

# International Corporate Rescue



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## To Stat Demand, or Not To Stat Demand, That is the Question: A Brief Guide and Comparison of Statutory Demands in the Cayman Islands and the British Virgin Islands

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### Synopsis

The purpose of this article is to provide a brief guide as to the use of statutory demands (a 'Demand' or collectively 'Demands') in both the Cayman Islands and the British Virgin Islands (the 'BVI'). In particular, this article will seek to summarise the basic statutory requirements of Demands in both the Cayman Islands and the BVI, highlight some key differences between the use of Demands in both jurisdictions and provide an overview as to certain strategic considerations when a creditor is contemplating issuing a Demand or a debtor is responding to a Demand.<sup>1</sup>

### A. What is a Demand?

In summary, a Demand is a formal written demand served by a creditor on a debtor for payment of a debt. If the debtor fails to:

1. satisfy, secure or compound the debt to the satisfaction of the creditor or reduce the debt to below the minimum statutory requirement (within 21 days from the date of service of the Demand);<sup>2</sup> or
2. obtain written confirmation from the creditor that the Demand is withdrawn; or
3. apply to the BVI High Court (the 'BVI Court') to set aside the Demand within 14 days from the date of service of the Demand ('Set Aside Application')<sup>3</sup> (applicable in the BVI); or
4. obtain an injunction order from the Grand Court of the Cayman Islands (the 'Grand Court' and together with the BVI Court, the 'Courts') restraining the creditor from presenting a winding up

petition in respect of the debtor (an 'Injunction') or an undertaking (an 'Undertaking') from the creditor not to present a winding up petition pending resolution of the debtor's application to restrain the creditor ('Injunction Application' and together with the Set Aside Application, the 'Applications') within 21 days from the date of service of the Demand (applicable in the Cayman Islands),

it is at risk of having winding up proceedings commenced against it.

In both the Cayman Islands and the BVI, failure to satisfy a Demand: (i) gives rise to a presumption of insolvency;<sup>4</sup> and (ii) is a ground upon which the Courts<sup>5</sup> can make a winding up order against the debtor (collectively referred to as the 'Consequences').

### B. Requirements of a Demand

Table 1 below shows a summary of the key statutory requirements of a Demand in the Cayman Islands and in the BVI.

### C. Strategic considerations when contemplating issuing a Demand

If the creditor is confident as to the validity of its debt (which can, from an offshore perspective, often be governed by a foreign law and therefore require foreign legal advice), then, in both jurisdictions, a Demand can be a cost effective and useful precursor to a winding up petition, noting the Consequences that arise if the Demand is left unsatisfied.

### Notes

- 1 This article only considers Demands in respect of unsecured debt and in the context of corporate debtors (and not individuals). This article is intended for informational purposes only and does not constitute legal or other professional advice or an opinion of any kind.
- 2 Section 155(2)(d) of the BVI Insolvency Act, 2003 (as revised) (the 'BVI Insolvency Act'); Section 93(a) of the Cayman Islands Companies Law (2018 Revision) ('Cayman Companies Law').
- 3 Section 156 of the BVI Insolvency Act.
- 4 Section 8(1)(a) of the BVI Insolvency Act and Section 93(a) of the Cayman Companies Law.
- 5 Section 162(1)(a) of the BVI Insolvency Act; Section 92(d) of the Cayman Companies Law.

Table 1.

<i>BVI</i>	<i>Cayman Islands</i>
Debt due and payable to the demandor at the time of the Demand <sup>6</sup>	Debt due and payable to the demandor at the time of the Demand <sup>7</sup>
Minimum Debt of USD 2,000 <sup>8</sup>	Minimum Debt of CI\$ 100 <sup>9</sup>
Demand in writing and specifies the nature of the debt and its amount <sup>10</sup>	Demand in writing in Companies Winding Up Rules Form No. 1 <sup>11</sup> which states the amount, the date on which the debt fell due, the currency of the debt and the consideration for it <sup>12</sup>
Dated and signed by the creditor or a duly authorised person on behalf of the creditor <sup>13</sup>	Signed by the creditor or; if the creditor is a firm, any partner of the firm or; if the creditor is a body corporate, any director or officer duly authorised to make the Demand <sup>14</sup> Must also contain the creditor's address (or contact details of the signatory, if not the creditor) <sup>15</sup>
Require the debtor to pay the debt or to secure or to compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the Demand <sup>16</sup>	Include a statement that if payment is not made within 21 days of the date upon which it was served on the debtor, the debtor will be deemed to be insolvent and a winding up petition may be presented against the debtor in accordance with section 92(d) of the Cayman Companies Law <sup>17</sup>
State that if the Demand is not complied with, the creditor may make an application to the BVI Court for the appointment of a liquidator <sup>18</sup>	See above
Set out the rights of a person to make the Set Aside Application <sup>19</sup>	No equivalent provision as no statutory mechanism available to set aside the Demand
No equivalent provision as no statutory requirement for information for payment	Contain information about ways in which the debtor may make payment, including details of a bank account to which the amount owing may be wire transferred <sup>20</sup>
Comply with and be served in accordance with the BVI Rules: <sup>21</sup> in summary, a Demand is validly served when an original hard copy is delivered by hand to the debtor's registered office <sup>22</sup>	Comply with and be served in accordance with the Cayman CWR: in summary, a Demand is validly served when an original hard copy is delivered by hand to the debtor's registered office. Email or Fax alone will not suffice <sup>23</sup>
If the amount claimed includes any charge by way of interest not previously notified to the debtor as included in its liability, or any other charge accruing from time to time, the Demand must state the grounds upon which the debtor is liable to pay such interest or charges and contain particulars of the way in which interest or charges are calculated <sup>24</sup>	If the amount claimed includes any charge by way of interest not previously notified to the debtor as included in its liability, or any other charge accruing from time to time, the Demand must state the grounds upon which the debtor is liable to pay such interest or charges and contain particulars of the way in which interest or charges are calculated <sup>25</sup>

### Notes

- 6 Section 155(2)(a) of the BVI Insolvency Act.
- 7 Section 93(a) of the Cayman Companies Law.
- 8 Rule 149(1) of the Insolvency Rules (Revised 2013) ('BVI Rules').
- 9 Section 93(a) of the Cayman Companies Law.
- 10 Section 155(2)(b) of the BVI Insolvency Act.
- 11 Order 2 Rule 2(1) of the Cayman Companies Winding Up Rules, 2018 ('Cayman CWR').
- 12 Order 2 Rule 2(3) of the Cayman CWR.
- 13 Section 155(2)(c) of the BVI Insolvency Act.
- 14 Order 2 Rule 2(2) of the Cayman CWR.
- 15 Order 2 Rule 2(5) of the Cayman CWR.
- 16 Section 155(2)(d) of the BVI Insolvency Act.
- 17 Order 2 Rule 2(6) of the Cayman CWR.
- 18 Section 155(2)(e) of the BVI Insolvency Act.
- 19 Section 155(2)(f) of the BVI Insolvency Act.
- 20 Order 2 Rule 2(7) of the Cayman CWR.
- 21 Section 155(2)(g) of the BVI Insolvency Act.
- 22 Rule 26(2)(a) of the BVI Rules.
- 23 Section 93(a) of the Companies Law; Order 2 Rule 3 of the Cayman CWR.
- 24 Rule 149 (2) of the BVI Rules.
- 25 Order 2 Rule 2(4) of the Cayman CWR.

The primary benefits of issuing and serving a Demand on a debtor are:

1. quick to prepare;
2. out of court;
3. inexpensive;
4. can be withdrawn by the creditor at its own volition (albeit that if it is withdrawn after the Applications have been made, then there are likely to be cost consequences for the creditor);
5. can lead to payment and/or settlement negotiations in and of itself as debtors are often compelled to act (after having ignored the debt previously) given the Consequences that arise if a Demand is left unsatisfied; and
6. the Consequences (on the assumption the Demand is left unsatisfied for the requisite statutory period) facilitate the granting of a winding up order by the Courts.

However, irrespective of the above benefits, a Demand is, as a matter of both Cayman Islands and BVI law, not a necessary precursor to wind up a debtor and, in certain circumstances; it can delay a winding up order being made against a debtor. In summary, this is because the Demand can give the debtor an opportunity to make the Applications (usually on the basis that the debt is disputed – which we examine in greater detail in section D below) which could result in the creditor being stalled by litigation and not being able to progress the winding up proceedings in a timely fashion.

#### D. Strategic considerations when served with a Demand

As referenced above, upon being served with a Demand (and on the assumption that the creditor does not agree to withdraw the Demand), a debtor broadly has the following options:

1. satisfy, secure or compound the debt to the satisfaction of the creditor or reduce the debt to below the minimum statutory requirement (as detailed in section A); or
2. file the Set Aside Application within 14 days from the date of service of the Demand (BVI); or
3. obtain an Injunction or Undertaking within 21 days from the date of service of the Demand (Cayman Islands).

In the event the debtor pays the debt in its entirety, secures or compounds the debt to the satisfaction of the creditor or reduces the debt below the statutory minimum requirements (as set out above) or obtains written confirmation from the creditor that the Demand is withdrawn, the matter is usually resolved. If the debtor seeks to challenge the Demand, it has the following options:

##### *i. Set Aside Application – BVI*

A debtor who wishes to set aside the Demand must, within 14 days from the date of service, apply to the BVI Court for an order setting aside the Demand.<sup>26</sup>

The Set Aside Application must be supported by an affidavit specifying the date upon which the debtor was served with the Demand and state the grounds upon which the debtor claims that the Demand should be set aside.<sup>27</sup>

When the Set Aside Application is filed at the BVI Court, the 21-day compliance period ceases to run from the date of filing.<sup>28</sup> The BVI Court will set aside a Demand if it is satisfied that:

1. there is a substantial dispute as to whether:
  - a. the debt is owing or due; or
  - b. a part of the debt (which would reduce the undisputed amount of the debt to less than the statutory minimum amount of USD 2,000) is owing or due;
2. the debtor has a reasonable prospect of establishing set-off, counterclaim or cross-claim in an amount that would reduce the debt to less than USD 2,000; or
3. the creditor holds security for the debt and the unsecured portion of the debt claimed is less than USD 2,000.<sup>29</sup>

Additionally and in any event, the BVI Court retains discretion to set aside a Demand if it is satisfied that there would be substantial injustice because there is a defect in it or for some other reason.<sup>30</sup>

##### *ii. Injunction Application – Cayman Islands*

The Cayman Islands has no statutory mechanism in which a debtor can apply to set aside a Demand, as in the BVI.

#### Notes

<sup>26</sup> Section 156(2) of the BVI Insolvency Act. Note that this time cannot be extended.

<sup>27</sup> Rule 152(1) of the BVI Rules.

<sup>28</sup> Section 156(4) of the BVI Insolvency Act.

<sup>29</sup> Section 157(1) of the Insolvency Act.

<sup>30</sup> Section 157(2) of the Insolvency Act.

Instead, the remedy available to a debtor is to promptly make the Injunction Application and either obtain an Injunction or Undertaking within 21 days from the date of service of the Demand. The Grand Court is likely to grant an Injunction preventing the presentation of a winding up petition if it appears that the debtor is solvent and that one of the following apply:

- the debt is genuinely disputed on substantial grounds;<sup>31</sup> or
- the debtor has a cross-claim or right of set-off against the creditor that exceeds the amount claimed in the Demand or reduces the undisputed amount of the debt to less than the statutory minimum amount of C\$ 100; or
- the debtor has a reasonable excuse for not paying the debt claimed.

In essence, the debtor needs to show that the presentation of a winding up petition would be an abuse of process.

### iii. Substantial dispute

In both the BVI and the Cayman Islands, the primary basis upon which a debtor seeks to challenge the validity of a Demand is on the basis that the underlying debt is disputed. In both jurisdictions, the debtor must prove that the debt is *bona fide* disputed on substantial grounds. We briefly set out below the applicable tests in the BVI and the Cayman Islands as to whether or not a debt is *bona fide* disputed on substantial grounds.

#### a. BVI

In the BVI the 'substantial dispute' test is on a statutory footing. In s. 157 of the BVI Insolvency Act the requirements are:

'(1) The Court shall set aside a statutory demand if it is satisfied that

- (a) there is a substantial dispute as to whether –
  - (i) the debt; or
  - (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due;

The leading case is *Sparkasse Bregenz Bank AG and in the Matter of Associated Capital Corporation*,<sup>32</sup> in which the then Chief Justice said:

'the dispute must be genuine in both a subjective and objective sense... the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried.'

The BVI Court of Appeal in the matter of *Jinpeng Group Limited v Peak Hotels and Resorts Limited*,<sup>33</sup> recently clarified that it will undertake the critical task of considering whether or not there is a substantial and *bona fide* dispute.

#### b. Cayman Islands

The position in the Cayman Islands is broadly similar to the BVI: In *Re Duet Real Estate Partners 1 LP* (unreported, 7 June 2011), Duet sought a declaration that there was a genuine dispute in relation to its debts and an injunction to restrain the presentation of a winding up petition where the underlying loan agreement contained an arbitration clause and an arbitration had already been commenced. Having considered the evidence presented to the Grand Court, Jones J determined that there was no *bona fide* dispute of substance and that the arguments made by Duet in that regard were 'nothing more than a disingenuous delaying tactic'. He therefore refused to grant the declaration and injunction sought. Subsequently, in *In re Ebulio Commodity Master Fund LP* (unreported, 24 May 2013), Jones J took a similar position determining that the existence of an arbitration agreement and arbitration proceedings being on foot would only be relevant if the Cayman Court determined that the dispute was genuine and on substantial grounds.<sup>34</sup>

## E. Conclusion

The Demand is an inexpensive and useful precursor to winding up proceedings, albeit, not necessary for the purposes of commencing winding up proceedings. However, it is important to be mindful of the tactics which can be employed by both a creditor in issuing a Demand and a debtor in responding to a Demand.

## Notes

31 *Re A Company* (No. 006685 of 1996) [1997] 1 BCLC 639, *Re Parmalat Capital Finance Ltd. v Food Holdings* [2009] 1 BCLC 274 and *Re GFN Corporation Limited* 2009 CILR 650.

32 BVIHMAP 2002/0010.

33 BVIHMAP 2014/0025 and BVIHMAP 2015/0003.

34 See also *Mann v Goldstein* [1968] 1 WLR 1091, *Re Claybridge Shipping Ltd* [1997] 1 BCLC 572, *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2009] 1 BCLC 274 at para 9 and also *Camulos Partners Offshore Limited v Kathrein and Company* [2010] (1) CILR 303.

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