

BVI Interim Remedies in Aid of Foreign Proceedings

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The British Virgin Islands (BVI) is one of the world's leading offshore financial centres, recognised for its developed common law legal system, creditor-friendly insolvency regime, and well-established courts that specialise in commercial matters. The territory's popularity as a hub for company incorporations means that many international structures and investments are anchored in BVI companies. As a result, disputes involving BVI companies frequently take place in foreign onshore jurisdictions and arbitral forums. However, foreign courts and arbitral forums may be unable to grant all necessary remedies against the BVI companies. In these cases, a claimant should consider obtaining legal advice on applying for additional interim remedies (including freezing orders, proprietary injunctions, disclosure and receivership orders) in the BVI courts.

Jurisdiction to grant interim relief

Section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act (Revised 2013) as amended (the **Supreme Court Act**) provides a statutory basis for the grant of interim relief in support of foreign proceedings, which have been or are about to be commenced.

In *Claimant X v A TVI Company BVIHC* (COM) 2021/0037, where the claimant successfully obtained a proprietary injunction and ancillary disclosure orders against a BVI company in support of substantive proceedings in England and Wales, the court established that in considering such applications, it should apply the following two-stage test:

- (a) whether the facts of the case would warrant the remedy sought if the substantive proceedings were brought in the BVI; and
- (b) if the answer to the above question is yes, whether the fact that the court has no jurisdiction apart from section 24A of the Supreme Court Act (because the substantive proceedings are abroad) makes it 'inexpedient' to grant the remedy.

As far as the second stage of the test is concerned, the court will consider whether there are 'connecting factors' to the BVI, including the presence of the relevant entity or assets within the jurisdiction. The court will also take into account whether:

- (a) granting the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order in the primary court, or overlaps with it;
- (b) it is the policy in the primary jurisdiction not to make relevant orders;
- (c) there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting, inconsistent or overlapping orders in other jurisdictions;
- (d) there is likely to be a potential conflict as to jurisdiction at the time the order is sought rendering it inappropriate and inexpedient to make a relevant order;
- (e) the court will be making an order which it cannot enforce; and
- (f) the primary court could have granted the order sought in the substantive proceedings but declined to do so, and whether the reasons for declining the order should affect the exercise of the BVI court's discretion.

Third parties

Whilst freestanding freezing orders may be granted against defendants to foreign proceedings, in some cases they may also be granted against third parties over whom the BVI courts have 'personal' jurisdiction. These parties are referred to as 'non-cause of action defendants' (**NCADs**).

In *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 the Privy Council clarified that to obtain a freezing order against NCADs, it is necessary to demonstrate that they are '*in possession or control of an asset*' against which a judgment made in the foreign proceedings could be enforced and that this could be achieved by showing that:

- (a) there is '*good reason*' to suppose that the asset held by the NCAD is beneficially owned by a defendant against whom the claimant '*has obtained or has a right to obtain*' a judgment;
- (b) enforcement of a judgment against the defendant might lead to its liquidation and the liquidator would be able to pursue a claim against the NCAD;
- (c) the defendant has a right of indemnity against the NCAD which can be enforced by a receiver; or
- (d) a transaction by which the defendant transferred an asset to the NCAD is voidable and might be set aside by the court.

Foreign insolvency proceedings

In *Parles AS and Others v Winsley Finance Limited* BVIHCM 2022/012, two unsecured creditors successfully obtained a freezing order against a BVI company (which was a NCAD) in support of insolvency proceedings in Czechia. The Court held that the 'foreign proceedings' in support of which an application may be made under section 24A of the Supreme Court Act include insolvency proceedings even if those proceedings concern the appointment of an insolvency practitioner rather than seeking a monetary judgment.

The court also observed that, unless there are exceptional circumstances (which are likely to be case-specific) that justify the application by a petitioning creditor, such applications should usually be made by the officeholder insolvency practitioner.

International Arbitration

Under section 43(2) of the Arbitration Act (Revised 2020) as amended (the **Arbitration Act**), BVI courts have jurisdiction to grant interim remedies (also known as 'interim measures') in support of arbitrations which have been or are to be commenced in or outside of the BVI. Pursuant to section 43(5) of the Arbitration Act, in cases where arbitration has been or is about to be commenced outside of the BVI, the BVI courts may grant an interim measure only if the arbitration is capable of resulting in an award that may be enforced in the BVI, such as against shares in a BVI company beneficially owned by the respondent.

However, in *Koshigi Limited and Another v Donna Union Foundation* BVIHCMAPP2018/0043 and 0050, the BVI court granted a number of interim measures, including a worldwide freezing order, a disclosure order and a receivership order in support of the proceedings before the London Court of International Arbitration, whilst observing that it is entitled to grant interim measures even if the existence of the BVI assets cannot be established with certainty. This is a helpful precedent in cases where an applicant has reasonable grounds to believe that the respondent is in possession or control of assets in the BVI, but this cannot be established with certainty.

Receivership Orders

Subject to the court's discretion, receivership orders may be granted under both section 24A of the Supreme Court Act and section 43(2) of the Arbitration Act. By making a receivership order, the court appoints a receiver who may be authorised to receive, manage, preserve and deal with the specified assets and business of a company. This order deprives the directors of all powers to enter into contracts in relation to the specified assets and business and prohibits them from selling, pledging or otherwise disposing of the specified assets.

A receivership order is an invasive and draconian remedy and, in addition to satisfying the usual tests for obtaining a freezing order, it is additionally necessary to show that a freezing order alone is unlikely to provide sufficient protection. In *Donna Union Foundation*, a receivership order was made in circumstances where the defendants had begun to dispose of their assets on the day of the conclusion of the liability hearing in breach of an earlier freezing order without explaining their behaviour.

Norwich Pharmacal Orders

Under section 24A(5) of the Supreme Court Act, BVI courts have jurisdiction to make orders for the provision of documents and information in support of the foreign proceedings. In *CIF v DLG & Another* BVIHCM2023/0050, the court clarified that *Norwich Pharmacal* orders fall within the type of orders which may be granted under that section.¹

Contacts

A full list of contacts specialising in BVI litigation and dispute resolution can be found [here](#).

¹ More information about these orders is available in our guide '[Documents and information that can be obtained in respect of a BVI company](#)'.