



# Restructuring and Insolvency

in 51 jurisdictions worldwide

Contributing editor: Bruce Leonard

# 2010



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Callum Campbell

## Publisher

Richard Davey

## Restructuring and Insolvency 2010

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
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2009

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ISSN 1468-3180

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0870 897 3239

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# Bermuda

Jennifer Y Fraser

Appleby

## 1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

Corporate insolvency means liquidation or winding-up proceedings in Bermuda relating to companies governed by the Companies Act 1981 part XIII. Additionally, there are rules relating to liquidation procedures in the Companies (Winding-up) Rules 1982. Some of the provisions relating to companies incorporate, by reference, some of the bankruptcy provisions contained in the Bankruptcy Act 1989.

Reorganisations are dealt with in sections 99 to 101 of the Companies Act 1981, part VII, dealing with schemes of arrangement. Provisions relating to the insolvency of insurance companies are found in the Insurance Act 1978. Insolvency provisions relating to segregated accounts companies are contained in the Segregated Accounts Companies Act 2000. The Rules of the Supreme Court 1985 also apply to insolvency proceedings in certain respects.

## 2 Excluded entities

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

No entities are specifically excluded from the application of the general provisions referred to in question 1. However, there are limitations on the application of these general provisions, including the following:

- insurance companies carrying on long-term business cannot be wound up voluntarily;
- a private act of parliament may restrict the application of the general provisions – this has occurred in the case of segregated accounts companies that were subject to private acts of parliament to create legal segregation of assets and liabilities, displacing the general provisions outlined above prior the introduction of the Segregated Account Companies Act 2000; and
- generally the legislation applies only to a company that is incorporated in Bermuda, but the court will also have jurisdiction over companies operating in Bermuda under a permit issued by the Ministry of Finance in Bermuda, or if a company is conducting business in Bermuda without such a permit or has substantial assets in Bermuda.

## 3 Secured lending and credit (immovables)

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

A first mortgage of a freehold is comparatively straightforward. The borrower conveys away the legal estate. The borrower has a common law right to occupy the property and a statutory right to have it conveyed back to it or to a third party, at its direction, when it repays the debt.

Second and subsequent mortgages (particularly where there is more than one lender) are more conceptually difficult because, although the practice in Bermuda is to convey the property to the

second lender subject to the first mortgage, in fact all the borrower has is its equity of redemption – which is perfectly mortgageable, but is not the legal estate in the land. This means that it may be more difficult for second mortgagees to realise their security, because in order to sell the legal estate, rather than just a right of equity, they need the cooperation of the first mortgagee. A first lender could hinder a second lender's efforts to sell the property. In such a situation an order for sale under section 36 of the Conveyancing Act 1983 should be sought.

There are many different types of mortgage but essentially they can be classified as either legal mortgages (under which the legal estate in the property is vested in the lender) or equitable mortgages (under which legal title remains with the borrower).

In Bermuda, the common practice in relation to mortgages of leaseholds is to use an assignment of the term.

## 4 Secured lending and credit (moveables)

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

Bermuda law recognises the creation of legal and equitable security interests in personal property. The nature of the security interest created will be determined by:

- the property interest of the party granting the security at the time of security interest is granted;
- the terms of the security document; and
- the nature of the property being encumbered.

Pursuant to section 19(d) of the Supreme Court Act 1905, an absolute assignment in writing of any debt or other legal chose in action, where notice is given to the debtor or other contracting party, is deemed effective in law. A legal assignment of this kind may be established for the purpose of creating a security interest. Compliance with section 19(d) confers a procedural advantage, as the assignee may sue the debtor or other contracting party without joining the assignor in the action.

The assignment of a bond or other obligation securing the payment of money which does not comply with section 19(d) of the Supreme Court Act 1905 will nonetheless enable the assignee to maintain an action in his own name, against the debtor under the instrument. Section 1 of the Bonds and Promissory Notes Act 1874 authorises the assignment of bonds and other debt instruments, and empowers the assignee to bring an action in the name of the assignee against the debtor under the instrument. Notice to the debtor is not required. However, the debtor under the instrument assigned may set off any lawful demands which it has against the original payee under the debt instrument incurred before the debtor received notice of the assignment.

An assignment of a chose in action that does not satisfy the requirements of the Supreme Court Act 1905 or the Bond and Promissory Notes Act 1874 may nonetheless be recognised as a valid

equitable assignment. As between the party granting the security interest and the secured party, an equitable assignment is effective when granted. However, to bind the debtor or other party to the chose in action, notice must be given to that party.

## 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?

Once a creditor has obtained a judgment by default or by summary nature, or as a result of judgment being entered at trial, it is then faced with a choice of enforcement similar to that available in England and Wales. These are subject to one exception, namely enforcement by way of charging order (available only to the Crown pursuant to the Proceeds of Crime Act 1997).

By statute, certain foreign judgments can be enforced in Bermuda depending upon the country from which the judgment emanates. Pursuant to the Judgments (Reciprocal Enforcement) Act 1958, it is possible to enforce a judgment obtained in the UK and other specified jurisdictions in Bermuda. The judgment must be by a superior court, for a sum of money and be final and conclusive.

If the judgment comes from a jurisdiction not covered by the above criteria, then enforcement depends upon the common law. The position is that, broadly, a foreign judgment given by a foreign court having jurisdiction to issue the judgment may be enforced by an action. There are no enforcement procedures available to an unsecured creditor of a non-judicial nature.

## Pre-judgment attachment

While no specific pre-judgment attachment is available, an unsecured creditor may be able to seek assistance by way of a *Mareva* injunction in order to freeze any asset of the debtor, but will still have to prove its claim to judgment before the unsecured creditor can take advantage of the 'attachment' by enforcing against that asset.

The *Mareva* injunction is available to an unsecured creditor who can prove to the court that: it has a cause of action; it has a good, arguable case; there exists a serious risk that, if not restrained by injunction, the assets will be removed from the jurisdiction or otherwise dissipated or disposed of, so as to frustrate any judgment which may be subsequently obtained; and it is just and convenient in all the circumstances to make the order.

If an unsecured creditor successfully freezes the asset, this does not give the unsecured creditor any priority of execution and the unsecured creditor will still be subject to any prior security or prior judgment affecting the relevant asset.

## 6 Courts

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

The Supreme Court of Bermuda is the court that has jurisdiction for insolvency and bankruptcy matters without limitation. Appeals go to the Court of Appeal of Bermuda and thereafter to the Privy Council.

## 7 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation and what are the effects?

### Voluntary winding-up

A creditors' voluntary winding-up is appropriate only when a company is insolvent.

The directors call a special general meeting of the shareholders. At that meeting the shareholders pass a resolution in favour of the voluntary winding-up and appoint a liquidator. A meeting of

creditors is called where the creditors pass resolutions in relation to the appointment of a liquidator and a committee of inspection.

The liquidator advises the registrar of companies of his or her appointment and places advertisements in the local press giving notice of the resolution to wind up and the appointment of the liquidator, and requests creditors to file their claims.

The liquidator will take steps to collect in all of the assets of the company and will adjudicate on the claims of creditors and will declare a dividend to creditors.

The liquidator will call final meetings of shareholders and creditors and will file a return with the registrar of companies. After three months from registration of the return, the company will be deemed dissolved.

There is no automatic stay of proceedings in a voluntary winding-up. The liquidator is able to apply to the Supreme Court for directions on any matter. The rules governing proofs of debt and the valuation of claims within a liquidation apply in a voluntary winding-up.

If a company is solvent then a members' voluntary liquidation may be instituted by the board of directors and shareholders of the company. The procedure is very similar to the procedure outlined above for a creditors voluntary liquidation except that the majority of directors are required to swear statutory declarations to the effect that they have made full inquiry into the affairs of the company and have formed the view that the company will be able to pay its debts in full within 12 months.

## 8 Involuntary liquidations

What are the requirements for creditors placing a debtor in involuntary liquidation and what are the effects?

A winding-up by the court commences following the filing with the court of a petition presented by any one of: the company, its directors, one or more creditors or contributories, a combination of these or the registrar of companies. The court has jurisdiction to grant a winding-up order on a number of separate grounds based on a petition by a creditor including:

- that the company is unable to pay its debts, taking into account contingent and prospective liabilities; and
- that the court is of the opinion that it is just and equitable that the company be wound up.

Upon the presentation of a winding-up petition, a court may immediately appoint a provisional liquidator, who may be the official receiver or any other fit person. There are no licensing requirements or prescribed qualifications for liquidators, although the practice is to appoint chartered accountants specialising in insolvency. The powers of a provisional liquidator are determined by reference to the order appointing him or her.

Upon the granting of a winding-up order, the provisional liquidator must summon separate meetings of the creditors and contributories of the company for the purpose of determining:

- whether an application should be made for an order appointing a permanent liquidator (or joint liquidators), other than the official receiver;
- as a practical matter, the identity of a person or persons they wish to have appointed; and
- the appointment, if any, of a committee of inspection.

An application may then be made for an order giving effect to the wishes of the creditors and contributories. If the wishes of the creditors appear inconsistent with those of the contributories, the court must resolve the difference (normally in favour of the creditors).

**9 Voluntary reorganisations**

What are the requirements for a debtor commencing a financial reorganisation and what are the effects?

It is possible to implement a scheme of arrangement under section 99 of the Companies Act 1981. Such a scheme can be used to agree to wind up the affairs in a manner not consistent with the usual provisions or to restructure the affairs of a solvent or insolvent company to allow it to continue in operation. A scheme may also be used in combination with one of the two winding-up procedures outlined above.

A scheme of arrangement is a statutory arrangement (effectively a contract) between a company and its creditors, or any class of them. The scheme becomes legally binding on all creditors to whom it is intended to apply, as long as a majority (at least three-quarters) of all those in the affected class vote in favour of the scheme at a meeting of creditors convened by the court and the court then sanctions the scheme.

**10 Involuntary reorganisations**

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

A creditor has standing to propose a scheme. The requirements for effects and procedure are the same as those outlined in question 9.

**11 Mandatory commencement of insolvency proceedings**

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

There are no provisions that expressly require a company to commence insolvency proceedings in particular circumstances. There are certain provisions, the effect of which may cause the board to consider commencing such proceedings to avoid the potential of personal liability or to avoid a creditor commencing insolvency proceedings against the company.

If the company becomes insolvent, continues to trade and ends up in an insolvent liquidation, the directors and possibly others could be held personally liable for the debts of all of the company, or at least those incurred since the time it became clear the company was insolvent.

The matters for the board of directors (and possibly others involved in the running of the business) to consider in connection with the potential insolvency of the company under Bermuda law are briefly set out below.

**Fraudulent trading**

Section 246 of the act imposes a personal liability on any persons, including directors, that have carried on the business of the company with an intent to defraud creditors or for any other fraudulent purpose. 'Person' may include a shareholder, in certain circumstances. An application under this section may be made only once winding-up proceedings have been begun and the application may be made by the liquidator, a creditor or a shareholder of the company.

It is noteworthy that the court has a broad discretion to order directions consequent upon a declaration of fraudulent trading, expressly including a direction that the respondent's liability may be a charge on any sum owed to the respondent by the company.

Fraudulent trading claims are typically brought against directors in cases where a company continues to trade and incur credit when it is insolvent. It follows that directors are exposed to liability for causing the company to trade when they know the company is plainly insolvent without any credible hope of rescue.

**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?

It is possible for a liquidator of a company that is in provisional liquidation or liquidation to continue the business of the company to the extent necessary for the beneficial winding-up of the company. Further, the Supreme Court of Bermuda can empower the liquidators to continue the business with a view to a possible restructuring or a sale of the business.

In the context of a reorganisation under a scheme, the terms of the scheme will contain the provisions under which the company shall continue business and will deal with the payment of creditors continuing to do business with the company. Typically such creditors will receive payment in priority over all other creditors.

The extent to which creditors and the Supreme Court of Bermuda will have a supervisory role in the business will depend on the terms of the particular scheme. It is common for a scheme to create a committee of creditors to oversee certain issues such as the timing and payment of distributions and the payment of fees. The scheme will usually provide that, in the event of a dispute over the terms of the scheme, the creditors and the company will have the right to apply to the Supreme Court of Bermuda in relation to such dispute or to refer the matter to arbitration. Also, it is common for a scheme to create the office of a scheme administrator who is essentially empowered by the scheme to oversee the operation of the business that is the subject of the scheme.

**13 Rejection and disclaimer of contracts in reorganisations**

Can a debtor undergoing 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?

There is no power under the law of Bermuda to reject contracts as such. However, there is a power under the law of Bermuda under which a liquidator may 'disclaim' onerous property. Onerous property may include contracts, at least in certain circumstances.

To exercise this right, the liquidator requires leave of the court. Furthermore, notice of an application for leave must be given to persons interested in the property sought to be disclaimed. The court can make an order vesting the property in an interested person. A person injured by the operation of a disclaimer is deemed to be a creditor of the company for the value of any loss suffered by the person and may prove this in the winding-up. The provision is normally invoked where a liquidator wishes to avoid an onerous and perhaps long-term lease.

As mentioned the provision may be invoked where the liquidator wishes to avoid some other type of contract. However, normally the liquidator does not invoke this right because it does not actually put the estate into a better position than it would be if he or she did not invoke the right. This is because the right to prove in the liquidation for damages as a consequence of the disclaimer would in most cases be about the same as the value of claims under the contract without a disclaimer.

**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?

In a reorganisation that is the subject of a scheme, the terms of the scheme dictate the circumstances that the company can sell its specific

assets or its entire business. In a liquidation, a liquidator is able to sell the assets of the company or the entire business of the company without approval of the Supreme Court of Bermuda or of the committee of inspection. There is no special meaning to a sale of assets in the ordinary course of business.

Whether the purchaser acquires assets free and clear of claims will depend upon the nature of the claims in question. If the claims are being compromised as a result of a scheme of arrangement or liquidation then the assets will pass free and clear; however, if the claims have not been specifically compromised and are somehow attached to the assets then they will pass with the assets to the new owner.

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#### 15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

In a winding-up by a court, any time after the presentation of a petition but before the making of a winding-up order, the court may stay legal proceedings pending against the company. Once the winding-up order has been made or a provisional liquidator has been appointed, an automatic stay comes into force with the result that no proceedings may be begun or continued against the company except with the leave of the court.

In a creditors' voluntary winding-up, there is no automatic stay but the court is vested with all the powers that it has in a winding-up by the court, and these powers include the jurisdiction to stay proceedings.

In a scheme proceeding, there is no automatic stay of proceedings, but once the scheme is effective it is very common for one of the terms to be a stay of proceedings against the company in relation to actions of scheme creditors.

Secured creditors may enforce their security notwithstanding the stay of proceedings, but may require the leave of the Supreme Court if they require steps to be taken by the company itself. Secured creditors in an insolvency proceeding are likely to be able to obtain the leave of the Supreme Court to enforce their claims against the company. Unsecured creditors are unlikely to obtain the leave of the Supreme Court if the result is that they would receive assets in priority over other unsecured creditors, as this would breach the principle of equal treatment of unsecured creditors.

In a scheme there may be provisions that prevent both secured and unsecured creditors beginning or continuing proceedings.

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#### 16 Arbitration processes in bankruptcy

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

Liquidators fairly often use arbitration in insolvency proceedings in relation to pending disputes. A stay of proceedings exists following the appointment of a provisional liquidator or a winding-up order. The court may grant an order allowing arbitration proceedings to be continued or commenced.

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#### 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?

A solvent liquidation does not affect the ordinary rules of set-off as between the company and its creditors, which generally can be excluded by an agreement between the parties. In an insolvent liquidation, the legislation provides for mandatory set-off where there have been mutual credits, mutual debts or other mutual dealings between the company and a creditor.

Insolvency set-off is wider in scope than solvent set-off: non-contractual claims can be set off as well as debts, and claims may be set off whether liquidated or unliquidated. Since insolvency set-off is automatic and mandatory, it cannot be excluded by agreement between the parties, nor can a creditor be deprived of this right of set-off by the court.

The extent to which set-off is allowed or required in a reorganisation will depend upon the terms of any scheme.

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#### 18 Intellectual property assets in insolvencies

May an IP licensor or owner 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 a licensor or owner and continue to use the IP for the benefit of the estate?

There is no automatic termination of any rights of a debtor as licensee of IP rights. The matter will be determined in accordance with the terms of the contract to the extent not prohibited by the insolvency regime. If a liquidator is able to comply with the terms of a licence agreement to use IP then the debtor will be able to continue to use the IP pursuant to the terms of the contract. A liquidator will not just be able to terminate the contract unilaterally. If he or she wishes to disclaim the contracting party will be entitled to a damages claim.

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#### 19 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

The Companies Act 1981 gives a liquidator the following powers:

- (with the sanction of the court or the committee of creditors) to carry on the business of the company, so far as may be necessary for the beneficial winding-up of the company;
- to do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets;
- to raise on the security of the assets of the company any money required; and
- to draw promissory notes in the name and on behalf of the company.

Accordingly, notwithstanding that a company is in a liquidation process, it can obtain secured or unsecured loans or credit, to the extent that this is necessary for the beneficial winding-up of the company. Debts and liabilities incurred by the liquidator on behalf of the company after the start of the liquidation will be paid in priority over the existing creditors.

In a reorganisation, the extent to which the company can continue to do business and incur debt, and the priority given to such debt, will depend upon the terms of the scheme.

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#### 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 release non-debtor parties from liability, and, if so, in what circumstances?

There are no mandatory provisions that must be included in a scheme itself. However, a scheme must contain some element of give and take by the company and its creditors. It must be a compromise or arrangement between the company and its creditors. Without that element it will not be a valid scheme.

Otherwise the parties are free to include provisions in the scheme to achieve the desired result. This is subject to the scheme not being used to circumvent mandatory procedures such as the procedure to be followed in relation to the reductions of share capital.

A scheme can be used to displace the application of the general insolvency law of Bermuda.

Creditors must vote in classes for the purpose of passing resolutions under section 99 of the Companies Act 1981. It is the responsibility of the company to create the definition of the classes.

The proposer of the scheme must send an explanatory memorandum with the scheme to all creditors affected and must ensure that the resolutions are properly passed by the requisite majorities and report the results to the Supreme Court. After that, the Supreme Court has discretion whether to sanction the scheme, but if it grants an order the order is effective when delivered for registration to the registrar of companies in Bermuda.

A scheme of arrangement may include a release in favour of third parties; however, for the release to be properly incorporated into the scheme, it is considered necessary for the creditors to appoint the scheme administrators or another party to act on their behalf and on behalf of the company to enter into a deed of release that is contemplated by the terms of the scheme in favour of the third-party creditors.

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### 21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

There are no specific provisions that allow for pre-packaged reorganisations. However, it is not impossible for a debtor to negotiate with its significant creditors and devise a restructuring plan that can be incorporated into a scheme or implemented through winding-up proceedings. Whether such a procedure can be achieved will depend on the facts of each case. These procedures are generally of limited availability.

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### 22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What if the debtor fails to perform a plan?

In relation to a scheme, if the requisite majorities set out in question 9 are not obtained for the relevant classes, then the court will not sanction the scheme and the scheme will not be effective.

If a creditor objects at the sanction hearing that the classes were improperly constituted or that the terms of the scheme are unfair, then the court may decline to sanction the scheme on the basis of jurisdiction or discretion.

If the scheme is not sanctioned and does not become effective, then the company will need to propose an alternative scheme or consider some form of formal insolvency proceedings.

The scheme will usually contain provisions to deal with the failure of the company to comply with the terms of the scheme.

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### 23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees can be formed and what powers or responsibilities do they have? May creditors pursue the estate's remedies against third parties?

The notices that will need to be given to creditors will depend upon the type of liquidation or scheme process. Generally, creditors will be given notice of a meeting to appoint a liquidator or to approve a scheme and will also be given notice of any filing deadline that will affect their ability to file a claim in the liquidation or scheme proceedings. In relation to a liquidation, creditors' meetings are held in an insolvent case in relation to the appointment of a liquidator and on certain matters where a committee of inspection has been appointed. The committee will meet from time to time. In relation to a scheme, it is necessary to call a creditors' meeting to consider the approval of the scheme, and the scheme itself may create a requirement to hold annual creditors' meetings generally, or it may create a committee

of inspection that may be required to meet on a periodic or regular basis. A committee of inspection can be appointed in a winding-up by the court or a creditors' voluntary winding-up. A scheme may create a similar committee of creditors whose powers will be dictated by the terms of the scheme. The committee of inspection in a winding-up or voluntary insolvency case will have certain specific powers in relation to such matters as approval of fees of the liquidator and similar matters. Generally, the powers of these committees are fairly limited and so are their responsibilities. A creditor can only begin an independent action against a third party. Generally, the rights will accrue to a liquidator rather than third party. For example, a third party will not be able to begin proceedings against a director for breach of duty. A creditor may be able to initiate proceedings under the Conveyancing Act as an eligible creditor to seek that the transaction be set aside as a transaction at an undervalue.

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### 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 pooled for distribution purposes?

Generally, each member of a corporate group will be treated as a distinct entity and the assets and liabilities of group companies are not combined into a pool for distribution purposes. There is one limited exception to this in the case of insurance companies.

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### 25 Modifying creditors' rights

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

The Supreme Court does not have any general jurisdiction to change the ranking of creditors. In limited circumstances, the court has jurisdiction to vary the order in which the expenses can be paid.

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### 26 Enforcement of estate's rights

If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Generally, creditors cannot directly enforce claims that are available to the liquidator. If a creditor is an eligible creditor under the Conveyancing Act 1983, it can apply for relief under those provisions in relation to it being a transaction at an undervalue.

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### 27 Claims and appeals

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

To vote at the first meeting of creditors in a winding-up by the court, a creditor must submit proof of debt in the prescribed form (or otherwise submit its claim in the manner required by the court). This proof is required to determine the value of the creditor's vote at the meeting, but not for dividend purposes.

There are no set time limits for the submission of claims. The court may fix periods within which creditors are to prove their debts or claims, or be excluded from the benefit of any distribution made before those debts are proved. The liquidator may from time to time require creditors to submit proofs of debt, in order to be eligible for any distribution in the liquidation. A notice is issued in which the liquidator will fix a date, with at least 14 days' notice, on or before which creditors must prove their debts or claim, failing which they will be excluded from the benefit of any distribution made before their debts are proved.

The liquidator can accept or reject proofs of debt and must, within 28 days of receipt of the proof, admit or reject the proof, or seek

further evidence in support of the proof. If the liquidator rejects a proof of debt, the creditor must be informed in writing of the grounds for rejecting the proof. The creditor can appeal to the court against the rejection of its proof, and the court may reverse or vary the decision of the liquidator. An appeal must be made within 21 days of the date of service of the notice of rejection (or seven days in respect of a proof lodged in response to a notice of intention to pay a dividend).

There are no provisions that deal with the purchase, sale or transfer of claims against the insolvent estate. Creditors are free to sell or otherwise transfer their claims and the purchaser or transferee may then make a claim in the liquidation.

### 28 Priority claims

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

In a liquidation generally the assets of a company are distributed in the following order:

- costs of liquidation;
- employees under the Employment Act 2000;
- preferred claims as defined in section 236 of the Companies Act 1981; and
- floating charge holders in certain circumstances under section 236(5)(b).

After all unsecured creditors have been paid in full, any surplus assets would be distributed to the shareholders in accordance with their respective rights.

The concept of *pari passu* distribution in respect of voluntary winding-up is expressed in section 225 of the Companies Act 1981.

### 29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

There are no liabilities that survive an insolvency process. Whether any liabilities survive a reorganisation process will depend on the scope of the reorganisation process itself.

### 30 Distributions

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

The liquidator will review the estate and determine whether and when it is appropriate for a dividend to be paid. The liquidator must give no more than two months' notice to creditors of his or her intention to declare a dividend, specifying the latest date up to which proofs of debt may be lodged, which must not be less than 14 days from the date of the notice. Any appeal against the rejection of a proof lodged in response to a notice of dividend must be made within seven days of the notice of rejection.

The distributions and appeals under a scheme will be contained in the terms of that particular scheme.

### 31 Transactions that may be annulled

What 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 various doctrines under the law of Bermuda whereby a transaction, such as the creation of security or the disposal of an asset by a company facing financial difficulties, may subsequently be found to be illegal, as follows.

- (i) A disposition in favour of a creditor by an insolvent company within six months prior to the filing of a petition for the winding-up of the company and for the purpose of preferring the creditor is void. An express statutory exemption protects the interests of any person obtaining title to property in good faith and for valuable consideration.

- (ii) Within certain limits, a disposition of property made with the dominant intention of putting property beyond the reach of a person (or class of persons) who have a claim or may at some time have a claim against the transferor and without adequate consideration is voidable at the instance of certain eligible creditors. This rule applies within or outside liquidation (and in fact a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite.
- (iii) A void disposition under Bermuda law is any disposition of the property of a company after the filing of a petition for the winding-up of that company. Such a disposition is void unless approved by the court.
- (iv) There is under Bermuda law a concept of fraudulent trading. This entails the carrying on of the business of a company with the intent to defraud creditors of the company or for any other fraudulent purpose. Any person found by a court to have been conducting business in this way may be held personally liable for any or all of the debts of the company. It must be proven that the respondent was knowingly a party to the carrying on of such business.
- (v) There is a statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misapplied any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. This provision is not thought to provide any substantive remedies that would not otherwise exist, but provides a summary mechanism.
- (vi) A floating charge granted by a company while it was insolvent and within 12 months prior to the presentation of a petition is void, except to the extent of cash advances made in consideration for the floating charge.
- (vii) A conveyance or assignment by a company of all its property to trustees for the benefit of its creditors is void to all intents.

### 32 Proceedings to annul transactions

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

See items (i) and (vi) in question 31. Transactions may generally only be attacked in a liquidation by a liquidator except transactions at an undervalue.

### 33 Directors and officers

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Corporate officers and directors are not personally liable for the obligations owed by their corporations, unless they are found liable in respect of fraudulent trading.

Apart from liability for fraudulent trading (see question 11), the Companies Act also prescribes a number of criminal offences for which a past or present officer of the company may be found liable. These all relate to acts that may be committed in the 12 months immediately preceding the start of the liquidation, or after the start. The offences are offences of fraud or dishonesty and include such things as the failure to deliver up assets to the liquidator, destruction or falsification of books or papers of the company, and obtaining goods on credit by false representation or fraud that the company does not subsequently pay for. The penalty for these offences is imprisonment for terms of up to five years.

As a general rule, directors owe their fiduciary duties and their duties of skill and care to the company. When a company is solvent, the directors' duties include having regard to the interests of the general body of shareholders. However, when a company is insolvent,

### Update and trends

The courts have seen an increase in cases dealing with disputes relating to the nature of the interests held by investors in insolvent fund structures and the treatment of such interests in the insolvency context.

or in danger of becoming insolvent, the directors' duties include having regard to the interest of the general body of creditors. In either case, solvent or insolvent, the company, or its liquidator, is generally the proper plaintiff to bring claims against directors for breaches of duty. This means that, save for special circumstances, shareholders and creditors are unable to maintain claims against directors.

It is safe to say that once a company is in danger of becoming insolvent, the directors have to consider the interests of creditors, weighing the gravity of the company's financial predicament against the realistic prospects of the company resolving the situation.

### 34 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?

This section will deal only with security over personal property as it is assumed that the relevance of the provisions relevant to real property will be of limited interest.

The procedure for the private appointment of a receiver out of court depends on the terms of the security document. Typically there will be provision for various events of default upon which the security holder becomes entitled (among other things) to appoint a receiver. Notice of the default will normally have to be given to the borrower. If the default is not corrected, the security holder may appoint a receiver to take possession of the assets subject to the security. In Bermuda the practice is to use chartered accountants with experience in the area to act as receivers (although there are no prescribed qualifications requiring this). The powers of the receiver will be established by the terms of the security document and will normally include the power to sell the assets subject to the security.

The provisions of the Conveyancing Act 1983 apply equally to receivers of real and personal property.

Part XIV of the Companies Act 1981 contains provisions regulating the activities of receivers appointed under a security document and those appointed by the court. The provisions are very general in nature and establish a number of filing and notice requirements in relation to the administration of a receiver.

### 35 Corporate procedures

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

The answers to these questions have been dealing with the liquidation of companies as a matter of Bermuda law. It is very unusual to encounter a bankruptcy of an individual proceeding in Bermuda. Bankruptcy of individuals is conducted under the supervision of the Supreme Court of Bermuda and involves the adjudication of an individual as bankrupt and the granting of a receiving order. It is possible for the bankrupt to propose some form of arrangement with its creditors and the successful completion of bankruptcy proceedings should eventually result in the bankrupt being discharged.

### 36 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a winding-up by the court, when the affairs of the company have been completely wound up and the assets distributed to the creditors,

the liquidator will apply to the court for his or her release and for the dissolution of the company. He or she may also apply for an order that the company be dissolved. If such an order is made, the company is dissolved from the date of that order.

In a winding-up by the court where the official receiver is the liquidator, the official receiver may apply to the registrar for early dissolution of the company if it appears that the realisable assets of the company are insufficient to cover the expenses of the liquidation, and that the affairs of the company do not require any further investigation. The official receiver must give 28 days' notice of his or her intention to apply for early dissolution to the company's creditors and any receiver of the company. The dissolution takes effect three months after the registration of the official receiver's application by the registrar.

In a voluntary liquidation, as soon as the affairs of the company are fully wound up, the liquidator is required to make an account of the winding-up, showing how the winding-up has been conducted and the property has been disposed of, and then to call a general meeting of the shareholders of the company at which the account is presented. A shareholders' resolution is passed at the final general meeting and the company is dissolved.

In a creditors' voluntary liquidation, the account is also presented at a final meeting of creditors. Within one week after the meeting, the liquidator notifies the registrar of companies that the company has been dissolved and the registrar records that fact and the date of the dissolution in the register of companies. In a members' voluntary liquidation, the dissolution takes effect from the date of the final meeting. In a creditors' voluntary liquidation, the dissolution takes effect three months after the notification of the final meetings to the registrar.

A scheme will be concluded in accordance with the terms of the scheme.

### 37 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? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Bermuda does not have any legislation expressly dealing with the recognition of foreign proceedings and office holders or start of ancillary proceedings which would compare to either section 426 of the English Insolvency Act 1986 or section 304 of the United States Bankruptcy Code. (See further below.) In these circumstances, the position is governed in Bermuda by common law. While English case law is not binding in a Bermuda court, it is of highly persuasive authority.

The courts of Bermuda would normally recognise a foreign court's jurisdiction in bankruptcy over a foreign debtor where the debtor is incorporated in the foreign jurisdiction. This principle follows from the fact that generally the law of the jurisdiction of incorporation will govern in relation to in rem issues pertaining to the status of the company. Accordingly:

- a Bermuda court may recognise the foreign office holder for the purpose of permitting him or her to take proceedings in Bermuda ancillary to the foreign proceedings;
- a Bermuda court may recognise the foreign office holder for the purpose of vesting in him or her or the foreign company the moveable (but not the immoveable) property of the debtor; and
- the office holder of a foreign company cannot simply arrive in Bermuda empowered to take whatever steps he or she could take in the foreign proceedings (just as a foreign judgment creditor cannot proceed to enforce a foreign judgment against Bermudian assets). However, such an office holder probably has (at a minimum) locus standi to apply to court for assistance ancillary to the foreign proceedings.

Through the courts of Bermuda the office holder is entitled to do the following:

- cause the foreign company to petition for the compulsory liquidation of the company in Bermuda, possibly together with an application for the appointment of a provisional liquidator;
- request that the Bermudian assets of the foreign company be remitted to him or her to be dealt with in the foreign jurisdiction (ie, request a 'turnover order');
- make application for an order staying actions and execution of judgments in Bermuda; and
- make application for the appointment of him or herself or some other suitable person as receiver.

There is currently consideration of whether the UNCITRAL Model Law should be adopted in Bermuda. To date, there has been no decision reached on this point.

### 38 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?

Protocols have been entered into by Bermuda-incorporated companies in proceedings in Bermuda in relation to US and Hong Kong proceedings on several occasions over the years. There have been no joint hearings in respect of cross-border cases, however. Letters of request have been issued by the Bermuda court to the English court on several occasions and there has been judicial cooperation between Bermuda and US bankruptcy judges relating to chapter 11 proceedings involving Bermuda companies.

## Appleby

**Jennifer Y Fraser**

**[jfraser@applebyglobal.com](mailto:jfraser@applebyglobal.com)**

Canon's Court  
22 Victoria Street  
Hamilton HM 12  
Bermuda

Tel: +1 441 295 2244  
Fax: +1 441 292 8666  
[www.applebyglobal.com](http://www.applebyglobal.com)

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the relevant chapter.

<b>Bermuda</b>	<b>Applicable bankruptcy law, reorganisations: liquidations</b>
	The main legislation is part XIII of the Companies Act 1981.
	<b>Customary kinds of security devices on immoveables</b>
	Mortgages and fixed charges.
	<b>Customary kinds of security devices on moveables</b>
	Floating charges.
	<b>Stays of proceedings in reorganisations/liquidations</b>
	A stay arising following the appointment of a provisional liquidator or winding-up order. A scheme usually includes a stay of proceedings in its terms.
	<b>Duties of the insolvency administrator</b>
	To collect the assets and distribute the assets in accordance with the statutory regime.
	<b>Set-off and post-filing credit</b>
	Mandatory set-off arises in a winding-up; a liquidator can borrow money during the course of the winding-up, subject to certain restrictions.
	<b>Filing claims and appeals</b>
	Creditors are required to file claims which the liquidator will adjudicate. The creditors have a right to appeal the decision of the liquidator.
	<b>Priority claims</b>
	Costs of liquidation, employee and tax claims rank in priority to other classes.
	<b>Major kinds of voidable transactions</b>
Fraudulent preference, transaction at an undervalue, fraudulent trading.	
<b>Operating and financing during reorganisations</b>	
Fairly limited process for such activities.	
<b>Requirements for approval of reorganisations</b>	
Schemes of arrangement to be approved by the classes of creditors or shareholders affected and then sanctioned by the Supreme Court.	
<b>Liabilities of directors and officers</b>	
Directors owe duties to the company and may be held liable for certain acts or omissions, subject to rights of indemnity against the company usually contained in the by-laws.	
<b>Pending legislation</b>	
Legislation under consideration but not before the legislature.	



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