

ADVISORY | INDUSTRY INFORMATION

# BVI Insolvency Proceedings - Top Creditor FAQs for 2023

## Introduction

As 2023 gets into its stride and with the financial markets forecasting severe economic challenges in 2023, we are seeing an increasing number of enquiries from creditors with respect to debts owed by BVI incorporated debtors. In particular, having stayed their hand, whether by choice or by virtue of local legislation which has imposed a standstill during the global pandemic, there are now clear indications that creditors are no longer willing to postpone payment indefinitely but want to explore their options including, specifically, the ability to initiate insolvency proceedings in the BVI in respect of the debtor.

Although every case is different, and needs to be considered on its own facts, some questions reoccur repeatedly. What follows is an attempt to provide some high-level answers to these questions, and an introduction to the framework of the BVI corporate insolvency process, without, we should emphasise, replacing the need for bespoke, tailored advice in any particular case.

### **The debt arises under a contract which contains an exclusive jurisdiction clause in favour of another jurisdiction: can I nevertheless initiate insolvency proceedings against the debtor company in the BVI?**

A BVI company falls within the *in personam* jurisdiction of the BVI Court, and the BVI Insolvency Act, 2003 the "Act" expressly grants the BVI Court jurisdiction to appoint a liquidator to a domestic company upon an application for

the appointment of a liquidator. It is not possible to contract out of that jurisdiction, although it is possible to contract for an alternative jurisdiction in relation to any dispute<sup>1</sup>.

Accordingly, an exclusive jurisdiction clause will only become a material factor if the Court determines that the debt upon which a petitioning creditor relies in the application is bona fide disputed on substantial grounds. If the Court determines that such a dispute exists, then its usual approach will be to set aside the statutory demand or to dismiss the petition<sup>2</sup>.

### **The debt arises under a contract which contains an arbitration clause: must the claim be referred to arbitration?**

If the debtor company so requests<sup>3</sup>, a dispute raised on an application to set aside a statutory demand in such a case must be referred by the Court to arbitration by virtue of section 18(1) of the Arbitration Act 2013 (as amended) adopting Article 8 of the UNCITRAL Model Law. However, the fact that the contract under which the debt arises contains an arbitration clause will not, by itself, engage an automatic stay of a winding up petition on insolvency grounds<sup>4</sup>. Rather, in adjudicating a petition the fact that the parties have agreed to arbitrate any dispute between them will be treated by the BVI Court as a relevant factor in the exercise of its discretion as to whether to appoint liquidators<sup>5</sup>. The existence of an arbitration agreement will often favour the dismissal or stay of a petition if the company concerned invokes it<sup>6</sup>. However, the Court will examine whether a proposed defence is advanced

1. Alexander Jacobus De Wet v Vascon Trading Ltd (BVIHC(COM) 2011/0129).

2. Although the form of the application in the BVI to appoint liquidators is by Originating Application rather than by Petition, the terms "Petition" and "petitioning creditor" are used in this piece because of the familiarity of their use across jurisdictions.

3. Novel Blaze Limited v Chance Talent Management Limited BVIHMAP2020/0006.

4. C-Mobile Services Ltd v Huawei Technologies Co Ltd [2015] ECSCJ No 195. This is because, as noted above, the Creditor in proceeding by way of Petition is considered to be exercising a collective remedy in which the issue is between the Company and its Creditors is the Company's ability to pay its debts, an issue not covered by any contractual arbitration clause between Applicant and Respondent: Jinpeng Group Ltd v Peak Hotels and Resorts Ltd BVIHMAP 2014/0025 AND 2015/0003.

5. Kenworth Industrial Limited v Xin Gang Power Investments Limited BVIHC (COM) 2022//0053AND BVIHC (COM) 2022/0065.

6. As it did in Capital KDT Ltd v Retribution Ltd; Retribution Ltdpv v L Capital KDT Ltd [2016] ECSCJ No 235 at [66]; IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd [2020] ECSCJ No 242; Rangecroft Ltd v Lenox International Holdings Ltd [2020] ECSCJ No 231, [2020] ECSCJ No 384.

bonafide, that is, with a real belief in its substance and test the reality of the dispute, before it will stay or dismiss an application for the appointment of a liquidator in favour of arbitration<sup>7</sup>.

**I hold security for the debt over the debtor company's assets which is sufficient to discharge my debt, however, I would prefer to proceed with insolvency proceedings against the debtor as it may be quicker to do that than to realise my security? Am I entitled to do that?**

If you are a secured creditor, and the security is sufficient to discharge your debt, the BVI Court will set aside any statutory demand which you may serve on the debtor company's application<sup>8</sup>. A secured creditor does have standing to apply for the appointment of liquidators on insolvency grounds. However, the Court may exercise its discretion against the making of an Order on such an application, and is likely to do so if the application is opposed, on the basis that a fully secured creditor has no financial interest in the making of the Order as, unless he waived his security, his rights subsist entirely outside the scope of the liquidation.

**I hold security for the debt over the debtor company's assets but the debt exceeds their current value by a large margin. Am I entitled to proceed with insolvency proceedings against the debtor?**

The fact that a creditor's debt is partly secured does not prohibit it from serving a statutory demand provided that: (i) the nature and value which the creditor puts on the security interest is specified in the demand; (ii) the amount claimed is the unsecured balance; and (iii) the balance is greater than the statutory minimum<sup>9</sup>. However, the Court will set aside a demand if it is satisfied that the security interest held by the creditor in fact equals or exceeds the value of the debt claimed in the demand less the prescribed minimum. However, provided that the unsecured portion of the debt exceeds the statutory minimum, and remains unpaid, that is sufficient foundation for winding up proceedings.

**I hold security for the debt in the form of a charge over third party assets. Am I nevertheless entitled to proceed with insolvency proceedings against the debtor?**

The Act defines a "secured creditor" as a creditor who holds an enforceable security interest over an asset of the debtor.

A creditor who holds an enforceable security interest over an asset of a third party is therefore not treated as a secured creditor within the meaning of the Act and is free to proceed<sup>10</sup>.

**The debtor company has been struck off the Register of Companies and dissolved. Does that mean that I can't proceed with insolvency proceedings against the debtor?**

The fact that a Company is struck off and dissolved does not prevent it from incurring liabilities, nor does it prevent a creditor from making a claim against the company and/or pursuing that claim to judgment or execution, including applying to appoint liquidators.

Accordingly, the fact that the debtor company is currently struck off and dissolved does not prohibit the creditor from issuing a winding up application against it. It is possible to combine a winding up petition with an application to restore the company to the register under section 218(1) (c) and/or (d) of the Business Companies Act, 2004 (as amended) (the "BCA") if the application is made within 5 years of the dissolution<sup>11</sup>. Before the Registrar will allow the registration of a liquidator's appointment, it will usually require that any outstanding fees and penalties are fully discharged.

**I'm worried that if I commence proceedings, the debtor company's directors may take steps to move its assets beyond reach pending the determination of the insolvency proceedings.**

If there are concerns that the debtor company may dissipate its assets prior to the determination of a winding up application, it may be possible for the creditor to seek the appointment of a provisional liquidator. The Court may appoint a provisional liquidator on the application of a creditor if:

- a. the debtor company consents to the appointment; or
- b. the Court is satisfied that the appointment of a provisional liquidator:
  - i. is necessary for the purpose of maintaining the value of assets owned or managed by the company; or
  - ii. is in the public interest.

If the BVI Court is satisfied that it is appropriate to appoint a provisional liquidator, it may do so on the terms it considers fit, including requiring the applicant to deposit at Court or otherwise secure such sum as the Court considers reasonable to cover the provisional liquidator's remuneration.

7. A Creditor v Anonymous Company Ltd [2021] ECSCJ No 467.

8. Insolvency Act, 2003 s.157(1)(c).

9. USD2,000.

10. Novel Blaze Limited v Chance Talent Management Limited BVIHCMP2020/0006.

11. BCA, 2004 s.218(5).

A provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out functions for which he or she is appointed.

A provisional liquidator's appointment comes to an end upon the determination of the petition at which point a liquidator will be appointed, or the application for the appointment of a liquidator will be dismissed.

---

## Author



**Rosalind Nicholson**  
Partner

+1 284 852 2237  
rosalind.nicholson@walkersglobal.com

---

## Global Contacts



**Luke Petith**  
Partner

Dubai  
+971 4 363 7926  
luke.petith@walkersglobal.com



**Colette Wilkins KC**  
Partner

Hong Kong  
+852 2596 3307  
colette.wilkins@walkersglobal.com



**Andrew Chissick**  
Partner

London  
+44 (0)20 7220 4994  
andrew.chissick@walkersglobal.com



**Adam Hinks**  
Partner

Singapore  
+65 6603 1657  
adam.hinks@walkersglobal.com