

# OFFICEHOLDERS FROM ADDITIONAL JURISDICTIONS NOW ENTITLED TO SEEK ASSISTANCE IN THE BRITISH VIRGIN ISLANDS



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**"The Court of Appeal in *Erez* [found] that the common law right of recognition survived in the BVI notwithstanding the statutory scheme. However, the fact of recognition did not necessarily carry with it the right of assistance"**

The insolvency law of the British Virgin Islands (the **BVI**) is contained in the Insolvency Act, Revised Edition 2020 (the **Act**) and associated rules and regulations. Although Part XVIII of the Act contains the UNCITRAL Model Law on Cross-Border Insolvency, that part has never been brought into force. Accordingly, it is not possible for a foreign officeholder to obtain an order in the BVI for general recognition of his or her appointment with the effect that the foreign officeholder then has all the powers of a BVI-appointed liquidator.

The only statutory basis for obtaining orders in aid of foreign proceedings is under Part XIX of the Act. That Part is designed to operate on an application-by-application basis. It gives a foreign representative from a "relevant foreign country" express rights to apply to the BVI Court for orders in aid, but without conferring status on the foreign representative through the recognition of the foreign proceedings in which he or she has been appointed.

For the purposes of Part XIX, a foreign representative means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding. Foreign proceedings means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

Relevant foreign countries are designated by the BVI Financial Services Commission. Up until recently (as to which, see below), only nine jurisdictions had been designated being Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States of America.

Previous attempts to argue that common law recognition and assistance continued to operate alongside the statutory scheme in the BVI have been unsuccessful.

In *Re C (a bankrupt)* (Claim No. BVIHC (COM) 2013/0080, 31 July 2013), trustees in bankruptcy appointed by a Hong Kong court applied to the BVI Court for an order that they be granted all of the powers which they would have had if they had been appointed under the Act. The Court held that the trustees were entitled to specific orders in aid of the foreign proceedings in which they were appointed, Hong Kong being a relevant country for the purposes of Part XIX. However, the Court expressed the *obiter* view that the common law approach to recognition and assistance did not survive in parallel with the statutory scheme. As such, it would not have been possible to confer upon the trustees the general powers that would be conferred upon a trustee appointed under the Act.

*Net International Property Limited v Erez* (Appeal No. BVIHCOMAP2020/0010, 22 February 2021) concerned an appeal against a decision of the BVI Court recognising the appointment of a trustee in bankruptcy by an Israeli Court and ordering, amongst other things, that the trustee be registered as the shareholder of the appellant BVI company. The Court of Appeal was required to consider whether the common law right of assistance survived the enactment of Part XIX of the Act, and if so, whether it was open to the courts of the BVI to grant the trustee in bankruptcy assistance. Although not binding on the Court of Appeal, the trustee argued that the views regarding the existence of common law assistance expressed in *Re C* had been incorrect.

The Court of Appeal in *Erez* had no hesitation in finding that the common law right of recognition survived in the BVI notwithstanding the statutory scheme. However, the fact of recognition did not necessarily carry with it the right of assistance. As Israel was not a designated relevant country for the purposes of Part XIX of the Act, the trustee was not entitled to assistance under that Part.

As regards the possibility of providing assistance to the trustee at common law, the Court of Appeal held that *Re C* had been correctly decided and should be followed. It held that:

*'... when the Legislature enacted Part XIX of the Act the intention was to provide a complete code for foreign representatives to apply to the BVI courts for assistance in cross-border insolvency matters such that foreign representatives from non-scheduled countries are unable to obtain assistance.'*

In arriving at this conclusion, the Court of Appeal said that it did so with some regret because it did not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross-border insolvency cases.

Nevertheless, with effect from 18 September 2024, the BVI FSC has designated the following additional fifteen jurisdictions as relevant foreign countries for the purposes of Part XIX:

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| 1. Bahamas        | 10. Jamaica   |
| 2. Barbados       | 11. Member States and Territories within the Organisation of Eastern Caribbean States |
| 3. Belize         | 12. Nigeria   |
| 4. Bermuda        | 13. Singapore   |
| 5. Cayman Islands | 14. Trinidad and Tobago   |
| 6. Guernsey       | 15. Turks and Caicos Islands  |
| 7. Guyana         |   |
| 8. Ireland        |   |
| 9. Isle of Man    |   |

As regards foreign proceedings being conducted in jurisdictions other than the twenty-four designated jurisdictions, there remains the possibility of ancillary proceedings being commenced in the BVI. The BVI Court has the power under section 163 of the Act to appoint a liquidator

over a foreign company if it is satisfied that the company is insolvent and has a connection with the BVI. Relevantly, for the purposes of the section, a foreign company will have a connection with the BVI if it has or appears to have assets in the jurisdiction such as shares in a subsidiary.

