 69A are the requirement that parties include a statement of value in the claim form and that a reply be filed 21 days after service of the defence. Under the non-commercial, old CPR, a reply (if any) was required to be filed 14 days before the case management conference (CMC). This often became impractical, since parties are rarely given that much notice of the fixing of a CMC, which led to applications for an extension of time in which to file a reply being made at the first CMC. These applications were, and are, invariably granted, resulting in the CMC proper being adjourned to a later date. It became commonplace for the first CMC to be ineffective.

By requiring that parties file their reply, if necessary, after service of a defence, Part 69A should reduce the need for adjournments and introduce

a welcome degree of certainty which was previously lacking. Of course, it must also be remembered that many commercial cases in the BVI do not even reach the stage of a CMC, since they focus and conclude at the stage of seeking urgent interim relief, or involve jurisdictional challenges.

An important change has also been proposed in respect of amendments of statements of case. Under the old CPR, a party was at liberty to amend its statement of case (and could amend it as often as it wished) until the CMC was held. At that point, effectively, the statements of case were frozen, with amendments only being allowed with permission of the Court, which could only be granted if there had been a change of circumstance which became known after the CMC.

The highly restrictive nature of this provision could occasion real prejudice to litigants in complex commercial matters, and its disapplication to commercial matters (which is proposed) will be widely welcomed. A change is purely mechanistic – parties are to draw up their own consent orders – it merely encapsulates what pertains in reality and will require very little, if any, change in practice.

Part 69A does not pretend to do anything more than create listing rules and to implement predictable deviations from parts of the CPR. Having seen the draft practice direction currently being circulated, it seems that much of the substantive change to current practice will be made there. Whether this is the appropriate place is quite another issue. Suffice to say that the success of the Commercial Court depends greatly on crafting rules of procedure that are not only forward thinking but also cognisant of our unique challenges.

As its first Commercial Court judge, the Hon Justice Edward Bannister may well look upon his task with both relish and trepidation at the challenge. His background as leading Queen’s Counsel in practice in London Chambers at the chancery/commercial bar without doubt well serves him as he takes up the challenge. It is clear that he is determined to continue the tradition established by earlier judges who sat on commercial matters in the

jurisdiction, of offering user-friendly service directed at the needs of commercial clients who use the Court. He has, it seems, also adopted a keen focus on the administrative and procedural requirements as the Court’s first judge – no less important in many ways from the substantive business and the facilities that it offers.

Aside from these procedural reforms, which when adopted will equip commercial litigators with the necessary tools for effective litigation in the jurisdiction, the Commercial Court also boasts state-of-the-art infrastructure. In October 2009, it opened the doors of its own court building for business. Nobody who walks into the court can fail to be impressed by what they are greeted with.

It offers a large and light main court, and a large ground-floor room which can comfortably accommodate trials or open court hearings for large or multi-party disputes. It is understood that the design of the building and its facilities benefited from specialist consultants experienced in court projects. Advanced video teleconferencing facilities are installed and one senses that the building is designed very much with the future in mind. Separately, an extremely spacious chambers hearing room is provided – a necessity in a jurisdiction which often convenes large hearings in chambers matters.

Together with these central features, the ancillary facilities that one would expect of large meeting rooms and advocates room are provided. In short, in terms of its physical appearance and specifications, the Commercial Court building offers all that its users would expect from a modern, high-tech court facility.

Over the last several years, the level of high-value commercial litigation has increased markedly in the BVI. Notwithstanding the recent economic downturn, this long-term trend will surely continue. The creation of the Commercial Court, and the dedication of many to its success, is an impressive and important testament to the confidence in the BVI litigation product. ■

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.