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British Virgin Islands: Trends & Developments

Matthew Freeman, Stuart Rau and Scott Tolliss
Maples Group

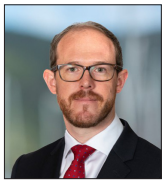
BRITISH VIRGIN ISLANDS

Trends and Developments

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

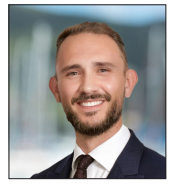
Maples Group through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the firm 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



Matthew Freeman is head of the British Virgin Islands dispute resolution and insolvency team at Maples and Calder, the Maples Group's law firm. He specialises in civil fraud and asset tracing, enforcement of judgments and arbitral awards, lender enforcement, trust litigation, regulatory, corporate restructuring and insolvency. He 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 a partner in the British Virgin Islands dispute resolution and insolvency team at Maples and Calder, the Maples Group's law firm. He has extensive experience of contentious cross-border matters arising out of multiple jurisdictions including Europe, Asia, the US and the Caribbean. He also specialises in financial litigation and regulatory investigations.



Scott Tolliss is of counsel in the British Virgin Islands dispute resolution and insolvency team at Maples and Calder, the Maples Group's law firm. 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. He has particular expertise in complex commercial, corporate and financial disputes, many of which are the result of distressed events.

Maples Group

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

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

Trends

Market analysis

Throughout 2024, 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 2024, in the BVI there were 358,592 active business companies with a further 2,468 active limited partnerships.

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 large-scale and complex restructuring measures resulting from distressed events overseas (including, but not limited to, the downturn of the real estate market in the People's Republic of China) and expansion of the statutory assistance regime under the BVI Insolvency Act to include 24 additional jurisdictions.

Crypto-assets

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

In February 2024, joint receivers were appointed by the BVI court over all assets held by or on behalf of Hector DAO. The purpose of their appointment was to wind down Hector's operations to include the distribution of assets to its creditors. However, during this process, a number of creditors took proceedings against Hector in New Jersey, which prompted the receivers to seek Chapter 15 recognition in the United States.

In July 2024, the receivers secured a landmark ruling from the bankruptcy judge Michael B Kaplan granting cross-border recognition of Hector DAO under Chapter 15 of the US Bankruptcy Code. This decision was the first of its kind and offers a helpful precedent to insolvency and legal practitioners operating in the BVI digital asset space.

Restructuring

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

The BVI Business Companies Act (the "BCA"), provides two court-led mechanisms to aid companies in financial difficulties. The first 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
- a combination of these things.

The second 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 shareholders or class of shareholders present and voting at a meeting agree to the scheme.

Plans of arrangement remain underutilised in the BVI but schemes of arrangement have become increasingly popular in the BVI during 2023.

In 2024, the BVI courts have been involved in several 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.

One of the most notable scheme decisions of the past year has been that of Tristan Oil Ltd v The Scheme Creditors BVIHCM 0120/2023 (the "Tristan Decision"), whereby the BVI court examined the specific criteria required of a third party to demonstrate a substantial interest in a proposed scheme of arrangement, thereby conferring upon it the requisite standing to be heard and raise objections in respect of an application to sanction the scheme pursuant to the provisions of the BCA.

The Tristan decision

Tristan was incorporated in 2006 as a special purpose vehicle to raise finance to fund the operations of two oil and gas companies operating in the Republic of Kazakhstan (the "Guarantors"). The Guarantors fell within Tristan's wider corporate group.

Tristan issued credit notes, due in 2012, to various investors (the "Original Noteholders") and raised approximately USD531 million which it advanced to the Guarantors to fund their oil and gas operations in Kazakhstan.

Contrary to the group's expectations, Tristan alleged that the Republic of Kazakhstan expropriated the Guarantors' rights and interests under contracts that they had for exploiting oilfields in the west of the country.

In 2010, individuals and entities affiliated with the group (collectively referred to as the "Claimant Parties"), excluding Tristan, initiated Swedish-seated arbitral proceedings against Kazakhstan, culminating in a favourable final judgment in the

Claimant Parties' favour totalling approximately USD500 million plus interest (the "Award"). The Swedish Supreme Court dismissed two attempts by Kazakhstan to overturn the Award and, by the time the scheme was proposed, all potential appeals against the Award had been conclusively dismissed.

Notwithstanding its failed appeals, Kazakhstan failed to comply with the terms of the Award, prompting the Claimant Parties to commence enforcement actions against it in multiple jurisdictions, including Sweden, Belgium, Luxembourg, Italy, the Netherlands, England, and the US. The Claimant Parties eventually ran out of money to continue funding their enforcement efforts, and so Tristan decided to take steps to raise additional funds from new investors to continue the execution proceedings.

Without the additional funding, the enforcement actions would have ground to a halt and there would have been no prospect of meaningful recovery of the Award. Having secured new sources of funding, Tristan proposed a scheme of arrangement with the Original Noteholders and the new investors (the "Scheme"). Broadly speaking, the Scheme would see new investors become senior creditors. They would be given priority in the waterfall of repayments by Tristan, with the Original Noteholders receiving repayment only after the senior noteholders. It was as a result of this variation of rights of the Original Noteholders that the Scheme was proposed.

In August 2023, Tristan obtained a court order to convene a creditors' meeting and, at a scheme meeting held in early October 2023, the Scheme received approval from creditors, representing 81.8% in value of those present and voting. On 1 November 2023, the BVI court sanctioned the Scheme pursuant to Section 179A of the BCA (the "Sanction Order"). The Sanction Order was subsequently recognised in the US (pursuant to Chapter 15 of the US Bankruptcy Code).

Following the Sanction Order, Kazakhstan, along with the National Bank of Kazakhstan (collectively referred to as the "Kazakh Parties"), submitted separate applications in the then-concluded scheme proceedings. Their applications sought, among other things:

- a declaration that the Kazakh Parties were interested parties in the scheme proceedings;
- an order formally adding them as parties to the scheme proceedings; and
- to set aside the Sanction Order.

In support of their applications, the Kazakh Parties put before the Court certain BVI orders recognising monetary judgements obtained by them in England against the Claimant Parties (the "Registered Judgments").

In summary, the Kazakh Parties contended that:

- the Scheme would improperly equip Tristan with the financial resources to support enforcement efforts in respect of an award that had been secured through deceit; and
- the variation of terms proposed by the Scheme would see the Claimant Parties receive less, which would prejudice the Kazakh Parties' efforts to execute the Registered Judgments against them.

Judgment

The BVI court found the Kazakh Parties were not entitled to a declaration that they were interested parties for the purposes of the Scheme. Notwithstanding their lack of standing, the BVI court also found that it did not have jurisdiction

to revisit the terms of the Sanction Order, which was a final sealed order of the BVI court.

Upon careful examination of the English case law, including the principles set out in Re Lamo Holdings BV [2023] EWHC 1558, the court held that a "relevant interest" is one "that would be affected by the Scheme itself, or the implementation thereof, in a way that is sufficient for a court to say that the Scheme should not be sanctioned".

The judge held that the Kazakh Parties were not creditors under the Scheme, and therefore their complaints about the Claimant Parties' recoveries were non sequitur for the purposes of an application under Section 179A of the BCA. The Kazakh Parties' rights were against the Claimant Parties by virtue of the Registered Judgments and the Scheme did not affect those rights therefore.

The fact that the Claimant Parties may have fewer assets against which the Registered Judgments could be enforced was not considered a sufficiently proximate event which would cause the BVI court to withhold its sanction of the Scheme.

The judge emphasised that the Scheme was a contractual arrangement within the creditor-company relationship, not directly influencing third-party rights or claims external to this framework and that, while the BVI court has discretion to hear third-party objections on an application to sanction a scheme of arrangement, it will be reluctant to override or undermine an agreement reached between a company and its creditors.

As for the Kazakh Parties' allegations that the Award was obtained by fraud, the BVI court held they remained entitled to pursue those arguments, albeit in the various enforcement proceedings, and not ex-post as part of the scheme proceedings, as they sought to do.

Fresh guidance on BVI court-supervised restructuring mechanisms, including schemes and plans of arrangement, is particularly well-received given current market conditions, which have seen distressed groups turning more and more often to the BVI court for assistance with cross-jurisdictional, intra-group restructurings.

Developments

Expansion of statutory assistance regime

The BVI has a long history of assisting foreign insolvency proceedings and, under Part XIX of the BVI Insolvency Act, 2003, "foreign representatives" (essentially, insolvency officeholders) from certain designated jurisdictions may apply to the BVI court for a range of remedies to enable the foreign representative to gain control of assets and take other steps to secure property and information within the jurisdiction in support of the foreign insolvency proceedings.

Before 18 September 2024, the list of designated jurisdictions for the purposes of Part XIX of the BVI Insolvency Act included New South Wales (Australia), Canada, Finland, Hong Kong SAR (China), Japan, Jersey, New Zealand, the United Kingdom and the United States of America. However, the BVI FSC and insolvency practitioners regularly assess the BVI's strategic role in global financial structures as well as the interplay between the BVI and other financial centres such as the Cayman Islands, Singapore and the Channel Islands (to name a few).

Following a recent consultation, the list of designated jurisdictions has been expanded to include:

- the Bahamas;
- Barbados;
- Belize;
- Bermuda;
- the Cayman Islands;
- Guernsey;
- Guyana;
- Ireland;
- the Isle of Man;
- Jamaica;
- Member states and territories of the Organisation of Eastern Caribbean States (OECS) (Saint Kitts and Nevis, Saint Lucia, Antigua and Barbuda, the Commonwealth of Dominica, Anguilla, St Vincent and the Grenadines, Grenada, Montserrat, Guadeloupe and Martinique);
- Nigeria;
- Singapore;
- Trinidad and Tobago; and
- the Turks and Caicos Islands.

Foreign officeholders from the jurisdictions listed above are now able to apply to the BVI court for orders in support of foreign insolvency proceedings. This development reflects the BVI's ongoing commitment to maintaining its position as a premier financial hub by adapting to the evolving global financial landscape and embracing comity with other leading financial centres.

Arbitration clauses and applications to appoint liquidators

In June 2024, the Judicial Committee of the Privy Council handed down its long-awaited decision in Sian Participation Corp v Halimeda International Ltd [2024] UKPC 16.

In its decision, the Judicial Committee rejected the long-standing approach in Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2014] EWCA Civ 1575 (the "Salford Decision"), where the English Court of Appeal held that winding up proceedings should be stayed in favour of arbitral proceedings save for exceptional circumstances. In so finding, the Court held that "none of the general objectives of arbitration legislation… are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose".

Background

The respondent, Halimeda International Ltd ("Halimeda"), is a subsidiary of a Russian transportation and logistics group, and the appellant, Sian Participation Corp ("Sian") is part of the corporate structure through which a minority shareholding in the group was held. Halimeda advanced a term loan of USD140 million to Sian under a facility agreement. The loan was not repaid in accordance with the facility agreement's terms and Halimeda issued a demand for USD226 million as of December 2020. Sian disputed the debt on the basis of a cross-claim and/or set-off, alleging, among other things, that Halimeda had participated in a corporate raid against the appellant's shareholding in the group, backed and instigated by the Russian state. Halimeda denied the existence of, and its involvement in, the corporate raid.

On 29 September 2020, Halimeda applied to have liquidators over the affairs of Sian on the basis that it was both cash flow and balance sheet insolvent. Sian opposed the application and sought a stay or dismissal of the BVI proceedings on the ground that the facility agreement contained a widely drawn arbitration clause in favour of the London Court of International Arbitration (LCIA).

The application was heard by Wallbank J, who held that Sian had failed to show that the debt was disputed on genuine and substantial grounds and therefore appointed liquidators. After an unsuccessful appeal to the Eastern Caribbean Court of Appeal, Sian applied for leave to appeal to the Privy Council, which was granted on the basis the case raised an arguable point of law of great general or public importance.

Judgment

The Privy Council dismissed the appeal and upheld the decisions of the lower courts. The main issue before the Judicial Committee was whether the lower courts should have followed the Salford Decision, which held that a creditor's winding up petition should be dismissed or stayed where the debt relied on was subject to an arbitration agreement and was not admitted by the company, even if it was not genuinely disputed on substantial grounds.

The Judicial Committee concluded that the Salford Decision was wrongly decided and that it was therefore correct for the BVI courts not to follow it.

The Judicial Committee's reasoning was based on the following considerations.

- The public policies underlying the insolvency and arbitration regimes in the BVI (and in England and Wales) are not in conflict, as a creditor's winding up petition (or liquidation application in the BVI) does not trigger the mandatory stay provisions of the arbitration legislation, nor does it breach the negative obligation not to commence proceedings in respect of matters covered by the arbitration agreement.
- A petition does not require or involve any pursuit or adjudication of the creditor's claim to be a creditor, either as to liability or quantum, and the court's order does not create any res judicata or affect the creditor's right to prove for the debt in the liquidation.
- The court proceeds to make a winding up order only on a provisional assumption that the company is insolvent, which may turn out to be untrue, without invalidating the liquidation process.
- The court's powers on the hearing of a liquidation application are discretionary, and a creditor with an unpaid debt that is not genuinely disputed on substantial grounds is in substance entitled to an order as a statutory right, ex debito justitiae.
- The legislative policy embodied in the arbitration legislation is that claims or matters within the scope of an arbitration agreement should be resolved in arbitration and not by the court, but nothing about a debt covered by an arbitration agreement is resolved in winding up or liquidation proceedings in court.
- To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation order would add delay, trouble and expense for no good purpose and would not promote a pro-arbitration policy.
- None of the additional reasoning in the Salford Decision remedies the unfilled space in terms of the supposed extent of the legislative policy, and the concerns expressed about the temptation to bypass an arbitration agreement or the use of an improper threat to present a petition are well-known in the insolvency court and can be treated as types of abuse of process.

The Judicial Committee also made a Willers v Joyce direction, namely that the Salford Decision should no longer be followed in England

and Wales and that the Committee's decision, so far as it holds that the Salford Decision was wrongly decided, now represents the law of England and Wales. The Judicial Committee considered that such a direction should be given, as its conclusion that the Salford Decision was wrongly decided was a conclusion about English law, and that it was the current practice of the Companies Court in England and Wales to follow the assumed precedent set by it. The Judicial Committee's view was that this should cease and it directed so. The Judicial Committee also stated that this direction applies where there is a generally worded arbitration agreement or exclusive jurisdiction clause, and that the presence of such a clause should not lead to the stay or dismissal of the petition unless the debt is genuinely disputed on substantial grounds.

The Privy Council judgment is a significant development in the law of both the BVI and England and Wales, as it clarifies the relationship between insolvency and arbitration in the context of creditors' petitions for winding up. The judgment reaffirms the traditional approach that a creditor with an undisputed debt is entitled to invoke the collective remedy of liquidation, regardless of whether the debt is subject to an arbitration agreement or an exclusive jurisdiction clause.

The judgment also rejects the reasoning and outcome of the Salford Decision, which had introduced a discretionary stay of creditors' petitions where an insubstantial dispute about the debt was raised between parties to an arbitration agreement. The judgment brings the position in England and Wales into line with that already in place in the BVI and aligns it with the approach taken in Hong Kong by the Court of Final Appeal.

The judgment is likely to have important implications for creditors and debtors who are parties to arbitration agreements or exclusive jurisdiction clauses, as well as for insolvency practitioners and arbitrators. The judgment restores the creditor's right to seek a liquidation order as a statutory remedy without having to prove exceptional circumstances or to go through arbitration where there is no genuine or substantial dispute.

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