

Insolvency and International Assistance – The Impact of the British Virgin Islands Insolvency Act 2003

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Introduction

On 17 April 2003, the British Virgin Islands' Legislative Council enacted the Insolvency Act, 2003 ("the Act"). This is the most comprehensive piece of legislation to be enacted in the BVI since the International Business Companies Act of 1984.

The Act is expected to come into force simultaneously with the Consolidated Companies Act, which will repeal and replace the existing Companies Act and the International Business Companies Act.

The English Insolvency Rules 1986 have previously been used as a guide to insolvency practice in the Eastern Caribbean. However, there is no statutory basis for their application and the case law¹ has not extended the substantive provisions of the English Insolvency Act to local BVI law. It is anticipated that insolvency rules similar to the English Insolvency Rules 1986 will be made to give effect to the Act².

Parts XVIII and XIX of the Act focus on cross-border insolvency and international assistance. These Parts enable cooperation between the BVI and other jurisdictions in cases of multi jurisdictional insolvency proceedings.

Part XVIII

The stated purpose³ of Part XVIII is

"to provide effective mechanisms for dealing with cases of cross border insolvency so as to promote the objectives of

- (a) Cooperation between
 - (i) the Court and insolvency administrators of the BVI; and
 - (ii) the courts and other competent authorities of foreign countries involved in cases of cross border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximisation of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment;"

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- 1 See *In the Matter of Tele-Art Inc.* (unreported, 1998) a decision of the BVI High Court of Justice. The Court considered the legislation and concluded that in the absence of specific winding-up rules having been made under the BVI Companies Act, the Court would rely upon the West Indies Associated States Supreme Court (BVI) Ordinance, Cap. 80 which provides that in the absence of special provisions in relation to the exercise of the civil jurisdiction of the High Court, such jurisdiction must be "exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England". The Court was therefore content to apply the provisions of the English Insolvency Rules 1986. See also *Marshall v Antigua Aggregates Limited and others* (unreported, 2000) a decision of the Court of Appeal of Antigua and Barbuda (highly persuasive in the BVI), in which it was accepted that since there were no local rules guiding the presentation of a winding up petition, the Court should look to the English Insolvency Rules 1986 for guidance.
- 2 See Section 498 of the Act, under which the Executive Council is given power to make Insolvency Rules "generally for giving effect to the Act and specifically in respect of anything required or permitted to be prescribed by [the] Act."
- 3 Section 436(1).

Part XVIII applies where:

- (a) assistance is sought in the BVI by a foreign court⁴ or a foreign representative⁵ in connection with a foreign proceeding⁶;
- (b) assistance is sought in a foreign country in connection with a BVI insolvency proceeding;
- (c) a foreign proceeding and a BVI insolvency proceeding in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a designated foreign country have an interest in requesting the commencement of, or participating in, a BVI insolvency proceeding.

Assistance sought in the British Virgin Islands in connection with a foreign proceeding

The Act contemplates that requests for assistance may be sought by foreign Courts, foreign administrators/receivers/liquidators or other foreign representatives as well as creditors or other parties with an interest in BVI insolvency proceedings. Pursuant to the Act the Court must co-operate to the “maximum extent possible”⁷ and may communicate directly with, or request information or assistance directly from, the foreign courts or foreign representatives. Such cooperation may be implemented by “any appropriate means”⁸ including

- “(a) appointment of a person or body to act at the direction of the Court;
- (b) communication of information by any means considered appropriate by the Court;
- (c) coordination of the administration and supervision of the debtor’s property and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;

- (e) coordination of concurrent proceedings regarding the same debtor.”

In order to obtain the assistance of the BVI Court the foreign representative must apply for the recognition of the foreign proceeding in which they are appointed. Once the foreign proceeding has been recognised by the BVI Court, the foreign representative may apply directly to the BVI Court for relief under Part XVIII. Subject to that, the BVI Court or an insolvency officer⁹ may provide additional assistance to a foreign representative where permitted by Part XVIII or any other Act or Rule of Law in the BVI.

For instance, the Virgin Islands’ Financial Services Commission (“FSC”) may disclose documents or information to a foreign regulatory authority (including a trading or security or exchange authority) in a country or jurisdiction approved by the Board of the FSC where the foreign authority is discharging duties or exercising powers corresponding to those under the Financial Services Commission Act 2001¹⁰. If such disclosure has been or is about to be made by the FSC to a foreign regulatory authority, then the FSC may consider it appropriate to provide some or all of that information to the foreign representative.

As matters currently stand, a foreign representative who seeks the recognition of a foreign proceeding will usually apply on notice to the parties to intervene in the proceedings. The BVI Court will hear representations from all parties, including the applicant. The BVI Court will usually receive evidence of the foreign proceedings, including relevant foreign Orders and has hitherto been prepared to grant wide forms of relief to foreign representatives. Once the Act comes into force, certain procedural formalities will have to be complied with to satisfy the BVI Court of the existence of the foreign proceeding and the appointment of the foreign representative¹¹ and the application will have to be framed so as to ask for specific relief

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- 4 “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding.
- 5 “Foreign representative” means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the re-organisation or the liquidation of the debtor’s property or affairs or to act as a representative of the foreign proceeding.
- 6 “Foreign proceeding” means a collective judicial or administrative proceeding in a designated foreign country (a country or territory designated by the Governor by notice published in the Gazette), including an interim proceeding pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign Court, for the purpose of re-organisation, liquidation or bankruptcy.
- 7 Section 458.
- 8 Section 460.
- 9 “Insolvency Officer” means the Official Receiver, a liquidator, provisional liquidator, bankruptcy trustee, administrator, receiver, supervisor or interim supervisor.
- 10 See Section 29(2)(e) of the Financial Services Commission Act 2001.
- 11 See Section 448(2). A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign court affirming the existence of the foreign proceeding and appointing the foreign representative must accompany the application. In the absence of such evidence (which may well be unavailable if the matter is urgent), the Court may be satisfied by “other evidence”. It is submitted that such other evidence could include uncertified copies of documents together with an undertaking from Counsel to file certified copies in due course.

under Part XVIII. However as a practical matter, these provisions are unlikely to have a substantial impact on the type of relief granted.

It is noteworthy that foreign creditors have been given the same rights as creditors in the BVI in respect of the commencement of and participation in a BVI insolvency proceeding¹². Thus, a foreign creditor of a BVI company could apply to the BVI Court for the appointment of a liquidator on the same grounds¹³ as creditors in the BVI. Foreign creditors (assuming their addresses are known) must be notified of the insolvency proceeding and no letters rogatory or other similar formalities are required¹⁴.

Orders in aid of foreign proceedings

Under Part XIX, a foreign representative may apply to the BVI Court under Section 467(3) for an order in aid of a foreign proceeding¹⁵ in respect of which they are authorised. The BVI Court has extensive powers to grant relief to a foreign representative. By way of example¹⁶, the BVI Court may:

- restrain the commencement or continuation of any proceedings, execution or other legal process against the debtor or the debtor's property¹⁷;
- appoint an interim receiver over any property of the debtor;
- require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
- make any other order/grant any other relief as it considers appropriate¹⁸.

It is important to note that for the purpose of this section, "property" must be subject to or involved in the relevant foreign proceeding but there is no requirement that the property itself must be within the BVI. In reality the BVI Court's assistance will likely be sought where the debtor's property or its proceeds are

located within the jurisdiction of the BVI.

In making an order under Section 467(3), the Court may apply the law of the BVI or the law applicable in respect of the foreign proceeding¹⁹.

Wide forms of relief (including injunctive relief) are available to the foreign representative and may be obtained even in the absence of extant or contemplated proceedings in the BVI. That said, it is doubtful whether injunctive relief will be available unless it is ancillary to a pre-existing cause of action²⁰ in the foreign proceeding since the Act specifically contemplates that orders under Section 467 are to be made *in aid of* foreign proceedings in which the property and affairs of the debtor are already subject to the control or supervision of a foreign court.

In determining an application under Section 467, the BVI Court shall be guided by

"what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with

- (a) the just treatment of all persons claiming in the foreign proceeding;
- (b) the protection of persons in the BVI who have claims against the debtor against prejudice and inconvenience in the processing of claims in the foreign proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding, or the proceeds of such property;
- (d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency; and
- (e) comity."

However, the BVI Court shall not make an order under Section 467 that is contrary to the public policy of the BVI²¹.

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12 See Section 446(1). Note that subsection (1) does not effect the priority of claims in a BVI insolvency proceeding or the exclusion of foreign penal, revenue and social security claims from such a proceeding; See Section 446(2).

13 Namely that the company is insolvent or if the Court is of the opinion that it is just and equitable that a liquidator should be appointed (see section 162(1)(a) and (b))

14 See Section 447.

15 "foreign proceeding" in Part XIX is a proceeding in which the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy see Section 466(1).

16 See the list of possible orders under s.467(3).

17 "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorised.

18 Secured creditors are not affected see Section 467(4).

19 Section 467(5).

20 As is required if the application is being made for an injunction against a person outside the jurisdiction under BVI CPR Part 7.3. See also *Siskina & Others v. Distos Compania Naviera SA* [1979] AC 210 at 256, followed in the BVI in *Koch v Chew et al* (1997/98) OFLR 537 and considered in *Argent Holdings Ltd & Others v. Creditcom NV & Others* (unreported, 1999).

21 Section 468(3).

Intervention by foreign representatives – urgent relief

Wide forms of relief are available to foreign representatives where such relief is necessary to protect the assets of the debtor or the interests of the creditors. For example, upon recognition of a foreign proceeding, a foreign representative may be entrusted with the administration or realisation of the debtor's assets in the BVI.

Section 454 provides as follows:

“454(1) Upon recognition of a foreign proceeding, whether main or ancillary, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including

- (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under section 453(1)(a);
- (b) staying execution against the debtor's property to the extent it has not been stayed under section 453(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under section 453(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) entrusting the administration or realisation of all or part of the debtor's assets located in BVI to the foreign representative or another person designated by the Court;
- (f) extending relief granted under section 452(1).

(2) Upon recognition of a foreign proceeding, whether main or ancillary, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's property located in the BVI to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in the BVI are adequately protected.

(3) In granting relief under this section to a representative of a foreign ancillary proceeding, the Court shall be satisfied that the relief relates to property that, under the law of the BVI, should be

administered in the foreign ancillary proceeding or concerns information required in that proceeding.”

Further, where an application for recognition of a foreign proceeding has been filed but not yet determined or withdrawn *and* the BVI Court is satisfied that relief is urgently needed to protect the assets of the debtor or the interests of the creditors the BVI Court may grant “such relief of a provisional nature as it considers appropriate” including:

- (a) staying execution against the debtor's assets;
- (b) entrusting the administration or realisation of all or part of the debtor's assets located in the BVI to the foreign representative or to another person designated by the BVI Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) any relief mentioned in Section 454(1)(c), (d) and (f)²².

Unless the provisional relief is extended under Section 454(1)(f), the urgent relief granted under Section 452 will automatically terminate when the BVI Court determines the foreign representative's application for recognition of the foreign proceedings.

Once a foreign proceeding has been recognised, a foreign representative may apply to the BVI Court under Section 249²³ for relief in respect of voidable transactions. Thus, in the same way as a liquidator or trustee in bankruptcy could apply to set aside a transaction at an undervalue or an unfair preference or seek other relief set out in the Act in respect of such voidable transactions (including extortionate credit transactions), the foreign representative is now entitled to make the same application. However, the BVI Court must not make an order granting relief in respect of voidable transactions on the application of a foreign representative unless satisfied that the foreign representative has roles and functions that are equivalent or broadly similar to the roles and functions of a liquidator or trustee in bankruptcy as may be appropriate.

Assistance sought in a foreign country in connection with a British Virgin Islands' insolvency proceeding

The principles of comity are at the forefront of this piece of legislation. In interpreting Part XVIII the BVI Court must have regard to the need to promote its application in a manner that is consistent with the

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²² See Section 452.

²³ In respect of companies, or under Section 405 in respect of individual bankruptcies.

application of similar laws adopted by foreign jurisdictions²⁴.

Thus, the BVI Court is likely to have regard to the provisions of Section 426 of the Insolvency Act 1986 and the English authorities dealing with the application of that section.

The leading English authority on Section 426 is *Hughes v Hannover Riickversicherungs-Aktiengesellschaft*²⁵ in which the English Court of Appeal considered a request from the Supreme Court of Bermuda to the English High Court under Section 426(5) to recognise the rights of joint provisional liquidators for the purpose of restraining actions or proceedings in England. It was held that when faced with a request from a relevant country²⁶ the Court in England could apply either the insolvency law of the relevant country concerned or its own insolvency law. Further the Court of Appeal confirmed that notwithstanding the mandatory words in Section 426(4), the English Court was not bound to grant the Order sought in the letter of request from the foreign court but that it had the discretion to do so. Morrit LJ said that in cases requiring the exercise of a discretion, the fact of the request was a weighty matter to be taken into account but it could not outweigh all others^{27,28}.

In *Re Bank of Credit and Commerce International SA*²⁹, the liquidators of a Cayman Islands' company sought the assistance of the English Court in order to obtain relief under sections 212, 213, 214 and 238 of the Insolvency Act 1986. The Grand Court of the Cayman Islands had no power to grant such relief because there are no comparable provisions in the Cayman Islands' Companies Law. In that case, Ratty J granted the relief requested, holding that Section 426(4) of the Insolvency Act 1986 imposed an obligation on the English Court to assist the Grand Court, although the English Court nonetheless had a discretion as to how such assistance should be provided.

The existing practice in the BVI is to issue a Letter of Request to foreign Courts to seek their assistance. Indeed, where a party involved in any proceedings in

the BVI wishes to obtain evidence (e.g. by deposition) from a person outside the jurisdiction (whether in the UK or elsewhere), an application must first be made to the BVI Court for the issue of a letter of request³⁰. If a letter of request is issued to a court in the UK, the UK Court may give effect to the application for assistance if it falls within the provisions of the UK Evidence (Proceedings in Other Jurisdictions) Act 1975³¹.

In insolvency proceedings, such applications have largely been successful, through the mechanism of Section 426(4). For example, in *Re Trading Partners Limited*³² Patten J acceded to an application by joint official liquidators of a BVI company who sought their recognition in the English Court to enable them to do all things that were necessary or convenient in connection with the winding up of the company, including obtaining information and records under Section 236 of the Insolvency Act 1986. The application was not opposed and the Judge made it, recognising that the policy behind Section 426(4) "must be to encourage the English Court to recognise the appointment of a foreign liquidator from an approved jurisdiction unless the only purpose of such recognition is to permit that liquidator to operate within the jurisdiction in a manner which this Court would regard as impermissible."³³

Under the Act, a party to a BVI insolvency proceeding³⁴ who wishes to obtain the assistance of a foreign country in connection with that proceeding, may rely upon the provisions of Part XVII of the Act to seek wider forms of relief. In view of existing UK legislation and case law, it seems likely that such requests will be treated favourably, at least in England.

Thus, in the same way that the English Court strives to assist foreign Courts in relevant countries or territories, the High Court of Justice of the BVI must now cooperate "to the maximum extent possible"³⁵ with foreign Courts or foreign representatives in designated foreign countries. It is not known which countries will be designated for the purpose of Part XVIII, but it seems likely that many of the countries

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24 See Section 437(2).

25 [1997] 1 BCLC 497.

26 By virtue of the Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123), the BVI and the Cayman Islands are designated territories.

27 [1997] 1 BCLC 497 at 518; (1997) BCC 921 at 939.

28 See also *England v Smith* [2001] Ch 419.

29 [1993] BCC 787.

30 BVI CPR Part 33.15.

31 In England, applications for depositions are governed by Part 34 of the Civil Procedure Rules and the Practice Direction thereto.

32 [2001] All ER (D).

33 Per Patten J at paragraph 6 of the Judgment.

34 A BVI insolvency proceeding is one that relates to the bankruptcy, liquidation administration or receivership of a debtor Section 437(1).

35 Section 458(1).

designated under the Insolvency Act 1986 will be included.

Concurrent proceedings

When the Act comes into force, once a foreign main proceeding has been recognised, no individual proceedings may be commenced for any relief regarding a debtor's property and all extant proceedings or execution against a debtor's property in the BVI are stayed. Moreover, any right to transfer or encumber or otherwise dispose of any property of the debtor within the BVI is suspended upon recognition of a foreign main proceeding³⁶.

Somewhat confusingly, the Act also provides that after recognition of a foreign main proceeding, a BVI insolvency proceeding may only be commenced if the debtor has assets in the BVI and that the BVI proceeding must be restricted to assets of the debtor in the BVI³⁷.

What is clear is that where a foreign proceeding and a BVI insolvency proceeding are taking place concurrently regarding the same debtor, the BVI Court is obliged to seek to ensure that any relief granted to a foreign representative to protect assets of the debtor or the interests of creditors³⁸ is consistent with the BVI insolvency proceeding.

To the extent that any such relief that has already been granted to the foreign representative is inconsistent with the BVI insolvency proceeding, the BVI Court shall review such relief and modify or terminate it.

It clearly makes sense to give the BVI Court maximum flexibility to review and amend relief already granted. However, these provisions surely go too far in *requiring* the BVI Court to modify or terminate relief already granted in respect of a foreign proceeding. In particular, the stay/suspension imposed³⁹ in relation to the debtor's property upon recognition of a foreign proceeding *shall* be modified/terminated if inconsistent with the BVI insolvency proceeding. Further, if the foreign proceeding is pending when the BVI insolvency proceeding commences, then no stay or suspension will come into effect.

In practical terms, this means that whether or not a foreign representative has obtained recognition, he or she must always be alive to the possibility that no stay may be available. Further, if a stay has automatically been imposed by virtue of recognition of the foreign proceeding, that stay may subsequently be lifted if the BVI Court considers it to be inconsistent with the BVI insolvency proceeding. It is noteworthy that no guidelines or rules as to the manner in which the BVI Court should exercise its power to modify the stay or suspension have yet been circulated⁴⁰.

A creditor who has received part payment of his claim in a foreign proceeding may not receive payment for the same claim in a BVI insolvency proceeding regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received⁴¹.

Conclusions

The new provisions relating to cross-border insolvency are welcome and long overdue. Parts XVIII and XIX have certainly been drafted to ensure that so far as possible the BVI Court will cooperate with foreign courts and authorities involved in cases of cross-border insolvency. There is an underlying assumption that the reciprocal courtesy will be extended by foreign courts to the BVI Court. The Act aims high, seeking to protect investment and preserve employment, whether in the BVI or elsewhere. It is without doubt a tall order for any jurisdiction to achieve through its own court system, not to mention seeking to influence the approach of other jurisdictions.

In granting orders in aid of foreign proceedings under Part XIX, it will be interesting to see how the BVI Court discharges its long-arm obligation to best ensure the economic and expeditious administration of the foreign proceeding while at the same time protecting claimants in the BVI against prejudice and inconvenience in filing proofs or litigating in the foreign proceeding.

Whether the Act will achieve "greater legal certainty for trade and investment" remains to be seen.

Notes

36 Section 453(1).

37 And, to the extent necessary to implement cooperation and coordination under sections 458, 459 and 460, to property of the debtor that, under the law of the BVI, should be administered in the recognised proceeding: see Section 461.

38 I.e. where urgent relief is sought under Section 452 or Section 454.

39 By virtue of Section 453.

40 Although see Section 455 which provides that in denying or granting relief under section 452 or 454, the Court shall be satisfied that the interests of the creditors and other persons, including the debtor, are adequately protected. There is no similar provision in respect of the stay and suspension under section 453.

41 Section 465.