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BVI adopts guidelines for communication and cooperation between courts

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The BVI today adopted new guidelines for communication and cooperation between courts in cross-border insolvency matters.

The initiative, which was the result of work by the Judicial Insolvency Network¹, has proved very popular. The BVI is the latest key commercial jurisdiction to adopt the guidelines this year, joining New York, Delaware, Singapore and Bermuda. It is very likely that others will shortly follow suit.

What the guidelines seek to achieve?

The guidelines are designed primarily to enhance communication between courts, insolvency representatives and other parties in the context of global restructurings and insolvency. As a result of the increased efficiency, it is hoped that stakeholders will see a reduction in delay and cost.

Key elements of the guidelines are:

Communication between courts

Courts are encouraged to communicate directly with one another. There has traditionally been inconsistency and caution for brother Judges to communicate and a question as to its appropriateness. The guidelines actively promote discourse:

- Providing for the orderly making of decision and submissions by the courts
- Providing court documents including judgments and orders to another court
- Directing legal teams to share documentation with other courts

Concerns that parties might have “behind the scenes” communications are largely addressed by a guideline which provides a default position that parties are entitled to be present during discussions. Communications will be transcribed and form part of the record in the relevant proceedings.

Court appearances

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The guidelines provide for foreign parties or appropriate persons to appear before a local court. The standard guidelines provided a safe harbour for appearances in foreign courts without submission to jurisdiction. Importantly in the BVI version, the rules relating to submission are not waived and the normal principles of private international law will apply. Additionally, foreign counsel will be heard according to existing practices.

Acceptance of foreign process

The guidelines provide a “default setting” that foreign laws, regulations and orders have been properly enacted or made. This is designed to streamline the unnecessary baggage of additional evidence in confirming the validity of a foreign proceeding. A provision is also included for courts to provide any updates to other courts involved in parallel proceedings.

Joint hearings

Perhaps the most ambitious aspect of the guidelines is the provision for joint hearings. An annex to the guidelines predicts contemporaneous hearings via video with the ability for counsel to be heard and make submissions in the parallel proceedings court. Unlike the safe harbour provided for those appearing in a domestic court, consideration will be given as to whether a party appearing in a joint hearing will have submitted to the other jurisdiction.

The courts will also have greater autonomy to communicate with one another to establish procedure for joint hearings and subsequent issues without the attendance of counsel.

In practice

Where the guidelines are to be implemented, they should be carried out by way of either an agreed protocol or, if required, by court order. It is likely that existing legislative frameworks, with or without adoption of the model law on cross-border insolvency, will support the guidelines. As a Judge-led initiative, we can expect to see adoption of the guidelines (which are a template only and can be tailored per jurisdiction) via practice direction or commercial guides rather than secondary legislation.

Commentary

The guidelines are deliberately flexible and without transgression to local laws and sovereignty. They are however reflective of the judiciary's desire to enhance coordination and cooperation, in a manner that will streamline proceedings for the benefit of stakeholders. For example, the first guideline encourages practitioners from the outset of proceedings to communicate and cooperate with their foreign counterparts.

Whilst the guidelines may not end turf wars between appointees, they are likely to bring such disputes before the courts at an earlier stage and that alone may well promote the culture of cooperation envisaged by the drafters.

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- ¹ The Judicial Insolvency Network last met in 2016 in Singapore. Judges participating at the Singapore Conference hailed from Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong SAR (as an observer), Singapore and the United States of America (Delaware and Southern District of New York).