

UPDATE

Appointment of 'Soft Touch' Provisional Liquidators in the BVI

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In a landmark decision¹ the BVI Commercial Court granted an application for the appointment of 'soft touch' joint provisional liquidators in support of a major cross-border restructuring. This is the first time the BVI courts have granted an application of this nature and is an important development for BVI insolvency.

A 'soft touch' provisional liquidation, together with a stay of proceedings, protects a company from actions brought by individual creditors throughout the restructuring of its debts, whilst the directors continue to exercise routine control. Individual creditors are prevented from attempting to gain an unjust advantage over other creditors by bringing actions against the company and the company is able to continue operating as a going concern under existing management. It is a useful and flexible tool in cross-border restructuring.

Background

Constellation Overseas Ltd (the **Company**) and five of its British Virgin Islands (**BVI**) subsidiaries (together, the **Applicants**) formed part of a group constituting an oil and gas drilling business ("**the Group**"). The Group was in the process of a cross-border restructuring involving both a judicial reorganisation in Brazil and US Chapter 15 bankruptcy proceedings. The group had a complex, integrated and multinational corporate and debt structure and for the restructuring to be successful ancillary support was required from courts in several other jurisdictions, including the BVI. The Applicants thus sought orders from the BVI Commercial Court to appoint 'soft touch' joint provisional liquidators (**JPLs**) and a stay of proceedings against the Applicants.

Application for joint provisional liquidation

The court accepted that the appointment of provisional liquidators was necessary for the purposes of maintaining the value of the assets owned or managed by the Applicants, and aiding their possible restructuring. The evidence before the court indicated that there was a real prospect of restructuring and that the realisation of assets for the Company as a going concern was significantly better than a company in liquidation.

Although this type of application was a first for the BVI, the appointment of JPLs to facilitate global restructuring had been demonstrated in other offshore jurisdictions which now have a well-established practice of appointing JPLs in aid of cross-border restructuring. In particular the court considered

¹ *Constellation Overseas Limited et al* BVIHC (Com) 2018/0206, 0207, 0208, 0210 and 0212

authorities from the Cayman Islands² and Bermuda;³ which in turn were cemented in persuasive English authorities.

The court found that it had a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect assets owned or managed by the company concerned and to make such appointments in aid of a cross-border restructuring.

The court granted the application, including a stay of proceedings under section 174(1) of the BVI Insolvency Act 2003.

Conclusion

The decision brings the BVI in line with other offshore jurisdictions and is a useful tool for managing cross-border restructurings efficiently.

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² *Re Fruit of the Loom Ltd.* [2000] CILR, Note 7b, unreported.

³ *Re ICO Global Communications (Holdings) Limited* [1999] Bda L.R. 69.

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