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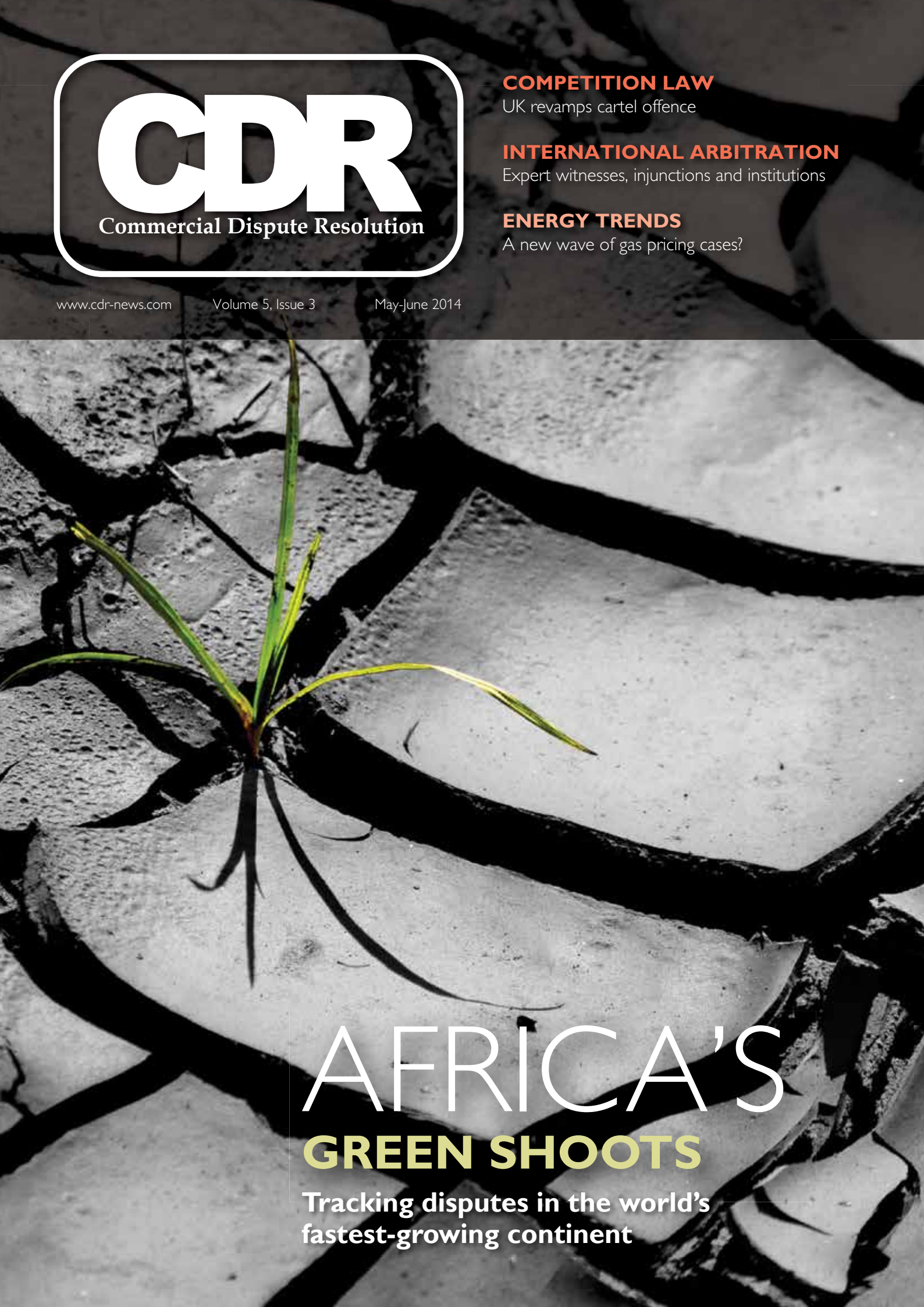

AFRICA'S GREEN SHOOTS

Tracking disputes in the world's fastest-growing continent

Opportunity knocks

Whether hunting for their next brief, or looking to grow firm-wide market share, disputes lawyers are turning to Africa in ever-greater numbers. As well they might. The continent is flush with opportunity – from combatting the corruption that continues to dog many of its countries, to capitalising on regulatory advances designed to bring Africa in line with more established legal regimes.

Most promising of all is international arbitration, whose roots in Africa were planted decades ago. The effects of the 800 BITs signed by African countries are, however, only now starting to show. Claims against sub-Saharan states made up 16% of all filings last year at ICSID, the World Bank's arbitration court, while African businesses are increasingly involved in commercial cases at the major arbitral institutions. And, playing on local law firms' lack of experience with large disputes, western lawyers have pitched hard for, and won a good deal of, such work.

To combat that dominance, firms on the ground are developing strong pan-African networks and forming alliances with the likes of **Dentons**, **Eversheds** and **Linklaters** in order to import much-needed global knowledge. The growing influence of regional treaties such as OHADA and the SADC are further harmonising Africa's approach to dispute resolution; turn to page 26 for an in-depth look at the continent's arbitral laws and institutions.

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THE BIG chill

Phillip Kite of **Harneys** looks at the subject of injunctions generally with a particular emphasis on recent case law on freezing orders

The British Virgin Islands is an idyllic collection of islands in the Caribbean. More importantly for commercial lawyers, they are home to about 950,000 corporate vehicles, limited partnerships and trusts, which represent about 40% of the world's offshore structures. It is therefore likely that practitioners will come across the BVI at some point, given that the sheer number of structures has led to a large number of BVI court disputes.

The BVI is a British dependent territory, and so naturally English common law is generally applied; a number of BVI statutes are also based on English law. However, there are important differences in some BVI statutes, such as the BVI's very user-friendly Business Companies Act, and some subtle differences such as in the BVI's Insolvency Act. There are also some areas where BVI does not have an equivalent English statute, such as Section 25 of the English Civil Jurisdiction and Judgments Act, which provides the English court with a statutory basis for the grant of injunctions in aid of foreign proceedings. ▸

The BVI does have Section 24 of the West Indies Associated States Supreme Court Act, which provides that an injunction may be granted in all cases in which it appears to the court to be just and convenient, and Part 17.1 of the Civil Procedure Rules, that provides the court with the ability to make a wide variety of interim orders, including at Rule 17.1(b) an interim injunction.

The BVI court has generally followed the guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (with the exception of freezing injunctions which are set out below), which can be summarised as follows. First of all, there must be a serious question to be tried, and so if the evidence fails to disclose the claimant has any real prospect of succeeding in his claim at trial, an injunction will be refused.

If a claimant can show a serious question to be tried, the BVI court will then consider three further questions: (a) if the claimant were correct at trial, whether an award of damages would be an adequate remedy; (b) if the injunction is granted and the defendant was successful at trial, whether damages under the cross undertaking would be an adequate remedy; and (c) if the balance of convenience favours an injunction, particularly if there is doubt as to the adequacy of the remedy of damages. These elements are standard where English common law is applied, as are the requirements for a claimant to give an undertaking in damages and the duty of full and frank disclosure, which are common features of all injunctions.

Freezing orders

Of particular importance to practitioners is the ability of a court to freeze assets where a claimant suspects that a defendant will try to frustrate a court judgment by dissipating assets in the interim. The ability to grant such an injunction has become a standard question for practitioners at the start of any proceedings. Can the defendant be trusted not to dissipate assets? The powerful and potentially crippling nature of freezing injunctions has not been lost on courts: even in England before the famous *Mareva* case, it was thought too invasive an order against a person who had not yet been tried. Freezing orders are also usually coupled with orders for disclosure of a defendant's assets, and a failure to disclose can, in some cases, be punished by contempt of court or even entering judgment.

While some courts have refused to follow the freezing order path (most notably the US Supreme Court), the English courts' power was extended by Section 25 to grant freezing orders in aid of foreign proceedings. The BVI did not enact an equivalent to Section 25, which was seen as a significant gap in the BVI court's power. However, BVI practitioners have for years found two ways around this gap.

First of all, a BVI claim form equivalent to the foreign claim could be filed, and a BVI injunction could be sought on the basis that the BVI proceedings would be stayed. Alternatively, BVI practitioners used a BVI specific claim against the target defendant, relying on a different cause of action from the foreign court and requesting a freezing order in support of that fresh claim. This was typically where a BVI company was not a party to the main action, but could be implicated in the events giving rise to that claim, such as conspiracy or accessory liability.

This overly restrictive nature of BVI law was based on a narrow interpretation of **Lord Diplock**'s speech in *The Siskina* [1979] AC 210. It is of note that in The Siskina, because the House of Lords was deciding a case where a defendant was not within the court's *in personam* jurisdiction, it was therefore a case concerning whether an injunction could form the basis for the grant of service out of jurisdiction. Since *The Siskina*, the English courts have never needed to address whether they had a common law jurisdiction to grant a freezing order against a defendant within England in aid of foreign proceedings, as this was dealt with under Section 25.

Black Swan

The restrictive approach in the BVI was overturned by the BVI Commercial Court in *Black Swan Investment v Harvest View Limited* BVI HCV (Comm) 2009/399, in which the BVI had its *"Mareva"* moment.

It remains the case, therefore, that a freestanding injunction is available in the BVI in support of foreign proceedings

In *Black Swan*, there was a personal claim against an individual in South Africa. The individual was the owner of two BVI companies. Black Swan sought a freezing injunction against those two companies in support of the South African proceedings, although the companies apparently had nothing to do with the litigation and Black Swan had no direct claim.

The respondent companies argued that there was no common law jurisdiction to grant a freezing injunction except in support of a claim in which the court had jurisdiction to make a final judgment. The respondents said there was no claim against the individual in the BVI and no claim against the respondents.

The court considered the dissenting judgment of **Lord Nicholls** in *Mercedes Benz AG v Leiduck* [1996] AC 284 which provided that where a respondent is within the court's territorial jurisdiction, a freestanding injunction may be granted against him where it is appropriate to avoid injustice. In particular, where a court would permit eventual enforcement of a foreign money judgment against a defendant who is within the territorial jurisdiction, it should grant a freezing order in aid of the prospective right of the foreign money judgment if it was otherwise a proper exercise of the court's power.

Bannister J decided that whenever the BVI Court is capable of exercising *in personam* jurisdiction over a defendant, the statutory power to grant an interlocutory injunction "in all cases in which it appears to the Court or Judge to be just and convenient" gave the court "strict jurisdiction" to grant an order. He used the phrase "jurisdiction in the broad sense" to explain that statutory discretion is subject to common law and procedure. On the basis that there was no real difference between the grant of relief in aid of a prospective domestic judgment and a prospective foreign one, he found that an order was a proper exercise of the court's jurisdiction and accordingly granted the freezing order.

Yukos

Next came the Eastern Caribbean Court of Appeal judgment in *Yukos CIS Investments Ltd & Anor. v Yukos Hydrocarbons Investments Limited & Ors*. HCVAP 2010/028. This case discussed and developed the judgment of Bannister J in *Black Swan*.

The facts of Yukos were complex, but in essence the claimants were trying indirectly to take control of the respondents, which were three BVI companies, in proceedings in the Dutch courts. They were doing this by seeking to take control of a Dutch trust vehicle which in turn controlled the respondents. Pending a determination of the Dutch proceedings, the claimants sought to freeze the respondents' assets so as to preserve them until such time as they could take control of the respondents. There was no claim for a freezing order in the Dutch courts.

Bannister J refused relief. On appeal, **Kawaley JA** gave a judgment approving the order at first instance, with which **Gordon JA** concurred. However, Kawaley JA gave approval to the reasoning of Bannister J, on the jurisdiction to grant Black Swan type relief. Kawaley JA considered that the judgment to be obtained abroad did not need to be a money judgment. However, an order will not usually be granted unless it is necessary to do so in aid of the foreign judgment. In the case of Yukos, any judgment in the Dutch court would not give the claimants the right to enforce a money judgment against the respondents, nor would it establish a proprietary claim against the respondents' assets. It would simply allow the claimants to control the ▸

The ability to grant a freezing injunction has become a standard question for practitioners at the start of any proceedings: can the defendant be trusted not to dissipate assets?

Dutch trust vehicle, and only indirectly the shares in the respondents.

The circumstances where no injunction has been granted by the foreign court will be a relevant factor against the granting of relief in the BVI. It will be an especially strong factor where, as in *Yukos*, it appears that the foreign court would be unlikely to grant relief because the relief sought goes beyond the scope of the foreign proceedings. In those circumstances, the BVI court may well regard the application as being not in fact in aid of the foreign proceedings, but an intrusion on the jurisdiction of the foreign court.

In *Black Swan*, there were assets in the jurisdiction, in the form of the shares in the BVI companies, against which a South African judgment (against the individual in South Africa) could be enforced. In *Yukos*, there were no assets in the jurisdiction against which a Dutch judgment giving the claimant control of the Dutch trust could be enforced: once the claimant had taken control of the Dutch trust, with or without enforcement in the Netherlands, they would automatically control the three respondents and there was no likelihood of enforcing the judgment in the BVI.

It remains the case, therefore, that a freestanding injunction is available in the BVI in support of foreign proceedings. If the scope of the injunction sought seems to go beyond the scope of the foreign proceedings, the court will not normally make an order, and if the prospective foreign judgment will not be suitable for enforcement in the BVI in respect of the respondents, relief will normally be refused.

Recent developments

As with most common law powers, the courts develop the jurisdiction and on occasion try to fill perceived gaps. In December 2013, the ECSC Court of Appeal made an order and gave much needed clarity to the Civil Procedure Rules relating to service out of foreign judgments and arbitral awards.

The previous literal reading of the CPR had led to the situation that foreign judgments obtained in all but a small number of countries could not be enforced in the BVI because there was no "gateway" to provide for service out of the jurisdiction of a claim form for enforcement of those foreign judgments in the BVI. Given that the *Black Swan* jurisdiction is premised on the ability of an applicant ultimately to enforce its foreign judgment in the BVI, this also threatened to limit the applicability of the case.

It was clearly not ideal to rely on case law in such an important point of procedure. Accordingly, on 1 February 2014 the rule was changed to provide that: "A claim form may be served out of jurisdiction if 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." As a home to so many companies and structures, this is a very welcome development and will no doubt assist claimants in seeking relief from the BVI court. ■

ABOUT THE AUTHOR

Phillip Kite is Global Head of Litigation and Insolvency at Harneys and specialises in large scale commercial litigation and contentious insolvency matters. He is one of the most experienced litigation and insolvency practitioners in the BVI and has worked on many of the jurisdiction's largest and most complex cases.

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