

Failure to comply with disclosure obligations in the BVI and the Cayman Islands

Insights - 26/11/2023

The concept of disclosure/discovery in the BVI and the Cayman Islands may be an unfamiliar concept to litigants from the PRC, and is often misunderstood. However, the potential sanctions for failing to comply with one's disclosure/discovery obligations are grave and can include a defaulting claimant's claim being struck out, or a defaulting defendant being debarred from defending the claim.

| Discovery/Disclosure Obligations

In the majority of commercial litigation disputes in the BVI and the Cayman Islands, one of the stages of the litigation process involves a formal exchange between the parties of documents relevant to the issues in the case. This process is known as "disclosure" in the BVI and "discovery" in the Cayman Islands.

Subject to certain exceptions, such as legal professional privilege and litigation privilege, each party must disclose to each other party those documents which are "*directly relevant*" to the matters in question in the proceedings and which are within its "*control*", and provide a copy of such documents to the other party if so requested. This includes documents which may be commercially sensitive, or detrimental/disadvantageous to that party's own case. Generally speaking, a document is "*directly relevant*" to the issues in the proceedings if the party intends to rely on it, or it adversely affect that party's case or supports another party's case.

Disclosure/discovery obligations extend to include a party's the obligation to preserve, and not destroy or delete any relevant documents.

A party's disclosure/discovery obligations arise upon the commencement of an action and continues until the proceedings are concluded. As such, a party must disclose relevant documents even if they were initially unavailable but were subsequently located after the date

for compliance with disclosure/discovery.

A party's failure to comply with its disclosure/discovery obligations can have a number of serious consequences. For example, a party can be debarred from relying on hitherto undisclosed documents, face adverse costs orders, or the Court may strike out the delinquent party's claim or defence.

Cayman Islands

Pursuant to O. 24, r.20 of the Grand Court Rules, an action may be dismissed or the defence may be struck out due to a party's failure to comply with a discovery order, and the delinquent party shall be liable to committal.

The Cayman Court confirmed in *Brown v Horvat Properties (Cayman Islands) Ltd. and Horvat* (Unreported, 20 December 1993, Smellie CJ), that wilful disobedience to an order for discovery may be justification for striking out a defence and entering judgment for a plaintiff even where there is still an opportunity for a fair trial. In *Renova Resources v Gilbertson* [2011] (2) CILR 148, it was held that the Grand Court has the power under the Grand Court Rules and its inherent jurisdiction to strike out a statement of case due to a failure to comply with a discovery order if there may be a substantial risk of unfairness at the trial.

In practice, the Grand Court is unlikely to impose such severe sanctions on the occasion of a party's first breach of a discovery obligation. A party's repeated failures to comply with a discovery order will typically lead the Court to make an "Unless Order", which will provide that unless the delinquent party complies with their discovery obligations by a certain date, that party's claim or defence will be struck out and they will be debarred from continuing to participate in the proceedings. The Grand Court in *Grand Cayman Golf Resorts Ltd v East End Aggregate Ltd.* [2001] CILR N 25 and *Cedrus Investments Limited v Abidin and Tata Artha Group* [2019] (1) CILR 39 commented that the discretion to grant an unless order for a time extension to comply with a discovery obligation should be exercised with care.

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In the BVI, rule 28.13 of the Civil Procedure Rules 2000 (the "CPR") provides that a party who fails to give disclosure by the date ordered, or fails to permit inspection, may not rely on or produce any documents not so disclosed or made available for inspection at the trial.

A party seeking to enforce an order for disclosure may apply to the Court for an order that the defaulting party's statement of case (or some part of it) be struck out. Upon consideration of such an application, the Court may make an Unless Order which will provide that unless the delinquent party complies with their discovery obligations by a certain date, that party's claim or defence will be struck out and they will be debarred from continuing to participate in the

proceedings.

Pursuant to rule 26.5 of the CPR, if the defaulting party does not comply with the unless order, the aggrieved party may ask for judgment to be entered and for a costs award to be made.

The party in default may apply for relief from such a sanction within 14 days from the date they were served with the relevant order. The Court may grant relief only if it is satisfied that (a) the failure to comply was not intentional; (b) there is a good explanation for the failure; and (c) the defaulting party has generally complied with all other relevant rules, practice directions, orders and directions. In considering whether to grant the relief, the Court will consider several factors, including but not limited to:

- The effect which the granting of the relief or not would have on each party;
- The interests of the administration of justice;
- Whether the failure has been or can be remedied within a reasonable time; and
- Whether the trial date or any likely trial date can still be met if the relief is granted.

Conclusion

It is essential that clients are advised fully and understand the ambit and extent of their discovery or disclosure obligations (as applicable) in the proceedings to which they are a party. There are various types of sanctions which the Court may impose on a defaulting party, which may range from adverse costs orders to the striking out of the entirety or parts of the defaulting party's statement of case and/or a party being debarred from participating further in the proceedings. Compliance with discovery/disclosure orders is not optional.

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