



# Restructuring and Insolvency

in 51 jurisdictions worldwide

Contributing editor: Bruce Leonard

# 2010



Published by  
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### 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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ISSN 1468-3180

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

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# British Virgin Islands

## Eliot Simpson

Appleby

### 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 and schemes of arrangement 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.

### 2 Excluded entities

What entities are excluded from general 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 principal types of security 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 principal types of security 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.

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 the 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 commencing a voluntary liquidation and what are the effects?

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 under the BVIBCA by a resolution of members or, in some circumstances, by a resolution of directors. The members may appoint a liquidator under the Act at a meeting of members by a 75 per cent majority of those attending and entitled to vote.

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 placing a debtor in involuntary liquidation and what are the effects?

A creditor may apply under section 162 to the BVI Court to appoint a liquidator either on the ground that the company is insolvent or on the ground that it is just and equitable that a liquidator should be appointed. Insolvency is defined in section 8(1) of the Act and includes where there is a failure to comply with a statutory demand that has not been set aside; where execution of a judgment is returned unsatisfied; where liabilities exceed 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 commencing a financial reorganisation and what are the effects?

The Act contains provisions for an alternative procedure to liquidation, known as administration. These provisions, in part III of the Act, have not yet been brought into force but might be introduced in the future by resolution of the Executive Council of the British Virgin Islands. The administration procedure, if brought into force, will allow insolvent companies to be reorganised and refinanced and may be used to realise the company's assets more effectively than in a liquidation.

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.

Section 179A of the BVIBCA provides for schemes of arrangement by allowing, inter alia, a company and its creditors to enter into a compromise or arrangement with approval of the court. A scheme requires agreement of 75 per cent in value of the creditors or class of creditors present and voting at the scheme meeting, as well as court approval, and will then bind dissenting creditors.

## 10 Involuntary reorganisations

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

Although the Act contains provisions for administration, these provisions are not currently in force. Under these provisions a creditor would be able to apply for an administration order.

## 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 is no express duty on a company to commence insolvency proceedings at any particular time. A director or former director can be held liable where such director continued 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.

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 formal insolvency proceedings 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.

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. It is the responsible insolvency practitioner who supervises the debtor's business activities.

## 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 can do so in a liquidation, subject to detailed provisions in the Act.

## 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

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

The purchaser purchasing assets would acquire them 'free and clear' of claims unless there was some particular third-party interest over the asset.

### Liquidations

A liquidator can 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 can also raise, on the security of the assets of the company, any money required. The purchaser would acquire assets purchased free and clear of claims unless there was some particular third-party interest over the asset.

## 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

Once a liquidator is appointed under the Act, no action or proceedings 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

Under the administration procedure, if it is brought into force, a statutory moratorium will come into effect restricting 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.

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.

### Schemes of arrangement

Once agreed by the requisite majority, a BVIBCA scheme is binding on all of the creditors or class of creditors.

## 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?

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?

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 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, 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. 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 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 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. Subject to detailed provisions in sections 217 to 224 of the Act, 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 rights.

### 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?

A liquidator can 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.

Most reorganisations will include 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 formal insolvency proceedings; 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.

### 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?

### Schemes of arrangement

A scheme of arrangement under section 179A of the BVIBCA requires an application to the court to order a meeting of the creditors or class of creditors. The scheme will be binding on the creditors or class of creditors and on the company if, at the scheme meeting, a majority of 75 per cent in value of the creditors or class of creditors present and voting in person or by proxy agree to the compromise or arrangement, and the compromise or arrangement is subsequently sanctioned by the court.

### CCA

A CCA must be proposed by the board of the company, or by the liquidator if the company is in liquidation. The board or liquidator will nominate an insolvency practitioner as an interim supervisor, who will subsequently become the supervisor if the arrangement is approved at a meeting of the creditors.

### 21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

It is unlikely that a BVIBCA scheme of arrangement could be completed in less than 70 days. In urgent cases it is possible that the listing of court hearings could be expedited to reduce this to around 50 days.

There are no provisions for the expedition of CCAs and the implementation time for a CCA depends on its complexity. As court involvement is not generally required, it should be possible to complete a CCA more quickly than a scheme.

### 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?

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.

A scheme of arrangement under the BVIBCA requires the agreement of 75 per cent in value of the creditors or class of creditors present and voting at the scheme meeting, as well as court approval.

### 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?

Generally, whether it be an administrative receivership (see question 26) 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.

Section 422 of the Act sets out the powers and functions of the creditors' committee, which include consulting with the office holder, requiring and receiving reports and requiring him to attend before the committee. The committee may also approve remuneration.

### 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, although it is possible that the court might approve pooling arrangements in appropriate cases.

### 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?

There are no provisions allowing the court to change the priority of creditors' claims.

**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?

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. The benefit of a claim might also be distributed as an asset *in specie*, so that a creditor or creditors may pursue the claim themselves.

**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. There is no fixed time limit for submission of claims and in practice the liquidator is likely to provide a deadline for claims, although claims submitted after his deadline are unlikely to be ignored. 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. The creditor may challenge the liquidator's decision by an application to the court.

**28 Priority claims**

What are the major privileged and priority claims in liquidations and reorganisations? Which 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;
- preferential creditors;
- 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.

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; and

- 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.

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 may be the subject of compromise with the particular class.

**29 Liabilities that survive insolvency proceedings**

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

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. It 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 to 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 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 under the Insolvency Act. These are undervalue transactions (section 246) and unfair preferences (section 245).

If the company makes a gift or enters into a transaction where it does not receive any consideration, or a transaction for consideration that is significantly less than the consideration provided by the company, and it is an 'insolvency transaction', an officeholder can apply to the court for an order restoring the position to that which it would have been in, in the absence of such a transaction. An 'insolvency transaction' is defined by section 244(2) as being a transaction entered into at a time when the company was insolvent or which causes the company to become insolvent and which was entered into during the vulnerability period (defined below). 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 entered into an insolvency transaction 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 that any valuable consideration was given (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 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?

The vulnerability period in the case of transactions at an undervalue or preferences given to connected persons is 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 an unconnected person, it must be entered into during the period commencing six months prior to the onset of insolvency and ending on the appointment of the officeholder. 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 (although the administration provisions are not currently in force);
- the date of filing of application for the appointment of a liquidator; or
- the date of appointment of a liquidator by the members of the company.

### 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 cannot be made personally liable for payment of the obligations and debts owed by their corporations.

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 a 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.

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.

### 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?

BVI law includes a regime 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 (administrative receiver) over the whole of the company's business and assets 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.

### 35 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 under the BVIBCA (see questions 7 and 8), a company can be struck off the register and dissolved by administrative action under 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.

### 36 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

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

A scheme of arrangement under the BVIBCA concludes when the order of the court sanctioning the scheme is filed with the registrar of companies.

Once a CCA is completed the supervisor must file a notice with the registrar and give note to the company and each creditor and member.

### 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?

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

### Update and trends

The credit crisis and general economic downturn has led to an increased use of statutory demands and winding-up applications as a means to enforce unpaid debts. We are also seeing in particular increasing numbers of mutual fund investors seeking winding-up orders from the court in circumstances where their attempts to redeem their investments have been met by the suspension of redemptions.

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 also does not prevent it from entering into the other insolvency regimes available under the Act, that is, 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, for example, 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 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

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insolvency proceedings and orders authorising the foreign representative to examine 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 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 has enacted a Foreign Judgments (Reciprocal Enforcement) Law, which provides for the registration of foreign judgments in the BVI.

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.

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**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?

The BVI is not a signatory to any treaties on international insolvency.

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>British Virgin Islands</b>	<b>Applicable bankruptcy law, reorganisations: liquidations</b>
	The Insolvency Act 2003 and the Insolvency Rules 2005. Reorganisations mainly by way of schemes of arrangement under the BVI Business Companies Act 2004 and company creditors' arrangements.
	<b>Customary kinds of security devices on immoveables</b>
	The principal type of security devices are legal mortgages, equitable mortgages and fixed charges.
	<b>Customary kinds of security devices on moveables</b>
	The principal type of security devices are registered charges, mortgages, specific fixed charges, debentures, pledges and liens.
	<b>Stays of proceedings in reorganisations/liquidations</b>
	Automatic stay of proceedings where a company is wound up.
	<b>Duties of the insolvency administrator</b>
	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.
	<b>Set-off and post-filing credit</b>
	Set-off/netting under statute. Credit obtained by liquidators takes priority ahead of preferential and unsecured creditors.
	<b>Filing claims and appeals</b>
	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.
	<b>Priority claims</b>
Include governmental claims due, claims due to the Commission, claims due to BVI Social Security Board and wages for services rendered to the company.	
<b>Major kinds of voidable transactions</b>	
The major voidable transactions are undervalue transactions and unfair preferences.	
<b>Operating and financing during reorganisations</b>	
No statutory restrictions on the manner in which a company can carry on business during a reorganisation.	
<b>Requirements for approval of reorganisations</b>	
Schemes of arrangement require agreement of 75 per cent in value of creditors present and voting and court approval. A company creditors' arrangement will be adopted where 75 per cent (in value) of the creditors of the company vote in favour of the arrangement.	
<b>Liabilities of directors and officers</b>	
Include malfeasance or breach of duty for losses caused to the company or fraudulent or insolvent trading and liability to account or pay compensation for company funds that have been misplaced or retained.	

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