BVI Takes Significant Steps To Enforce Court Judgments And Arbitration Awards

By Dancia Penn, OBE QC, Dancia Penn & Co., Caribbean Arbitrators, and Arbitrators@33BedfordRow; and the Honourable Barry Leon, Caribbean Arbitrators, Arbitrators@33BedfordRow, and Arbitration Place

The British Virgin Islands is the home jurisdiction to around 400,000 active companies. Collectively, BVI companies, as of 2015, were the world’s seventh largest source of foreign direct investment. Assets held by them had an estimated worldwide value of US$1.5 trillion.

It is not surprising, therefore, that BVI courts are regularly involved in assisting creditors to enforce judgments and arbitration awards against assets legally held in the BVI.

The BVI became more welcoming to foreign arbitral awards about six years ago when the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) was extended to the BVI in May 2014. This occurred shortly before the BVI’s version of UNCITRAL’s Model Law on International Commercial Arbitration, the Arbitration Act, 2013, came into force in October 2014. The Act includes provisions governing the recognition and enforcement of foreign arbitral awards.

BVI courts have long been receptive to recognition and enforcement when a foreign judgment creditor complies with a limited number of ordinary requirements. They have had little patience for obstructive guerilla tactics designed to avoid or delay recognition and enforcement.

Two Problems With Enforcement Of Judgments And Awards Needed Solutions

The BVI faced two judgment and award enforcement problems as 2019 moved into 2020. Solutions were needed.

First, a cloud hung over the BVI courts’ ability to grant “charging orders”, a method of enforcement whereby a court imposes a charge on a judgment or award debtor’s assets. This mechanism enables the sale or appropriate realisation of a charged asset to satisfy a judgment or award.

The cloud arose from a BVI Commercial Court Judgment (Stichting Nems v Gitlin (BVIHC(COM) 0001/2018)) which held that the Eastern Caribbean Supreme Court (ECSC)’s procedural rules governing charging orders (CPR Part 48) merely set out the procedural framework for the relief but did not confer jurisdiction to allow the Court to grant it. The Commercial Court held that BVI courts lacked a statutory basis to grant charging orders.

This judgment was appealed to the ECSC Court of Appeal which confirmed that the BVI had not enacted legislation conferring jurisdiction on BVI courts to grant charging orders. However, it held that the BVI courts had this jurisdiction based on historic English legislation in force as at 1 January 1940 (Judgments Act of England 1838 and 1840).

This judgment was not appealed to the Privy Council, which is the final appellate court for the BVI (and most other nine members of the Organization of Eastern Caribbean States), so it remains unclear whether the Court’s decision would have been upheld.

The second enforcement problem confronting the BVI involved layered asset protection structures.

While respected enterprises worldwide use BVI companies, with the BVI being home to part of the group structures of over 140 major companies listed on the London, New York or Hong Kong stock exchanges, a small proportion of corporate structures involving BVI companies – complex, multi-jurisdictional, layered asset protection structures – were created for no legitimate commercial purpose. Their purpose is solely to make it difficult or impossible for judgment and award creditors to reach assets held for the benefit of the company’s ultimate beneficial owner (UBO).

This was not solely a BVI problem. Many of these asset protection structures involve companies incorporated in other jurisdictions around the world, both offshore and onshore – including Delaware, Luxembourg, the Cayman Islands, Jersey, Cyprus, and elsewhere.
Charging Orders Act, 2020 Resolved Both Problems

The BVI’s forward-thinking Charging Orders Act, 2020, which came into force on 19 March 2020, resolved both enforcement problems.

The BVI’s House of Assembly enacted this progressive legislation, first to ensure that there is a clearly expressed statutory jurisdiction conferred on BVI courts to issue charging orders and second, to enable judgments and awards to be enforced in the BVI despite the use of layered asset protection structures.

The latter intention of the legislation was summarised by the BVI’s Attorney General, the Hon. Baba Aziz, before the House of Assembly during the second reading of the Bill:

“[S]ome judgment debtors seek to avoid the enforcement of judgments of the High Court. This Bill is intended to confer jurisdiction on the court to make orders imposing a charge on assets which are directly or indirectly owned or controlled by a judgment debtor. This includes where assets or shares are held in layered corporate structures which are ultimately beneficially owned by a debtor. The enactment of this Bill will demonstrate that the Territory is not a haven for recalcitrant debtors and those who would seek to evade justice by means of in part the use of asset protection structures.”

Jurisdiction To Issue Charging Orders

Addressing BVI courts’ jurisdiction to issue charging orders, the Act expressly confers jurisdiction (s.3(1)):

“[w]here, under a judgment or order of the Court a debtor is required to pay a sum of money to a creditor then, for the purpose of enforcing that judgment or order, the Court may make an order in accordance with the provisions of this Act imposing on any property as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order”.

The court’s powers apply to foreign judgments and awards once they become enforceable as a BVI Judgment or order (under s.3(2)):

“[f]or the purposes of this Act, references to a judgment or order of the Court shall be taken to include references to a judgment, order, decree or award (however called) of any court or arbitral tribunal (including any foreign court or arbitral tribunal) which is or has become enforceable (whether wholly or to a limited extent) as if it were a judgment or order of the Court”.

This ensures that a BVI court can enforce a foreign judgment or award against assets under its jurisdiction once it has been ‘domesticated’ by a court order recognising it.

Reaching Down Through Layered Asset Protection Structures

Most jurisdictions have had to wrestle with enforcement challenges in the face of layered asset protection structures.

Paradoxically, the availability of this abuse of the corporate form flowed from a seminal 1897 English House of Lords decision in Salomon v A Salomon & Co Ltd UKHL 1 AC 22. For sound economic and commercial reasons, thee House of Lords found that a corporation has a legal personality and existence which is separate and distinct from that of its shareholders. Incorporation enables the company to conduct trade without exposing its owners personally to its debts and liabilities. Thus, personal and business capital can be safely separated.

With specially commissioned reports assessing critical developments, delivering practical case studies and academic analysis, each IFC Media publication serves as an invaluable handbook for doing business whether in individual jurisdictions or across entire regions.

For more information please contact ads@ifcreview.com
Since then, legislators, regulators, and courts have struggled with corporate structures implemented for abusive purposes. The abusive purpose may be tax evasion; avoiding obligations to employees, to investors, or to the State (e.g., environmental protection); concealing fraudulent or other criminal activities; or making it difficult, if not impossible, for creditors to reach down through layers of companies to reach assets which are ultimately beneficially owned by judgment and award debtors, in order to satisfy judgments and awards. (This is sometimes called reverse corporate veil lifting).

Courts almost everywhere have struggled to devise ways to overcome abuse of the corporate form, utilising established legal principles to lift or pierce “corporate veils” (such as agency or fraud) and more innovative ones (e.g., the uncertain “group of companies” doctrine and “single economic unit” theory).

Increasingly, legislation has effectively eliminated traditional separate legal personality principles in specific abusive circumstances, especially tax evasion, closing previously available legal loopholes. An example is the Taxation of Chargeable Gains Act 1992, s. 13, in England and Wales, that treats an offshore company’s taxable gains as those of the individual UK resident shareholder in certain circumstances.

In the BVI, the lack of a direct remedy for judgment and award creditors against asset protection structures led to an anomaly. Under Chabra extended freezing order jurisdiction, assets under the direct or indirect control of a defendant could be frozen if there was an asset flight risk. Control included the power to procure the sale of an asset not held in a defendant’s name. Thus, pursuant to Chabra jurisdiction, the assets of a corporate defendant’s subsidiary could potentially be frozen.

However, come enforcement, judgment and award creditors encountered difficulties due to layered asset protection structures. Enforcement remedies often did not extend as far as asset preservation remedies, leaving judgment and award creditors sometimes unable to enforce their judgment or award against frozen assets.

The recent ECSC Court of Appeal decision in Broad Idea International Limited v Convoy Collateral Limited (BVIHCMAP 2019 / 0026) and its effects are significant. The Court held that Black Swan Investments ISA v Harvest View Limited (BVIHCV 2009/399) was wrongly decided, and there is no jurisdiction, absent legislation creating it, to freeze a party’s assets for potential future enforcement if no cause of action is asserted against it.

At the time this article is being written and published, a broad-based and intensive initiative is underway in BVI to enact legislation to empower the BVI Courts to grant the relief that the Court of Appeal held it is not presently empowered to grant. There is strong support for a ‘legislative fix’ and it seems quite likely that a legislative fix will be enacted reasonably soon.

The Act expands judicial enforcement powers in the face of asset protection structures by extending the circumstances when a charging order can issue. When considering the scope of the Act, the BVI’s Attorney General’s words, quoted above, are important as they are an official aid to interpretation (BVI’s Interpretation Act, Cap 136, s.42).

The Act defines a debtor’s “interest” in an asset widely (s.2):

“any direct or indirect legal, beneficial or equitable interest in the ownership of property, including without limiting the foregoing, whether property is (a) held in a debtor’s own name or otherwise, or (b) is solely or jointly held by a debtor, or (c) where a debtor has the power, directly or indirectly, to dispose of or deal with property as if it were his or her own, or (d) where a debtor owns share in any company or other legal entity which in turn directly or indirectly owns share in a company incorporated within the Territory.”

This definition, and in particular (d), ensures that where a judgment debtor has used a layered asset protection structure to try immunise assets beneficially owned by the debtor from enforcement, courts may disregard the structure and reach down through corporate layers to enforce the judgment or award against assets in the BVI.

The Act also defines ‘property’ widely (s.2) so that chargeable property (s.4) can encompass a wide a range of assets.

**Conclusion**

The Act resolved two enforcement problems that judgment and award creditors faced in the BVI. It provides clarity on the BVI courts’ charging order jurisdiction. It also ensures that the small proportion of UBOs who attempt to protect their assets through layered asset protection structures will not be welcomed in the BVI. At a time when offshore jurisdictions are under the spotlight, the Act signals to the small minority of rogue judgment and award debtors that the BVI’s policy and intention is to stamp out the misuse of BVI companies by judgment and award debtors.

Perhaps other jurisdictions – both offshore and onshore – will follow the BVI’s lead, using the Act as a template.