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A Comparative Look at Pre-Packs in Selected Jurisdictions

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Acknowledgement

This timely and very interesting Special Report looks at “pre-packs” in various jurisdictions by asking very specific questions about the process involved and the concerns that are raised in getting these approved in practice.

The fundamental question that pre-packs seek to answer is how to protect, preserve and maximise value in a trading business when it is prejudicial for it to continue to trade following the opening of formal insolvency proceedings. Pre-packs answer that question by bringing forward certain elements of the process, although this can give rise to concerns being raised regarding a lack of transparency and a perceived loss of independence by officeholders. As the Report demonstrates, there is significant divergence in the approaches that have been taken in different jurisdictions to seek to address these issues.

INSOL International wishes to sincerely thank **Ben Jones, INSOL Fellow** (Simmons & Simmons LLP, UK) for leading this important project to which a number of colleagues around the world have contributed. INSOL International would also like to thank the various authors for their contribution to this Report, which we have no doubt the INSOL membership will find useful and informative.

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BRITISH VIRGIN ISLANDS

There is no bespoke legislation dealing with “pre-pack” restructuring or sale of the business or assets of an insolvent British Virgin Islands (BVI) company, and in practice, as primarily a holding company jurisdiction pre-packs are not in high demand in the BVI. Whilst the existing BVI insolvency legislation includes procedures that may achieve some aspects of a pre-pack style transaction, there will be limitations compared with the English regime meaning that, in essence, it would usually be necessary to have buy-in from the majority of the company’s stakeholders and, in all likelihood, court approval, which would add time and cost to the process and in many cases defeat the purpose. We are not aware of any precedents for BVI companies undergoing a pre-pack in the BVI. This would not however preclude the possibility of a BVI company undergoing a pre-pack in another jurisdiction, since it is not uncommon for a BVI company to have its centre of main interests outside the BVI. If that were the case, the BVI’s cross border assistance provisions might be available to provide relief in support of the foreign pre-pack process, if required (provided that the jurisdiction of the main restructuring was a designated country for the purposes of the BVI’s cross-border assistance provisions: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom, and the United States of America).

One of the limitations of the BVI insolvency regime is that the administration provisions contained in the BVI Insolvency Act 2003 have not been brought into force, and there is no intention to bring them into force. Administrative receivership is available, but that regime would only be suitable to achieve a pre-pack if the secured creditor was fully cooperative and willing to initiate an administrative receivership to achieve the sale of the company’s assets. The principal insolvency procedure in the BVI is liquidation. That is usually initiated by a creditor’s application which must be advertised and generally takes four to six weeks to be determined. A liquidation can however also be commenced straightaway if the company’s members pass a special resolution to appoint a liquidator. It is also possible to apply to court to appoint a provisional liquidator (but only where a full liquidation application has also been filed), and whilst the BVI court has confirmed that provisional liquidation can in certain circumstances be used as a tool to facilitate a restructuring (light touch provisional liquidation), that procedure has not been widely used in the BVI.

However, there are limitations with both a members’ appointment and provisional liquidation which means that they are not ideal procedures to facilitate a pre-pack.

- Where a liquidator is appointed by members’ resolution, the liquidator’s powers to dispose of assets are limited until after the first creditors’ meeting has been held. As such, in practice it would be difficult to achieve a pre-pack sale of a company’s business or assets without the buy-in of the majority of unsecured creditors, and / or a court order approving the transaction.

- Whilst a provisional liquidation is available as a restructuring tool in the BVI, in practice it is rarely used as such, and certainly less so than in Cayman or Bermuda. The principal limitations with a BVI provisional liquidation in the context of a proposed pre-pack would be that, unlike in Cayman, provisional liquidation does not come with the protection of a moratorium on claims, and the provisional liquidators' powers are generally limited to preserving assets, rather than disposing of them. Accordingly, as with a members' appointment, in practice it would be difficult to achieve a pre-pack administration using provisional liquidation without the buy-in of unsecured creditors and other stakeholders and / or a court order.

As such, a pre-pack sale by an insolvent company would in all likelihood be difficult to achieve in the BVI without buy in from creditors and other stakeholders, and in most cases court approval would be required in any event.



INSOL
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INSOL International

6-7 Queen Street

London

EC4N 1SP

Tel: +44 (0) 20 7248 3333

Fax: +44 (0) 20 7248 3384