

Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Insolvency

British Virgin Islands
Harney Westwood & Riegels

[chambers.com](https://www.chambers.com)

2019

BRITISH VIRGIN ISLANDS

TRENDS AND DEVELOPMENTS:

p.3

Contributed by Harney Westwood & Riegels

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

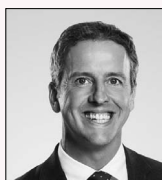
Trends and Developments

Contributed by Harney Westwood & Riegels

Harneys is a global offshore law firm with entrepreneurial thinking. We provide advice on British Virgin Islands, Cayman Islands, Cyprus, Bermuda and Anguilla law. Our international client base includes the world's top law firms, financial institutions, investment funds and private individuals. We have acted in some of the largest and most complex cross-border restructurings and insolvencies of recent times, and have unparalleled experience in schemes

of arrangement, creditors' arrangements and plans of arrangement. Our team frequently advises lenders and investors, corporates and insolvency office-holders on the use of schemes of arrangements in the context of parallel restructurings or reorganisation procedures in other jurisdictions, such as Chapter 11 of the US Bankruptcy Code or parallel schemes of arrangement in other common-law jurisdictions.

Authors



Andrew Thorp leads the BVI Litigation and Insolvency practice group, and specialises in cross-border asset recovery and insolvency work. His clients include law firms, banks, funds, private equity houses and trust companies. Andrew

focuses largely on pre-emptive remedies, including freezing orders, provisional liquidations and discovery orders. He has acted in numerous successful asset-retrieval operations across CIS, Latin America and Asia. He has also pioneered a number of cross-border protocols between court officers, and is regularly retained to advise on the restructuring of international distressed structures.



Stuart Cullen is a counsel in our BVI Litigation and Insolvency practice group where he specialises in cross-border insolvency and often advises creditors on the approach to recovery of debts from insolvent debtor companies. He regularly

appears in the BVI Commercial Court and Eastern Caribbean Court of Appeal for both creditors and debtor companies. His experience includes acting for the provisional liquidators in the application for the winding-up of two BVI companies with debts in excess of USD1.5 billion, and securing the urgent appointment of provisional liquidators in the course of a high-profile USD1.6 billion insolvency matter involving multiple proceedings in the US, Hong Kong and Cayman, which involves substantial allegations of trade finance fraud on the part of one of the entities.

British Virgin Islands (BVI) vehicles are utilised for a myriad of different purposes in numerous sectors and across all regions. Some 500,000 BVI companies access finance, hold valuable assets, direct and pool foreign investment. This may well partly explain why, when there was a general downward trend in formal insolvencies in advanced markets in 2017, the BVI bucked that trend with over 100% growth. This is despite a continued rise in work-outs and a preponderance of forbearance agreements. The following is a look at what the statistics mean and the likely themes in 2018 and beyond.

Liquidator Appointments

The BVI provides an efficient two-point entry into court-supervised corporate liquidation. This may be achieved by either an order of the court where an insolvency practitioner will be appointed or, unlike many other jurisdictions, by a members' resolution backed by a majority of at least 75%. The latter route to winding up has been pursued in some of the biggest insolvencies of the last few years. This is primarily

because a BVI or foreign parent company has been put into liquidation itself, and the liquidators of that parent company choose to proceed by the members' resolution route. It has also been the source of occasional confusion abroad as many other jurisdictions, with more dated legislation, have struggled with the concept of a voluntary, shareholder-driven court-supervised procedure. Favourable decisions in Singapore and New York, however, suggest that this will be less of an issue in future.

Increased Activity

Despite a continued heavy reliance on workouts or restructurings, 2017 saw a significant increase in the number of BVI insolvencies. There were altogether a total of 88 liquidator appointments – the highest recorded number yet. In all, 57 of these appointments were court-ordered while 31 were appointed by members.

To place this in context, in 2016 there were just 35 appointments, down from 46 in the previous year.

Whilst the increase in liquidator appointments may be seen in part as a correction from the previous year, increased activity can be attributed to a number of factors. Given the preponderance of US-denominated debt issued through BVI vehicles, a general rise in the value of the US dollar has been hard on industries relying on local currency for revenue. Paired with this, defaults driven by corruption scandals have also driven liquidations.

Such large-scale investigations have also resulted in “cluster” insolvencies of group companies (such as various units of the China Fishery Group, the troubled family-owned trawling and factory business) which has also pushed appointment numbers higher.

In addition to the appointment of a liquidator on the grounds of insolvency, BVI insolvency legislation also provides for the appointment of a liquidator by the court on the just and equitable basis and in the public interest (on the application of the Financial Services Commission or the Attorney General). Traditionally, the just and equitable winding-up of companies had been based on grounds such as vehicles incepted by fraud or a complete loss of substratum. One interesting movement this year was the willingness of the BVI Commercial Court to appoint liquidators on the just and equitable basis, in addition to the insolvency basis, in aid of asset-tracing efforts (by the trustees of Boris Berezovsky’s insolvent estate) over a BVI company to which Berezovsky had transferred significant sums prior to his death. The BVI Court has also shown its willingness to appoint a liquidator where it could be shown that the directors’ conduct in permitting wholly inadequate accounting practices could justify the company’s liquidation.

Further, enforcement actions have generally increased. With this noted rise in activity in this sphere we have seen, most notably, lenders and creditors enforcing on share pledges (often via the appointment of out-of-court receivers).

Appointments and Fees

In contrast to certain other offshore jurisdictions, when liquidators are appointed to insolvent companies by members or by the court, at least one of the liquidators is required to be a BVI-licensed insolvency practitioner, based in the BVI (of which there are about 30, plus many other skilled insolvency professionals). This requirement does not prevent the appointment of a joint liquidator who is not a BVI-licensed insolvency practitioner and who is based in another jurisdiction with a close connection to the company’s business. While such joint appointments have become more common in recent years, it should be noted that the court does consider whether such a joint appointment is necessary, will be

in the interests of the creditors and makes economic sense on a case-by-case basis.

When considering liquidators’ fees, the court has also been keen to track levels of remuneration with the progress of the estate and recoveries, along with ensuring that market rates are generally applied (even across jurisdictions). The BVI Court has also been receptive to more creative approaches to liquidators’ fees and has recently been prepared to sanction the drawdown of fees yet to be incurred.

Cross-border Co-operation

Whilst not having enacted the legislation mirroring UNCITRAL’s Cross Border Model Insolvency Law, the BVI has continued to work with other jurisdictions to recognise foreign appointments, both by way of common law and provisions for specific assistance under Part XIX of the Insolvency Act. Legislative reform will likely address the question of wider cross-border co-operation, although it would appear unlikely that a full implementation of the Model Law would be in the best interests of the territory for now. In the meantime, it is more likely that the list of countries to which assistance will be formally granted under Part XIX will be extended. The BVI was one of the first countries to implement the Judicial Insolvency Network’s Guidelines for co-operation between courts. These exciting new provisions provide for better communications between courts and more ambitious practices, such as joint hearings and sharing of documents.

Restructuring and Corporate Rescue

BVI insolvency legislation provides for three different procedures through which a restructuring may be achieved: (i) schemes of arrangement (similar to the English procedure); (ii) plans of arrangement (similar to the US procedure); and (iii) company creditor arrangement (similar to the English company voluntary arrangement procedure). Restructuring in BVI is not assisted by the fact that there is no way for a company to obtain a temporary moratorium while planning its restructuring.

Part III of the BVI Insolvency Act contains provisions for administration (modelled on the now dated administration regime in the UK’s Insolvency Act 1986), although this part has never been brought into force. This may well reflect on the number (75% in value of debt threshold) of effectively consensual creditors’ arrangements being deployed over court-driven schemes and plans of arrangement.

Unlike the position in the Cayman Islands and Bermuda, where provisional liquidation is regularly used in this way, the BVI Insolvency Act doesn’t specifically provide for the appointment of provisional liquidators to effect a restructuring.

The BVI is now actively considering new restructuring legislation that will seek to balance the interests of the BVI as a traditionally creditor-friendly jurisdiction, widely utilised for funded debt and structured finance, with the need for turnaround capacity. It is likely that this will take the form of a “light touch” regime that would complement cross-border co-operation.

Harney Westwood & Riegels LP

Craigmuir Chambers, PO Box 71
Road Town
Tortola
VG1110
British Virgin Islands

HARNEYS

Tel: +1 284 494 2233
Fax: +1 284 494 3547
Email: bvi@harneys.com
Web: www.harneys.com