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Useful clarification from the BVI Commercial Court on late amendments to statutory demands and other matters

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In *BEC Limited v (1) A2 and (2) A1* (BVIHC (COM) 2022/0059) in which judgment was handed down on 2 June 2022, the BVI Commercial Court held that it was permissible (at least in the circumstances of that case) for the debtor to amend their application to set aside the statutory demand in question after it has been filed.

Initially, the debtor had sought to rely on CPR 20.1 (amendments to statements of case) to do this. However, Jack, J held that this was "*an error*" since "*the application of CPR Part 20 to insolvency matters is specifically excluded*" by the Insolvency Rules 2005. However, the Court found that the Court's general powers of case management under CPR Part 26 were sufficient to permit an amendment to rely on new grounds. In particular;

"It frequently arises that applications need to be amended. Any exclusion of the possibility of amendment of an application would be inconvenient. Applications to set aside statutory demands must be made within fourteen days of service. This is an extremely tight timetable. There is no power to extend time. It is not surprising that parties wish to develop their cases or raise new points after the expiration of the time limit. In the current case, for example, the Company changed its legal representation on Friday 27 May 2022. Its new legal team wanted to rely on the revenue rule at the hearing on 31 May 2022. There is in principle nothing objectionable about that."

The case also provides a useful indication of how the BVI Court will treat arguments based on the "foreign revenue rule" (the "**Rule"**). In essence, the Rule provides that the BVI Court will not permit the enforcement, whether directly or indirectly, of foreign revenue laws.

In this case the subject of the disputed demand was said by the debtor to be an arbitral award that was ultimately be based on a tax liability to the PRC tax authorities. Jack, J made it clear that "*there seems to be some force in (...) the submission that if the principal is unenforceable on public policy grounds, awards, like costs, which are parasitic to the principal claim should also be unenforceable.*" However in this case the foreign tax authorities had been paid in full many years ago and "*all that* [was] *in dispute is which of three private companies, as between themselves, is liable to reimburse the other private company or companies*."

As such the Court found that the matter was "*a quintessential private law dispute*" and "*ha*[d] *nothing to do with a sovereign nation like the PRC enforcing its own tax laws.*" It appears from this that the BVI Court will be slow to invoke the Rule unless it can be shown that the statutory demand in question is ultimately an attempt to enforce a foreign tax law.

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Finally, the judgment provides useful confirmation that it is unnecessary to first register a foreign arbitral award before steps under the BVI Insolvency Act, 2003 can be taken in relation to it. The Court held that "*All the Act required is that there be an undisputed debt. The arbitration award itself is sufficient evidence of that*."

If you have any questions or if you require any assistance on this topic, please contact a member of our Dispute Resolution team.

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