Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Insolvency 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

British Virgin Islands: Trends and Developments

Adrian Francis, Matthew Freeman, Stuart Rau and Scott Tolliss
Maples Group

BRITISH VIRGIN ISLANDS

Trends and Developments

Contributed by:
Adrian Francis, Matthew Freeman, Stuart Rau and Scott Tolliss
Maples Group

Maples Group advises, through its leading international law firm Maples and Calder, global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, it leverages this local expertise to deliver an integrated service offering for global business initiatives.

Authors

Adrian Francis is a partner of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's British Virgin Islands office. He specialises in complex international commercial litigation and dispute resolution. Adrian has considerable case management and advocacy experience at the interlocutory, trial and appellate levels, as well as in arbitration and mediation.

Matthew Freeman is a partner of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's British Virgin Islands office. He specialises in civil fraud and asset tracing, enforcement of judgments and arbitral awards, lender enforcement, trust litigation, regulatory, corporate restructuring and insolvency. Matthew practised in England and Wales for eight years before relocating to the British Virgin Islands in 2015. He has considerable case management and advocacy experience at the interlocutory, trial and appellate levels, as well as arbitration and mediation.

Stuart Rau is of counsel of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's British Virgin Islands office. He has extensive experience of contentious cross-border matters arising out of multiple jurisdictions including Europe, Asia, the US and the Caribbean. Stuart's area of practice also include financial litigation and regulatory investigations.

Scott Tolliss is of counsel of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's British Virgin Islands office. He practises in all the core areas, including fraud and asset recovery, shareholder disputes, corporate investigations, contractual claims, cross-border insolvency and restructuring, contentious trusts and probate, and enforcement of judgments and arbitral awards. Scott has particular expertise in complex commercial, corporate and financial disputes, many of which are borne out of distressed events.

Maples Group

Ritter House
PO Box 173
Road Town
Tortola VG1110
British Virgin Islands

Tel: +1 284 852 3000
Email: info@maples.com
Web: www.maples.com

Contributed by: Adrian Francis, Matthew Freeman, Stuart Rau and Scott Tolliss, **Maples Group**

Trends

Market analysis

Throughout 2023, the British Virgin Islands (BVI) has remained one of the most significant international jurisdictions for company incorporations. According to the latest BVI Financial Services Commission (FSC) statistical bulletin dated June 2023, there were 366,050 active business companies and a further 2,358 active limited partnerships in the BVI.

The BVI continues to retain its status as one of the most significant jurisdictions in the international corporate service sector and, in particular, the insolvency and restructuring sector. Throughout this period, the BVI has proved to be a resilient and agile jurisdiction that has been at the forefront of emerging insolvency and restructuring sectors, including those in the real estate and crypto-asset spaces. The BVI has also shown its ability to react quickly to major world and economic events, demonstrated during the past year by its implementation of the UK sanctions regime, and application of that regime by the courts to extant disputes involving sanctioned individuals and entities.

Crypto-assets

The BVI continues to show that it is a market leader when dealing with distressed crypto-asset funds and trading platforms.

Liquidators appointed by the BVI court continue in their attempts to recover assets on behalf of the creditors of the failed Three Arrows Fund, which has resulted in substantive proceedings being advanced in the United States against the founders of the Fund.

In addition to this, provisional liquidators were installed over the Auros crypto fund that fell into financial difficulties towards the end of 2022. The provisional liquidators were appointed on a "light touch" basis to allow the directors time to restructure the debts of the fund, which is significant as the BVI court applied its recent decision in the Constellation matter (relating to the restructuring of debts in the drilling industry) to digital assets and liabilities.

Restructuring

The BVI has also seen a general uptick in court-supervised restructurings during the past year.

The BVI Business Companies Act provides two court-led mechanisms to aid companies in financial difficulties. The first mechanism is a plan of arrangement, which permits a company to:

- amend its constitution;
- reorganise;
- merge or consolidate;
- dispose of assets;
- approve the dissolution of the company; or
- effect a combination of these things.

Plans of arrangement remain under-utilised in the BVI, but schemes of arrangement have become increasingly popular in the BVI during 2023.

The second mechanism is a scheme of arrangement, which is a statutory mechanism that permits a company to enter into an arrangement between it and its creditors, or between it and its shareholders. In certain circumstances, it allows a company to restructure and avoid entering into a formal insolvency process. It can be initiated by the company, a creditor, a shareholder or a liquidator applying to the BVI court for a meeting of creditors or shareholders. There is no requirement for the company to be insolvent when the application to the court is made.

The scheme will be approved if 75% in value of the creditors or class of creditors, or of the shareholders or class of shareholders, present and voting at a meeting agree to the scheme.

In 2023, the BVI courts have been involved in a number of significant (international) restructurings that originate from the financial difficulties in the Chinese real estate market. The BVI has played host to substantive schemes of arrangement, and has also seen restructuring proposals used to attempt to adjourn liquidation applications brought against BVI companies in the BVI and elsewhere.

Notable applications include proposed schemes of arrangement of the China Evergrande Group and Rongxinda Development (BVI) Ltd, which saw the court grant applications sought by the companies to convene scheme meetings. The proposed schemes related to offshore lending to Chinese property developers, and involved the restructuring of billions of dollars of debt under bonds that had fallen due.

Court-led restructuring is arguably more prevalent in the BVI now than it has ever been, and the jurisprudence in this area is fast developing. Outside BVI-centric restructurings, the courts have also seen overseas arrangements used as justification to adjourn, or otherwise delay, applications to wind up BVI-incorporated companies.

In two recent cases, Happy Lion Ventures Limited and Chinex Limited v RZ3262019 Limited, and Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd, an intervening creditor and debtor company, respectively, requested adjournments of winding-up proceedings to facilitate restructuring processes. In *Happy Lion*, the BVI court determined that the intervening creditor had not demonstrated a comprehensive proposal sufficient to show a genuine desire to explore a restructuring, nor had they shown sufficient creditor support, in principle, for such a restructuring. The court ultimately wound up the company. Not dissimilarly, in *Cithara*, the BVI court held that the debtor company lacked the necessary support for its desire to restructure, in that case finding that the company had not demonstrated it could meet the 75% threshold required for a BVI scheme of arrangement to be approved by creditors of the company.

While both decisions ultimately turned on their facts, the BVI court has acknowledged that there are situations where it may consider adjourning an application for the appointment of liquidators to allow a company to conduct restructuring; however, it emphasised that such adjournments will depend largely on the debtor company's active engagement in the restructuring process and the level of creditor support. This recent jurisprudence in the territory underscores the importance of the debtor company's proactive involvement in any proposed restructuring, and of comprehensive presentation of such a restructuring proposal, before the court will consider adjourning liquidation proceedings. In a recent unreported judgment, the authors have seen the court adjourn a liquidation application in circumstances where there would be no prejudice to an applicant by allowing the company additional time to secure funding.

Developments

Key amendments to the BVI Business Companies Act, 2004

Commencing 1 January 2023, the Business Companies Act, 2004 underwent significant modifications resulting from the enactment of the BVI Business Companies (Amendment) Act, 2022 and the BVI Business Companies (Amend-

ment) Regulations, 2022 (the "BCA Amendments"). The BCA Amendments ushered in a suite of changes that will significantly impact companies incorporated in the BVI and how they are administered. Among these changes were:

- a revised procedure for reinstating dissolved companies;
- modifications to the strike-off regime;
- adjustments to voluntary liquidator requirements;
- the elimination of bearer shares;
- obligations for filing annual financial returns for BVI companies; and
- a new provision for public access to the details of BVI directors, upon request.

These amendments are significant, and affect not only commercial litigation in the territory, but also the mechanics of insolvency and restructuring processes.

Notably, and largely because voluntary liquidators have the ability to commence restructuring and insolvency proceedings in the BVI, the BCA Amendments stipulate that voluntary liquidators must meet specified minimum experience qualifications and BVI residency requirements – including that, where joint liquidators are appointed, at least one must have resided in the BVI for a minimum of 180 days prior to their appointment. Previously, non-resident liquidators could liaise with creditors of BVI companies, and restructurings (in particular) would rarely have a close connection to the BVI (other than the company being incorporated there). Following the BCA Amendments, any restructurings involving BVI companies will have the benefit of BVI-qualified insolvency practitioners who bring with them a wealth of experience when it comes to winding up companies and/or restructurings.

Status of bondholders

In the landmark decision of Cithara (see above, under Restructuring), the BVI court held that the applicant (Cithara), being the ultimate beneficial holder of notes issued by the respondent (Haimen) was a contingent creditor possessing the requisite standing to present an application for winding-up under Section162(2)(b) of the BVI Insolvency Act (2003) (the "Act"). This brings the BVI in line with the English authority of Re Castle Holdco 4 Ltd, and, interestingly, distinguishes the BVI from the recent decisions before the Bermudian and Cayman courts (Bio-Treat Technology Ltd v Highbridge Asia Opportunities Master Fund and Shinsun Holdings (Group) Co Ltd, respectively).

The case centred on bond issuances whereby, in June 2021, Haimen, as issuer, authorised the issuance of up to USD150 million of 12% Guaranteed Senior Notes (the "Notes") pursuant to a New York law indenture entered into between Haimen, its parent company as guarantor, and the trustee (the "Indenture").

The structure involved "global notes" being delivered to and registered in the name of the Common Depository or its nominee for the accounts of Euroclear and Clearstream. Participants holding accounts with Euroclear and/or Clearstream could buy/sell beneficial or economic interests in the Notes through their accounts. Investors without accounts could do so through a participant holding the Notes on its behalf. Cithara held the ultimate beneficial interest in the Notes in the principal sum of USD7 million as an indirect participant through participants with book-entry interests registered in Euroclear's system.

The Notes were due on 8 June 2022, with interest payable on 9 December 2021 and 8 June 2022. Haimen defaulted on the principal and

second interest payment of the Notes. Following the service of a statutory demand on Haimen, Cithara filed an application for the appointment of liquidators in October 2022. Haimen challenged the standing of Cithara as a "creditor" for the purpose of Section 162(2)(b) of the Act.

The BVI court considered the question of whether Cithara was a "creditor" to be a mixed question of New York law (ie, the nature and extent of parties' rights and obligations arising from the Notes and the Indenture) and BVI law (ie, whether those rights and obligations were sufficient to make Cithara a creditor under the Act). Ultimately, the judge held that Cithara had standing as a creditor to present the winding-up petition.

The key aspects of the judge's reasoning are set out below.

- Applying principles of construction to the documentation, Cithara was a contingent creditor under New York law. Cithara had the right to receive the Certificated Note and become the registered holder itself.
- A contractual relationship between Cithara and Haimen was not the only basis upon which contingent obligations could arise. The judge referred to the decision of the UK Supreme Court in *Re Nortel* closely and opined that the modern trend is to give an expanded definition to a contingent obligation.
- The express provisions of the Act made it clear that a contingent liability is capable of giving rise to a claim in liquidation proceedings, which consequently makes the person to whom the debt will be owed as a result of the contingency a creditor for the purposes of Section 162(2)(a) of the Act. A wide approach to the provisions of the Act fit with "commercial reality" and gave "due regard to the important underlying rights of those with the real economic interests."

Arbitration clauses and applications to appoint liquidators

The Eastern Caribbean Supreme Court recently considered the impact of arbitration agreements on liquidation proceedings. In November 2022, the Commercial Division of the BVI High Court handed down judgment in the matter of Kenworth Industrial Limited v Xin Gang Power Investments Limited; and on the same date, the Eastern Caribbean Court of Appeal also released its judgment in the matter of Sian Participation Corp (in liquidation) v Halimeda International Limited.

In Kenworth Industrial Limited v Xin Gang Power Investments Limited, the respondent company sought an order staying proceedings brought by the applicant seeking the appointment of liquidators of the company on just and equitable grounds. The application to appoint liquidators was made based on a lack of probity on the part of the company's management, giving rise to a lack of trust and confidence. The applicant relied on a number of specific grounds to make out its complaint, including the purported forfeiture of its shares.

The company contended that the question of whether it was entitled to forfeit the applicant's shares should be referred to arbitration in accordance with an arbitration agreement found in the company's articles of association.

A preliminary argument raised by the applicant in opposition to the stay, to the effect that the company had waived its right to refer the forfeiture issue to arbitration as it had taken steps in the proceedings, was dismissed by the Court on the basis that the company had commenced its

arbitration the day before filing its first affidavit in the proceedings.

As regards the question of whether a stay should be granted, the Court stated that there were three propositions of law that were not in dispute:

- an order appointing liquidators can only be made by the court – the power to make such an order is not available to an arbitration panel;
- the automatic stay which applies to an action under Section 18 of the Arbitration Act does not apply to applications for the appointment of liquidators; and
- the court has a discretion as to whether or not to appoint liquidators – however, the existence of an arbitration agreement is relevant to whether to grant a stay of the application to appoint liquidators.

The Court held that, in general, the existence of an arbitration agreement will favour the dismissal or stay of an application to appoint liquidators; but not always – for example, where a defence is an obvious "put-up job".

Ultimately, the Court accepted that it would be inappropriate to hive off the forfeiture issue to arbitration given that it was but one of a number of issues that arose in the proceedings. In addition, the Court was mindful that if it was found in the arbitral proceedings that the company was entitled to forfeit the applicant's shares, the applicant would then lose its standing as a shareholder to pursue its application for the appointment of liquidators. A stay was therefore refused as a matter of discretion.

In *Sian Participation Corp* (see above, under Arbitration clauses and applications to appoint liquidators), the Court of Appeal considered an appeal against an order appointing liquidators to the appellant company on the basis that it was insolvent, having failed to repay a USD150 million loan due to the respondent. The company had contended at first instance that, among other things, it had a cross-claim under the loan agreement which was equivalent to or exceeded the value of the loan. The company had argued that the liquidation proceedings should be stayed in favour of arbitration on the basis that the loan agreement contained an arbitration agreement.

The BVI Commercial Court found that:

- the arbitration point had been raised too late;
- it was not the law that the existence of an arbitration agreement precluded a creditor from applying for a winding-up order; and
- there is no mandatory stay of liquidation proceedings in favour of arbitration.

On appeal, it was argued by the company that the judge had erred by holding that the arbitration point had been raised too late. It was contended that there was no requirement for the company to have commenced arbitration in order to rely on the arbitration agreement, since the parties were bound to resolve their dispute by arbitration, irrespective of whether or not any arbitration had actually been commenced.

The Court of Appeal confirmed that the court had a discretion as to whether to stay liquidation proceedings in favour of arbitration. However, it upheld the judge's finding that the arbitration point had been raised too late on the basis that the company's first statement on the substance of the dispute, being its notice of opposition under Rule 164 of the BVI Insolvency Rules, did not contain any request for a referral to arbitration. It was not until an amended notice of

opposition was filed some months later that the arbitration issue was raised for the first time. The appeal was accordingly dismissed.

Both decisions confirm that:

- unlike the position in England (where the subject matter of a dispute as to the existence of a debt falls within the scope of an arbitration agreement), an applicant for the appointment of liquidators in not required to prove exceptional circumstances before a BVI court determines the question of whether the debt is bona fide disputed on substantial grounds;
- the automatic stay under Section 18 of the Arbitration Act does not apply to applications for the appointment of liquidators; and
- the court retains a discretion as to whether or not to appoint liquidators, although the existence of an arbitration agreement is a relevant consideration in the exercise of that discretion.

Both decisions also illustrate the importance of a company wishing to refer a dispute to arbitration and making a request for a referral in its first statement to the court on the substance of the dispute. A failure to do so may result in the company being unable to obtain a stay, as was the case in *Sian Participation Corp*.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com