

BVI adoption of Judicial Insolvency Guidelines: Q&A with Nicholas Brookes from Ogier's BVI Dispute R

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International guidelines on cross-border insolvency matters have recently been adopted by the BVI courts. The Judicial Insolvency Network guidelines – drafted in 2016 by ten insolvency judges from international jurisdictions, including a BVI Commercial Court Judge – aim to create co-operation and communication between courts on cross-jurisdiction proceedings, and to minimise the time and expense involved in litigation.

The guidelines have also been adopted in England and Wales, the Southern District of New York, Singapore, Bermuda and Delaware – and more jurisdictions are expected to come into line.

In the following Q&A, originally published in CDR Magazine, senior associate Nicholas Brookes from Ogier's BVI Dispute Resolution team explores the guidelines in more detail. Nicholas is a specialist in insolvency matters who has worked on a wide range of high value commercial litigation cases, taking several to trial in the Commercial Court, appearing in the Court of Appeal as well as being involved in Privy Council matters.

Why have the guidelines been implemented?

The implementation of the guidelines is driven by the desire to avoid inconsistent judicial findings and the need for coordination in jurisdictions' approaches to dealing with assets and creditors.

Why have guidelines been created for cross-border insolvency matters specifically?

Insolvency proceedings are for a class/group as opposed to specific parties, so it is particularly important that all interested parties around the world are treated equally. After all, it is the equal and fair handling in insolvency proceedings that discourages creditors in matters -- such as, administrations, schemes of arrangement and liquidations -- from taking their own steps to get their hands on an unequal share of the remaining assets of a company or structure.

Furthermore, the fact that assets can be both jurisdiction-centric, such as shares and realty, or mostly non-jurisdiction dependent, such as money or commodities, means that there ought to be some coordination of how those assets are handled and distributed for fairness to be achieved.

Don't jurisdictions already have provisions to ensure coordination in these matters?

Many jurisdictions have evolved their own rules for dealing with foreign assets, foreign insolvency specialists, and even foreign companies. These rules are not always the same and do not always produce even results.

The objective of the guidelines is to encourage those participating in parallel insolvency proceedings to agree a sensible protocol to traverse these issues by permitting greater and efficient corporation between the judicial systems that are handling those proceedings.

You mentioned their use will be on a case-by-case basis, what types of proceedings might they not be suitable for?

The reason the guidelines are used on a case-by-case basis is for two reasons, neither of which is quite to do with not being unsuitable.

First, the Guidelines were conceived by representatives of the judiciaries of the participating countries. Those representatives wanted to produce 'guidelines' not a 'code'. They did not feel it was appropriate to restrict the well-established rights of parties in the different participating jurisdictions. Accordingly, it is up to the parties to agree a sensible protocol to govern the manner in which matters proceed. The parties may, indeed, decide not to adopt a protocol at all. How that attitude will be received by the respective Courts will be a matter for that case and for those parties to explain to them.

Second, the 'protocol' is flexible in nature. When there are parallel proceedings it will often be the case that some form of cooperation and agreement as to mutual dealing will be sensible. However, what form that takes and the extent that the protocol will be adopted will depend on various factors, such as: how the countries' respective laws deal with the issues in the proceedings, what type and quantity of assets are to be distributed or managed, and how large is the insolvency. Accordingly, the Guidelines have been made flexible, so that it can be determined what the most sensible approach is on a case-by-case basis.

There will of course be the cases where proceedings are sufficiently simple that there is no need for cooperation, but simplicity is very much a rarity in parallel insolvency proceedings.

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