



Restructuring and Insolvency

in 57 jurisdictions worldwide

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1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

The Insolvency Act 2003 (the Act) and the Insolvency Rules 2005 (the Rules) together constitute the British Virgin Islands' (BVI) all-encompassing insolvency law, dealing with companies and individuals. Voluntary liquidations of solvent companies are governed by the BVI Business Companies Act 2004 (BVIBCA). These companies include those registered under the BVIBCA and companies registered under the International Business Companies Act, all of which were automatically reregistered as BVI business companies on 1 January 2007. The Act also deals with reorganisations in the form of company creditors' arrangements and administration.

2 Excluded entities

What entities are excluded from bankruptcy proceedings and what legislation applies to them?

Unlike other jurisdictions, there are no express exclusions.

There are separate provisions in the Act dealing with insurance companies. The BVI court has the jurisdiction to appoint liquidators over a foreign company, that is, a company formed outside the BVI. However, this jurisdiction can only be exercised if the company has a 'connection' with the BVI. The Act defines connection to mean any one of the following situations: the company has or appears to have assets in the BVI; it is carrying on, or has carried on business in the BVI; or there is a reasonable prospect that the appointment of a liquidator will benefit the company's creditors.

3 Secured lending and credit (immovables)

What are the principal types of security devices that are taken on immovable (real) property?

The principal type of security granted over immovable property is the legal mortgage. A legal mortgage is a transfer of the whole of the mortgagor's legal ownership in the property subject to the security. This is subject to the mortgagor's right to redeem the legal title upon repayment of the debt (known as the equity of redemption). The appearance of ownership remains with the mortgagor although the legal mortgage effects an absolute transfer subject to the right of redemption.

An alternative is the equitable mortgage, which differs from the legal mortgage in that only the beneficial interest (as distinct from the legal interest) is transferred by the mortgagor. An equitable mortgage can be created by a written agreement to execute a legal mortgage or by the deposit of title deeds with the creditor with the intention of creating a security. Another alternative to the legal mortgage is the fixed charge. This involves no transfer of ownership but gives the creditor the right to have the designated property sold and the proceeds applied to discharge the debt. A fixed charge attaches to the

property in question immediately on creation (or, if acquired later, after creation but immediately on the debtor acquiring the rights over the property to be charged). The debtor may then only dispose of the property once the debt has been repaid or with the consent of the creditor.

4 Secured lending and credit (moveables)

What are the principal types of security devices that are taken on moveable (personal) property?

The principal security devices relating to moveable property are mortgages and charges of securities, ships, aircraft and vehicles, hypothecations of cash deposits and legal assignments of choses in action. Other types of security instruments include specific fixed charges, debentures (which incorporate both fixed and floating charges), pledges and liens.

A floating charge does not attach to a specific asset. It is a charge over a class of assets, present or future, and allows the debtor to deal with the charged assets in its ordinary course of business while the charge remains floating. In practice, floating charges are generally created over the whole business and undertaking of a company. Upon the occurrence of a specified event, such as default on the repayment of the debt, the charge attaches to the secured assets and becomes fixed and the chargor is no longer free to deal with the assets without repayment of the secured sum or without the consent of the chargee. This is called crystallisation. The floating charge received statutory recognition under the Act and is an important security instrument to be included in a secured lender's armoury as it enables the holder to appoint an administrative receiver and block a petition for the appointment of an administrator.

A pledge is a form of security that gives the creditor a possessory right to the pledge asset. It is usually created by delivering the asset to the creditor, although symbolic or constructive delivery may be sufficient.

A lien is a possessory right of a creditor to retain possession of a debtor's asset until the debt has been repaid. It can be created by contract or by operation of law. The creditor has no right to deal with the asset and the lien is usually extinguished once the asset is returned to the debtor.

5 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Apart from the winding-up process, unsecured creditors can only recover debts by obtaining and enforcing judgment. Interim orders for the preservation of assets (but not for their delivery up) are available pending judgment.

The speed and ease of obtaining judgment against a debtor depends upon the extent to which the proceedings are contested.

If the proceedings are contested, a creditor who is ordinarily a resident outside the British Virgin Islands may be ordered by the court, on an application by the debtor, to give such security for the debtor's costs of the proceedings as the court thinks just.

Once a judgment has been obtained, it may be enforced by one or more of the following remedies:

- a writ of fieri facias or of sequestration by which the debtor's goods are seized and sold;
- garnishee proceedings, or attachment of debts;
- a charging order over the debtor's land or securities;
- the appointment of a receiver over the debtor's business or assets; and
- an order attaching the debtor's earnings.

Certain creditors may have the benefit of a lien imposed by statute over the assets in their possession. Landlords also have statutory protection in that they have a right to sell the possessions of an insolvent tenant. A supplier of goods may protect itself by inserting a clause in the supply contract to the effect that title to the goods supplied will not pass to the buyer until payment has been received (known as a retention of title or Romalpa clause). The contract can either provide for retention of title until the specific goods supplied by the contract have been paid for or, more usually, until all monies outstanding from the debtor have been paid. The creditor is, therefore, contractually entitled to the return of its goods.

An unsecured creditor has the right to submit a claim in writing to the liquidator providing details of their claim. The liquidator can then reject or accept, in whole or in part, the claim and if it is rejected, he or she must provide the creditor with a notice specifying the reasons for rejecting the claim.

6 Courts

What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?

Corporate insolvency proceedings are brought in the High Court of the British Virgin Islands. Appeal lies to the Eastern Caribbean Court of Appeal and from there, with leave, to the Privy Council in England. There are no restrictions on the jurisdiction of the High Court of the British Virgin Islands over the winding-up of British Virgin Islands companies.

7 Voluntary liquidations

What are the requirements for a debtor to commence a voluntary liquidation of its business? What are the effects of the commencement of the liquidation?

A company that has never issued shares may voluntarily commence to wind up and dissolve by a resolution of directors. A company that has issued shares may, subject to any limitations or provisions to the contrary in its memorandum or articles of association, voluntarily commence to wind up and dissolve by a resolution of members or by a resolution of directors.

The effect of such a resolution is that the company ceases to carry on its business except as may be required for its beneficial winding-up, and liquidators take over the function of the directors.

8 Involuntary liquidations

What are the requirements for creditors to place a debtor in involuntary liquidation? What are the effects of the commencement of the liquidation?

The principal requirement for a creditors' petition to wind up a company is that the value of the company's liabilities exceeds its assets. A liquidator will not be appointed unless the creditor is owed more than US\$2,000, being the prescribed minimum required for a statutory demand, that remains outstanding for a period of three weeks, or is a judgment creditor 'whose debt is unsatisfied'. Alternatively, a liquidator can be appointed if the creditor establishes to the satisfaction of the court that the value of the company's liabilities exceeds its assets, or the company is unable to pay its debts as they 'fall due'.

Once a liquidator is appointed, he or she has custody and control of the company's assets, which become subject to a statutory trust to apply them in accordance with the Act for the benefit of the general body of creditors.

9 Voluntary reorganisations

What are the requirements for a debtor to commence a financial reorganisation? What are the effects of the commencement of the reorganisation?

The Act provides an alternative procedure to liquidation, known as administration. These provisions, in part III of the Act, have not yet been brought into force but may be introduced at any time in the future by resolution of the Executive Council of the British Virgin Islands. For completeness, the provisions are discussed in this chapter. The administration procedure allows insolvent companies to be reorganised and refinanced and can be used to realise the company's assets better than would be the case in a liquidation.

The statutory purposes for which an order can be sought are set out in section 76 of the Act and are as follows:

- the rehabilitation of the company or one or more companies in a group of companies in which the company is a member;
- the survival of all or part of the company's undertaking as a going concern;
- a better return for the company's creditors than would result from an immediate liquidation;
- the approval of a company creditors' arrangement; or
- to facilitate an application, or the provisions of cooperation in respect of cross-border insolvency proceedings or to aid orders in foreign proceedings.

The application for an administration order is made to the court, with the application specifying the statutory purposes sought to be achieved by making an administration order. The application must also state that the applicant believes that the company is or is likely to become insolvent. The application must also contain the name of the insolvency practitioner who is going to act as administrator and a statement from him or her saying that he or she believes there is a reasonable prospect that an administration order will achieve the statutory purposes specified in the application. The court has ultimate discretion as to whether to grant an administration order.

The key feature of an administration order is that it restricts the rights of creditors to enforce security or take action against the company or its property while it is in force.

It does not affect the rights or the enforceability of parties to netting arrangements under market contracts; see question 17.

The directors of a company (or, where relevant, the liquidator or administrator) may make a proposal to the members and creditors of the company under part II of the Act for a 'composition in satisfaction of its debts'. This is known as a company creditors' arrangement (CCA).

The CCA commences with the directors of the company making a written proposal to an insolvency practitioner (the nominee) who then decides whether to call a meeting of creditors of the company to consider the proposal. Once the meeting has been held, and provided 75 per cent (in value) of the creditors of the company present and voting vote in favour of the CCA, the CCA will bind every creditor that had notice of, and was entitled to vote at, those meetings. Where the company is in administration or liquidation, the arrangement will be proposed by the administrator or liquidator respectively and there will be no need for a separate nominee.

Preferential and secured creditors are not bound by the CCA unless they agree to be.

The arrangement has to be supervised by a supervisor, who must be an insolvency practitioner. The procedure can be used when the company is in administration or in liquidation. Company creditors' agreements are modelled on 'company voluntary arrangements' found in the UK, but there is no court involvement in the BVI procedure.

10 Involuntary reorganisations

What are the requirements for creditors to commence an involuntary reorganisation? What are the effects of the commencement of the reorganisation?

A creditor can apply to the court for an administration order, as can the supervisor of a CCA and a liquidator of the company. The effects are the same as in question 9.

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances (to avoid personal liability to directors and officers or otherwise)? In what circumstances must companies do so? If proceedings are not commenced, what liabilities can result?

There is no express duty on a company to commence insolvency proceedings at any particular time. Directors can be held liable where such a director continues to trade after a time when he or she knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding liquidation. Liability for insolvent trading cannot arise until there is no reasonable prospect that the company can avoid going into liquidation.

If the court finds such a director liable under section 256 of the Act (insolvent trading) the court may declare that person liable to make such contribution to the company's assets as the court thinks proper. The amount is purely compensatory rather than punitive.

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Reorganisations conducted outside any formal insolvency or restructuring regime are usually carried out pursuant to the terms set out in a standstill agreement between the company and its creditors. The purpose of the standstill agreement is to ensure that banks and other creditors do not bring enforcement proceedings independently during the important initial period of information gathering and appraisal. The central aim is to ensure that facilities and credit are maintained during the information gathering process and that no action is taken against the debtor that would force it into a formal insolvency proceeding or that would destabilise the restructuring or result in individual creditors receiving preferential treatment. To achieve this, the

standstill agreement will contain covenants from the debtor on the one hand and from the creditors on the other.

If the reorganisation occurs in the context of an administration, the administrator has power to carry on the business of the company and to sell its assets, including secured assets, where the disposal would be likely to promote the purposes specified in the administration order. In addition, the administrator has power to pay creditors who supply goods to the company after the administration order has been made in priority to ordinary unsecured creditors, but only in respect of those supplies. In the case of a CCA as there is no moratorium in place, the use and sale of assets will be a matter for agreement between the company and its creditors. In both the CCA and administration procedures, it is the responsible insolvency practitioner who supervises the debtor's business activities. A creditors' committee may be appointed to assist in an administration.

13 Rejection and disclaimer of contracts in reorganisations

Can a debtor in a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

A debtor has no powers to reject or disclaim an unfavourable contract in a reorganisation. A liquidator has the power to do so in a liquidation but there are no such powers in a reorganisation.

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Reorganisations

As mentioned in question 12, if the reorganisation occurs in the context of an administration, the administrator has the power to carry on the business of the company and to sell its assets, including secured assets, where the disposal would be likely to promote the purposes specified in the administration order.

In the case of a CCA, the use and sale of assets will be a matter for agreement between the company and its creditors. In both the creditor arrangement and administration procedures, it is the responsible insolvency practitioner who supervises the debtor's business activities.

The purchaser purchasing assets in the ordinary course of business would acquire them 'free and clear' of claims.

Liquidations

It is the major purpose of liquidation that the company's assets are collected and distributed among the company's creditors. A liquidator has the power to sell any of the company's property by public auction or private contract. This power can be exercised in both voluntary and compulsory liquidations without sanction of the court or creditors' committee. A liquidator also has the power to raise, on the security of the assets of the company, any money required. The purchaser would acquire assets purchased in the ordinary course of business free and clear of claims.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by secured and unsecured creditors are imposed by legislation or court order in liquidations and reorganisations? In what circumstances may secured or unsecured creditors obtain relief from such prohibitions?

Liquidations

When a company is placed in compulsory liquidation, once the court order has been made, no action or proceeding may be started or proceeded with against the company or its property without the leave of the court. Leave will be refused if the proposed action raises issues that could be dealt with more conveniently and less expensively in the liquidation proceedings.

Reorganisations

From the moment that an application for an administration order is filed, a statutory moratorium comes into effect that restricts the rights of secured and unsecured creditors, as well as those of members, and it is this aspect that is intended to provide an ailing company with breathing space while rescue elements are made. Its aim is to lessen the pressure from creditors by restricting their right of enforcement.

Thus, no steps can be taken to enforce security or to repossess assets that are used by the company or are in its possession and no proceedings or other legal process may be commenced or continued against the company or its assets, except with the leave of the administrator.

Once a CCA is reached, it is in effect a form of statutory contract that binds the company, its members, and its creditors, including dissenting creditors and those who did not vote on it. However, secured creditors and preferential creditors are protected under the Act, as an arrangement cannot prejudice their position without their written consent.

16 Arbitration processes in bankruptcy

How frequently are arbitration procedures used in insolvency proceedings? What limitations are there on the availability of arbitration procedures in insolvency cases? In insolvency proceedings, will the court allow arbitration proceedings to continue after an insolvency case is opened?

There is no provision for the use of arbitration procedures in insolvency proceedings. There is no bar to the commencement or continuation of arbitration proceedings following the commencement of insolvency proceedings, but prior to the appointment of a liquidator.

17 Set-off and netting

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

There are two types of set-off, legal and equitable set-off (which are slightly distinct from each other and subject to differing conditions) and statutory set-off.

Broadly, set-off is confined to money obligations that are mutual as between the insolvent company and the creditor. Statutory set-off is set out in section 150 of the Act. It is only available when the company is in liquidation: it is not available during a reorganisation. Statutory set-off is wider in scope than the legal and equitable set-off and is of mandatory application, which cannot be excluded by contractual agreement. Statutory set-off applies where there have been mutual dealings between a creditor and the company. Account is taken of what is due from each party to the other in respect of mutual credits, mutual debts or other mutual dealings, and sums

due from one party shall be set off against sums due from the other party and only the balance of the account, if any, may be claimed in the liquidation or is payable to the company. The effect of this is that unsecured creditors entitled to set-off have an advantage over other unsecured creditors.

Sections 434 and 435 of the Act contain provisions dealing with netting and financial contracts and giving statutory effect to provisions contained in netting agreements and collateral arrangements relating to financial contracts upon insolvency of the company. Netting arrangements in market contracts are specifically exempt from insolvency set-off and other provisions of the Act and the Rules. A creditor can validly waive or contract out of the benefit of the set-off provisions before insolvency, and such waiver or contract will be effective.

Debt subordination agreements and acknowledgments are also effective. Netting under these provisions may be exercised during both a liquidation and in a reorganisation.

18 Intellectual property assets in insolvencies

May the licensor or owner of the IP terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with an IP licensor or owner to continue to use the IP for the benefit of the estate?

There are no provisions requiring IP assets to be dealt with differently from other assets. Where a licensor or owner of IP may otherwise terminate a debtor's licence to use the IP, it is not prevented from doing so by virtue of the commencement of insolvency proceedings. No administration provisions are yet in force. A liquidator may disclaim IP rights if they are considered onerous property. A liquidator may carry on the business of the company as far as may be necessary for its beneficial liquidation and, to that extent, may continue to exercise any IP assets.

19 Post-filing credit

Does your country's insolvency system allow a debtor in a liquidation or reorganisation to obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A liquidator has the power to raise, on the security of the assets of the company, any money required. Such credit would have priority over ordinary unsecured creditors but only in respect of the new funds and to the extent of the security granted.

An administrator has the power to raise or borrow money and grant security, therefore, over the property of the company. The administrator can also pay creditors that supply goods to the company after the administration order has been made in priority to ordinary unsecured creditors, but only in respect of those supplies.

Most reorganisations will be contained in a standstill agreement between the company and its creditors. The central aim of a standstill agreement is to ensure that facilities and credit are maintained during the information gathering process; that no action is taken against the debtor that would force the company into a formal insolvency proceeding; or which would destabilise the restructuring or result in individual creditors receiving preferential treatment. To achieve this, the standstill agreement will contain covenants from the debtor on the one hand and from the creditors on the other. The priority given to such credit is a matter of contract between the parties and as noted above inter-creditor and subordination agreements are recognised and effective under the Act.

In a CCA, the obtaining of credit and the use of assets as security is a matter for agreement between the company and its creditors.

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan create releases in favour of third parties, and, if so, in what circumstances?

There are no mandatory features of an informal reorganisation, whether at the standstill stage or when the final plan is put forward for approval by creditors.

See question 9 for the formal procedures to be followed for administration and CCAs.

Creditors fall into three categories: secured, preferential and unsecured.

A reorganisation plan cannot create releases in favour of third parties.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

If it is proposed that the reorganisation will occur in the context of an administration, it is possible to obtain an administration order from the court, out of normal court hours, although this is rare and reasons for the extreme urgency will need to be shown. The length of time a company remains in administration depends upon the complexity of the administration and the purpose for which the administration order was sought.

There are no provisions for the expedition of CCAs and the implementation time for a CCA depends on its complexity.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What happens if there is default by the debtor in performing an approved plan?

An application for an administration order can be defeated by the holder of a floating charge who has the ability to appoint an administrative receiver. The court may refuse to accept the proposal and not grant the order. If the administrator subsequently believes that the purposes specified are incapable of achievement, he can apply to the court to discharge the order and for the presentation of a winding-up petition.

A CCA requires the approval of 75 per cent in value of the creditors present or represented at the meeting to vote in favour of it.

Secured and preferential creditors are not bound by the CCA unless they expressly consent to it in writing.

The prospect of what happens if there is a default by the debtor in performing an approved plan is not covered in the Act. BVI law will follow English law and thus, on the failure of a CCA, the creditor must be able to prove in any subsequent liquidation the debts owed, but they must give credit for any sums received under the CCA. From a practical perspective, the proposal should provide that in the event of any breach by the company or the directors that the supervisor of the CCA be at liberty to present a petition seeking the winding-up of the company.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? What powers or responsibilities do these committees have? May creditors initiate proceedings to pursue remedies against third parties?

Generally, whether it be an administrative receivership (see question 26), an administration, a creditors' arrangement, or a liquidation, the Act provides for early notification of all creditors by advertisement

and in all cases (apart from administrative receivership) for the holding of a meeting of creditors. A creditors' committee can be appointed at a meeting of creditors.

However, the liquidator need not call a meeting if he or she considers it unnecessary, but he or she must still notify the creditors of his or her decision. If 10 per cent of the creditors give notice within 10 days then the liquidator must nevertheless call a meeting.

24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be combined into one pool for distribution purposes?

In insolvency proceedings, there are no provisions permitting members of a corporate group to be combined for administration purposes or to combine assets and liabilities.

25 Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

No.

26 Enforcement of estate's rights

If the insolvency administrator is without assets to pursue a claim that is available to the estate, are there procedures by which the creditors can pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

There is no difficulty in a liquidator being funded by a creditor while in office where there are no assets available to pursue a claim. The liquidator's duty, however, remains to the court and to the general body of creditors as a whole and the fruits of any claim must be dealt with in the same way as any other asset of the company.

27 Claims and appeals

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does a creditor appeal a disallowance? Are there any provisions that deal with the purchase, sale or transfer of claims against the debtor?

Generally, unsecured creditors' claims are not submitted until the company is in liquidation. A creditor has a right to make a claim by submitting his or her claim in writing to the liquidator, signed by him or her or on his or her behalf. It is up to the liquidator to then reject or accept, in whole or in part, the claim and if the claim is rejected he or she must provide the creditor with notice, stating the reasons for rejecting the claim. Claims can now also be submitted to the administrator and the same procedure will be followed.

28 Priority claims

What are the major governmental and non-governmental privileged and priority claims in liquidations and reorganisations? Which priority and privileged claims have priority over secured creditors?

A liquidator will apply the proceeds of the realised assets and pay creditors in the following order:

- creditors secured by a fixed charge or mortgage, out of the proceeds of the asset subject to the fixed charge or mortgage;
- the liquidator's costs and remuneration; and
- preferential creditors.

The following applies to preferential claims.

Government

- Sums due to the government of the Virgin Islands in respect of any tax, duty, including Stamp Duty, licence fee or permit are to be considered preferential claims and the maximum amount of the claim to be regarded as preferential is set at US\$50,000; and
- sums due to the Financial Services Commission of the British Virgin Islands in respect of any fee or penalty with the maximum set at US\$20,000.

Non-government

- The amount due to a person as a present or past employee that represents wages and salary, due in respect of the whole or any part of the period of six months immediately prior to the relevant date up to a maximum of US\$10,000;
- the amount due to the BVI Social Security Board in respect of employees' contributions deducted from the employee and in respect of employer's contributions payable for the six months immediately before the relevant date, with no maximum amount set;
- the amount due in respect of pension contributions or contributions in respect of medical insurance payable during 12 months immediately before the relevant date, including any amounts deducted from the employee with a maximum set at US\$5,000 per employee and employees who are owed remuneration up to a set amount;
- creditors secured by a floating charge, out of the proceeds of the assets subject to the floating charge;
- unsecured creditors; and
- any claims arising from post-liquidation interest.

All preferential claims rank equally between themselves and, if the assets of the company are insufficient to meet all the claims in full, they shall be paid rateably.

It is important to note that most companies incorporated in the BVI will not be operating from within the BVI and therefore the likelihood of preferential creditors arising other than fees payable in respect of annual fees for maintenance of the company are low.

Each creditor will be paid its full entitlement under one category before any lower category is paid. This may mean that secured creditors are paid in full but unsecured creditors receive nothing. If the value of any security does not cover the whole debt, the remaining unpaid debt will rank as an unsecured debt.

Creditors who can establish valid retention of title and other proprietary claims will have their property returned (or its monetary equivalent) in priority to those listed above.

Where there have been mutual dealings between a creditor and the company, the liquidator is required to take an account of what is due from each party to the other in respect of dealings and set off the sums due from one party to the other. The effect of this is that unsecured creditors entitled to set-off have an advantage over other unsecured creditors. Note, however, that there are special provisions that apply to certain contracts in the financial markets that are outside the Act and the Rules.

The same privileged and priority creditors will also be present in a reorganisation but the extent to which they are given priority will be a matter of negotiation between all the creditors of that particular class.

29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive insolvency so that they are enforceable against the debtor after it has reorganised?

Where a liquidation is terminated by the dissolution of the company, there is no debtor against which to enforce a debt. It is possible to

reverse the dissolution and restore the company on an application to court. This procedure may be available where there is a need to enforce a debt, but the court would need to be satisfied with the reasons why the debt was not dealt with prior to dissolution and is unlikely to make an order, the effect of which would be to place the restored company back into a state of liquidation, without good reason, for example, unless it is also the case that a hitherto unidentified asset is available for distribution.

The court may terminate a liquidation, in which case all subsisting debts remain enforceable.

30 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

In both liquidations and reorganisations, a distribution will be made when sufficient funds are available to justify it.

Liquidations

A notice must be issued stating that the liquidator intends to distribute a dividend and that a creditor who does not submit a claim by the date specified in the notice will be excluded from the distribution.

In determining the funds available for distribution, the liquidator shall take notice of any claims that creditors may not have had sufficient time to make, any claims that have not yet been determined and any disputed claims.

When the liquidator distributes a dividend, he or she shall send a statement to each creditor participating in the dividend, containing such particulars with respect of the company and to its assets and affairs as will enable creditors to understand the calculation of the amount of the dividend.

31 Transactions that may be annulled

What types of transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

There are two main types of transactions that may be set aside by a liquidator or administrator (the officeholder) under the Insolvency Act. These are undervalue transactions (section 246) and unfair preferences (section 245).

An undervalue transaction: if the company makes a gift or enters into a transaction where it does not receive any consideration, or a transaction entered into for a consideration that is significantly less than the consideration provided by the company, and is an 'insolvency transaction', which is defined by section 244(2) as being a transaction if entered into at a time when the company was insolvent or causes the company to be insolvent and was entered into during the vulnerability period (defined below). An officeholder can apply to the court for an order restoring the position to that which it would have been in the absence of such a transaction. Possible defences are that the company entered into the transaction in good faith, for the purpose of carrying on the business of the company, or that there were reasonable grounds for believing the transaction would benefit the company.

A company grants a preference, if it is an insolvency transaction entered into in the vulnerability period (defined below) that does something or allows something to be done that puts a creditor, surety or guarantor in a better position than it would otherwise have been in if the company went into insolvent liquidation.

In addition to transactions at an undervalue and preferences, extortionate credit transactions (section 248) will be invalid, as will certain floating charges (section 247). Any floating charge that is created in the vulnerability period and is an insolvency transaction will

be invalid except to the extent of any valuable consideration (being money, goods or services supplied; or a discharge or reduction of any debt or interest).

32 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether a transaction by an insolvent debtor can be annulled? May voidable transactions be attacked by secured creditors or by unsecured creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or suspension of payments or only in a liquidation?

The vulnerability period in the case of transactions or preferences given to unconnected persons relates to transactions entered into in the period commencing two years prior to the onset of insolvency and ending on the appointment of the officeholder. For a transaction to be either a transaction at an undervalue or a preference with a connected person the period commences six months prior to the onset of insolvency ending on the appointment of the office holder. For extortionate credit transactions the vulnerability period is five years prior to the onset of insolvency and ending on the appointment of the officeholder.

The term 'onset of insolvency' means:

- the date of filing of an application for an administration order;
- the date of filing of application for the appointment of a liquidator; or
- the date of appointment of liquidator by the members of the company.

33 Directors and officers

Are corporate officers and directors liable for or can they be made to pay obligations owed by their corporations?

Corporate officers and directors cannot be made personally liable for payment of the obligations and debts owed by their corporations. A company's officers and directors can be liable to compensate the creditors of the company in the circumstances set out in question 27.

Directors and officers may be liable for misfeasance if they have misapplied or are accountable for any money or other property of the company, or they are guilty of misfeasance or breach of duty in relation to the company. In such circumstances, the court may, on application of the liquidator or any creditor or contributory of the company, order such person to account for the money or property or any part of it (with interest) or contributory sum to the company's asset by way of compensation. There are various statutory offences relating to malpractice by directors before and during liquidations. These include (unsurprisingly) fraud in anticipation of winding-up, transaction in fraud of creditors, failure to deliver properties or papers to a liquidator, inventing fictitious losses or expenses, falsification of books, material omission in the company's statement of affairs and false representation to creditors.

34 Duties of directors to creditors prior to bankruptcy

Do corporate directors and officers have any liability for pre-bankruptcy actions by their companies? Can they be made subject to sanctions or penalties for other reasons?

The company's officers can be held to be personally liable to contribute to the assets of the company for any one of the following reasons:

- if they misapplied or retained, or become accountable for, money or other assets of the company; or
- if they are guilty of misfeasance or breach of any fiduciary or other duty in relation to the company.

Fraudulent trading

Section 255 of the Act provides that where the court is satisfied that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, the court may declare that any persons who were knowingly parties to the carrying on of business in that manner are liable to contribute to the company's assets as the court considers proper. This section is not limited to directors and officers but applies to anyone who has been involved in carrying on the business of the company in a fraudulent manner. It is necessary to prove actual dishonesty.

Insolvent trading

Section 256 of Act applies only to directors, former directors and 'shadow directors' and only where such a director continues to trade after a time when he or she knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding liquidation. Any contribution that the court orders the directors to pay will be compensatory rather than penal. The money recovered from the director will, therefore, go into the general assets of the company to be distributed by the liquidator.

The court can make orders under the Act where a person has misapplied or retained, or become accountable for any money or assets of the company in insolvent liquidation. The court can order such a person to repay, restore, or account for the money or assets, or pay compensation for any misfeasance or breach of duty, and to pay interest.

35 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A new regime has been introduced into BVI law called administrative receivership that is primarily for the benefit of secured creditors holding a floating charge. The essence of it is to allow the holder of a floating charge to appoint a person, an administrative receiver, over the whole of the company's business and assets in order to realise them for the benefit of that secured creditor.

Creditors may enforce certain proprietary and contractual rights without an application to the court, for example, pursuant to hire purchase agreements, retention of title clauses, security documentation or, in the case of a landlord, a right to levy distress.

36 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Other than the winding-up by, or subject to, the supervision of the court, or voluntarily (see questions 7 and 8), a company can be struck off the register and dissolved by administrative action under the the BVI Business Companies Act. The registrar may, if there is reasonable cause to believe that a company no longer satisfies the requirements prescribed for such companies under the BVIBCA, strike its name from the register, if the registrar has complied with the various statutory provisions required for notice etc. Once a company is struck off the register, if it remains continuously struck-off for 10 years, it is deemed dissolved with effect from the last day of that period.

37 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

When the affairs of the company have been completely wound up, the liquidator shall file with the registrar a copy of the final report

Update and trends

The increase in the number of insolvency proceedings has continued, especially involving investment funds that have been adversely affected by the impact on the various markets following the 'credit crunch'. The current economic climate suggests that the amount of insolvency proceedings will continue to be on the rise for the foreseeable future.

and the statement of realisations and distributions sent to the creditors and members of the company.

When the registrar is happy all procedures have been met, a certificate of dissolution is produced and the company is officially dissolved.

In the case of an administration, the administrator of a company may, at any time, apply to the court for the administration order to be discharged, if the administrator considers that the purposes specified in the order have been achieved or are incapable of being achieved; or is required to do so by a meeting of creditors. It is then up to the court to decide whether to discharge the order.

38 UNCITRAL Model Law

Is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency under consideration in your country? If so, what is the present status of this consideration?

The Act contains provisions based on the UNCITRAL Model Law on Cross-Border Insolvency for giving and seeking assistance in insolvency proceedings, but these provisions are yet to come into force.

39 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The BVI is not a signatory to any treaties on international insolvency. However, in international and cross-border insolvency proceedings the following applies.

A liquidator appointed under a foreign liquidation may apply to the BVI court for relief on behalf of the company in liquidation and the BVI court will recognise his title.

If a BVI company has been wound up by a foreign court, it can nevertheless be placed in liquidation in the BVI by either of the two routes available, that is, the appointment of a liquidator by the court or by the members. A foreign company that is in liquidation abroad may also be placed in liquidation but only through the mechanism of a court-appointed liquidator.

If a BVI company is in liquidation abroad, that does not prevent it from entering into the other insolvency regimes available under the Act, that is, administration, administrative receivership or CCA. If it does enter into these regimes, that by itself will not negate the foreign liquidation of the company.

Part XIX of the Act brings in a new regime for judicial assistance in insolvency proceedings. It allows foreign representatives of certain types of insolvency proceedings (ie, collective judicial or administrative proceedings in which the property and affairs of the debtor are subject to control or supervision by a foreign court, eg, liquidations) taking place in designated territories to apply to the BVI court for assistance. The representatives who can apply for such orders are persons authorised to administer the reorganisation or liquidation of the company's property or affairs (eg, liquidators), or who are authorised to act as representative of the foreign insolvency proceedings. The provisions are modelled on section 426 of the UK Insolvency Act 1986.

The BVI court, when faced with such an application, will do what best ensures the economic and expeditious administration of the foreign principles to the extent that is consistent with certain guiding principles, that is, the just treatment of all persons claiming in the foreign proceedings, the protection of persons in the BVI who have claims against the company against prejudice and inconvenience in the processing of claims in the foreign proceedings, the prevention of preferential or fraudulent disposition of property and the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency.

The orders that the BVI court can make in aid of the foreign proceedings are extremely wide and include the restraining of proceedings; orders compelling a person to deliver up the property of the company to the foreign representative; orders to facilitate the coordination of insolvency proceedings in the BVI with the foreign insolvency proceedings and authorising the foreign representative of any person who could be examined in BVI proceedings.

Secured creditors are protected as the Act specifically provides that such orders shall not affect the rights of secured creditors to take possession of and realise the property over which they have security.

The provisions are wide enough for the BVI court not only

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to render merely procedural assistance but also to apply substantive principles of BVI insolvency law. The BVI court has discretion whether to apply the law of the BVI or the law applicable to the foreign proceedings. However, set-off and preferential creditors are protected from this provision in that the court order also cannot affect the right of any creditor to benefit from the set-off provisions in section 150 of the Act, or result in a preferential creditor receiving less than he or she would under a BVI insolvency, without the consent of such person.

The BVI have enacted a Foreign Judgments (Reciprocal Enforcement) Law, which provides for the registration of foreign judgments in the BVI.

40 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Not applicable.

41 Pending legislation

Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Not applicable.

British Virgin Islands	Applicable bankruptcy law, reorganisations: liquidations
	The Insolvency Act 2003 and the Insolvency Rules 2005. Reorganisations mainly by way of administration and company creditors' arrangements.
	Customary kinds of security devices on immovables
	The principal type of security devices are legal mortgages, equitable mortgages and fixed charges.
	Customary kinds of security devices on moveables
	The principal type of security devices are registered charges, mortgages, specific fixed charges, debentures, pledges and liens.
	Stays of proceedings in reorganisations/liquidations
	Automatic stay of proceedings where a company is wound up by, or subject to the supervision of the court or where a company is placed in administration.
	Duties of the insolvency administrator
	Include filing and publishing requisite notices, getting in all assets of the company, settling claims made by creditors, declaring dividends and distributing surplus assets of the company.
	Set-off and post-filing credit
	Set-off/netting is mandatory under statute. Model netting legislation for financial and market contract. Credit obtained by liquidators takes priority ahead of preferential and unsecured creditors.
	Filing claims and appeals
	Claims are submitted to the liquidators in the form of a proof of debt. Appeals against rejection of proofs of debt are made to the High Court.
	Priority claims
	Include governmental claims due, claims due to the Commission, claims due to BVI Social Security Board and wages for services rendered to the company.
	Major kinds of voidable transactions
The major voidable transactions are undervalue transactions and unfair preferences.	
Operating and financing during reorganisations	
No statutory restrictions on the manner in which a company can carry on business during a reorganisation.	
Requirements for approval of reorganisations	
The BVI court must be satisfied that the company is, or is likely to become, insolvent, and that by placing the company into administration, there is a reasonable chance that the goals of the administration will be met. A company creditors' arrangement will be adopted where provided 75% (in value) of the creditors of the company vote in favour of the arrangement.	
Liabilities of directors and officers	
Include malfeasance or breach of trust for failure to wind up insolvent company, fraudulent or insolvent trading and liability to account or pay compensation for company's funds that have been misplaced or retained.	

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