Discussing the benefits of using BVI courts for cross-border restructuring but also potential obstacles

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Restructuring & Insolvency analysis: Where a group's holding company is incorporated in the British Virgin Islands (BVI), it has access to the BVI courts for the purpose of attempting to restructure its debts. This article discusses (i) restructuring options available via the BVI courts (with a case study to illustrate an increased willingness of the judiciary to assist struggling companies that have a realistic prospect of trading their way out of difficulty) and (ii) potential obstacles to such restructuring. Written by Peter Ferrer and Gerrard Tin of Harney Westwood & Riegels LP.

The BVI and cross-border restructuring

The BVI is a self-governing overseas territory of the United Kingdom. It is a leading international finance centre which is tax neutral, politically stable and economically secure. The legal system is based on English common law with the final appellate court being the Privy Council (comprising members of the UK Supreme Court) in London.

The source of restructuring law in the BVI is found in two statutes: the Insolvency Act 2003 (IA 2003) and the Business Companies Act 2004 (BCA 2004), which together provide a comprehensive restructuring regime that includes tools not traditionally part of English law (such as Canadian-style plans of arrangement).

For companies seeking to reorganise their capital or debts there are three main routes available:

- a plan of arrangement
- a scheme of arrangement, or
- a creditors' arrangement

Plans and schemes are governed by the BCA 2004 and creditors' arrangements are governed by the IA 2003.

Plans of Arrangement (BCA 2004, s 177). These are (i) at the discretion of the directors, (ii) do not require the 75% in value threshold to be satisfied, but (iii) do require court sanction.

Schemes of Arrangement (BCA 2004, s 179A). These are between a company and its creditors and/or members or any class or classes of them. The section does not use the term 'scheme of the arrangement' specifically in the body of the text but rather refers to 'compromise or arrangement'.

There is no indication in the legislation as to the procedure for obtaining court sanction, but the BVI courts follow the English court practice by (i) obtaining permission to convene a meeting and (ii) obtaining the court sanction.

Creditors' Arrangements (Part II, IA 2003). These can be entered into between the company and its unsecured creditors without court sanction provided there is a sufficient number (75% by value) of creditors in favour.

Case study—constellation overseas

The BVI Commercial Court has recognised the role that provisional liquidators can play by way of 'light touch' appointments. Since 2019, the Commercial Court has developed a practice whereby provisional liquidators can be appointed in support of a subsequent restructuring plan, usually a scheme of arrangement. In those cases, the aim is to provide the company with some breathing space in order to come to an agreement with the requisite percentage of creditors.

In *Constellation Overseas Ltd et al* [BVIHC (COM) 206, 207, 208, 210 and 212 of 2018] (5 February 2019) (unreported), Justice Adderley, after an extensive review of the English and Commonwealth authorities, determined that the court had 'a very wide common law jurisdiction' to appoint provisional liquidators in support of a restructuring plan.

Crucially, in *Constellation* there was no evidence of over 75% support from creditors at the time of making the application (the threshold for actual approval of a scheme of arrangement). In fact, the support was initially very limited but in circumstances where there was no complaint of mismanagement of the company's affairs and there was some prospect of a forthcoming agreement with creditors, the BVI Commercial Court agreed that an appointment was appropriate. This was followed by a successful application to sanction a scheme of arrangement under BCA 2004, s 179A as discussed further below.

Constellation was followed by Justice Jack in the 2020 case of the Chinese fertiliser group Century Sunshine. The four BVI entities were part of a wider group of companies held by a Cayman listed company, Century Sunshine Group Holdings Ltd. Century Sunshine Group was in default of an approximately US$563,563,000 Singapore bond issue which had been guaranteed by the companies. This default was the commercial driving force behind the Group seeking to restructure its debts in the Cayman Islands, Bermuda and the BVI.

Jack J granted the appointment of provisional liquidators on the basis that there was some support from creditors and the liquidation analysis demonstrated that the return to creditors would be 0–40% for unsecured creditors and 33.6–100% for secured creditors, whereas the board considered that 100% return would be achievable on a restructuring.

Focus—schemes of arrangement

Schemes of arrangement pursuant to BCA 2004, s 179A have proved a useful tool for companies in difficulty over the course of 2020–2022.

BCA 2004, s 179A(3) provides:

> 'If a majority in number representing seventy five per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding on all the creditors or class of creditors, or the members or class of members, as the case may be, and also on the company or, in the case of a company in voluntary liquidation or in liquidation under the Insolvency Act, on the liquidator and on every person liable to contribute to the assets of the company in the event of its liquidation.'

Under BCA 2004, s 179A(2), an application may be made by the company and there is nothing in the BCA 2004 that prescribes the subject matter of a compromise or arrangement.

The court must also be satisfied that the resolutions have been passed by the requisite majority in accordance with the BCA 2004 in a meeting duly convened and held in accordance with the order convening the meeting. The

majority is that of those who vote, not those entitled to vote, nor of those who are present. This means that creditors who are not present in person or by proxy, or who, although present, do not vote, may be ignored.

This highlights the need to have a properly prepared liquidation analysis as the basis for the comparison.

Potential obstacles

While the IA 2003 was largely modelled on the UK Insolvency Act 1986, there are significant differences that can trip up the unwary. For example, while the IA 2003 makes provision for administration orders, the section has not been enacted. Similarly, Part 18 sets out the UNCITRAL Model Law on Cross-Border Insolvency, which has also not been enacted.

Plans and schemes of arrangement pose particular risks that businesses should be aware of:

Plans of Arrangement: there is no statutory moratorium available in relation to plans of arrangement so a company remains vulnerable to creditors' claims.

Schemes of Arrangement: the court will not simply 'rubber stamp' a scheme but will analyse it critically to make sure it is fair, reasonable and efficacious. At the meeting, 75% in value must vote in favour of the scheme in order for it to be binding.

As with plans of arrangement there is no statutory moratorium available and therefore the scheme remains liable to upset by creditor claims until sanctioned by the court.

The absence of a statutory moratorium needs to be anticipated and mitigated: in *Constellation*, the court addressed the issue of the moratorium under IA 2003, s 174(1), which provides that—where an application for appointment of a liquidator had been issued but not determined, an application can be made to stay any pending actions against the company.

In *Constellation*, proceedings had been issued and therefore the stay was granted. In *Century Sunshine* no other proceedings had been issued but the court was satisfied that it could grant a conditional moratorium so that in the event any actions were commenced against the companies they could obtain the benefit of the moratorium under IA 2003, s 174(1) and an automatic stay would be imposed.

Recent attempts to follow this reasoning were frustrated by the prospect of imminent liquidation proceedings, again emphasising the need for a coherent restructuring strategy to be before the court.

Conclusion

Constellation was a major success for the BVI Commercial Court, permitting a Brazilian restructuring plan and Chapter 15 recognition in the United States to proceed in parallel with a BVI scheme of arrangement in relation to one entity which fell outside of the Brazilian plan. The court took a pragmatic approach to what was one part of a global group restructuring.

Macroeconomic factors are pointing towards a likely increase in the use of restructuring. The use of provisional liquidators to facilitate and oversee a credible restructuring plan will continue to be a viable course of action for businesses facing liquidity issues.

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