Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

Insolvency

British Virgin Islands
Campbells

chambers.com

2019

BRITISH VIRGIN ISLANDS

Contributed by Campbells

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Campbells

Contents

Campbells' team of 19 litigators has the experience and strength in depth to handle the largest and most complex liquidations and restructurings. It specialises in complex cross-border insolvency and restructuring, with particular expertise in distressed investment fund disputes. Clients include local and overseas insolvency professionals, creditors, investors, directors and other professional service providers, which the team advises on all aspects of the restructuring and winding up of companies, investment funds, limited partnerships and structured finance entities.

Authors

Brian Child is a partner at the firm and has more than 30 years' experience of complex international insolvencies, restructurings and security enforcement. He has specific experience of contentious and non-contentious corporate liquidations, bankruptcies, receiverships, restructurings, reorganisations and related litigation matters. Brian also has experience of complex multi-jurisdiction fraud recovery, asset tracing and shareholder disputes, including asset freezing injunctions, disclosure and search orders.

Matthew Freeman is a senior associate in the litigation, insolvency & restructuring group. He has significant experience of complex international insolvencies, restructurings and security enforcement. He advises clients in contentious and non-contentious corporate liquidations, bankruptcies, receiverships, restructurings, reorganisations and related litigation matters. Matthew also advises on complex shareholder disputes and trust disputes.

1. Market Trends and Developments

1.1 The State of the Restructuring Market

In 2017, the British Virgin Islands (BVI) was ranked as the world's third most important offshore jurisdiction. This was despite challenges from the Channel Islands and the Cayman Islands.

Data from that year shows that, as of March 2017, there were 431,776 active BVI companies and 1,426 active funds.

Since then, the BVI has retained its status as a major player in the international service sector. This is despite facing significant flooding and mudslides in August 2017 and the catastrophic effects of Hurricane Irma and, to a lesser extent, Hurricane Maria in September 2017. The BVI proved to be an agile jurisdiction at this time and quickly took steps to set up the Commercial Court temporarily in St Lucia to ensure that there was as little disruption to the legal and financial services market as possible.

Despite being at the forefront of regulatory disclosure and governance, on 1 May 2018, the UK government enacted the Sanctions and Anti-Money Laundering Bill, which requires territories and crown dependencies to establish a publicly accessible register of the beneficial ownership of companies registered in its jurisdiction. The BVI government has objected to this legislation, not least because it represents interference with the territory's constitutional autonomy and places the territory at a competitive disadvantage compared to other jurisdictions that do not meet the stringent regulatory and disclosure standards in the BVI. The BVI government has also pointed to the fact that there is presently no requirement in the UK for companies to provide information to Companies House regarding beneficial ownership.

It is not clear at this time whether the presence of a publicly accessible register will affect company incorporations in the BVI, as the territory has until 31 December 2020 to establish one. However, early signs are promising, as the number of incorporations increased over the first part of 2018, which suggests that the BVI continues to play an important role in international financial services.

1.2 Changes to the Restructuring and Insolvency Market

Interest is growing in the new form of British Virgin Islands limited partnership that can be registered under the Limited Partnership Act 2017 (the Act). In the context of banking and finance transactions, there is increasing awareness among lenders of the ability to take security over limited partnership interests. Taking security over limited partnership interests can be useful in a variety of finance transactions, whether the security is being granted by the borrower or a third party. The Act contains a clear and simple framework that facilitates this.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of the Laws and Statutory Regimes

Laws

The principal legislation for restructuring, reorganisation and insolvencies in the BVI is the Insolvency Act, 2003 (the IA) and the Business Companies Act, 2004 (the BCA). The

BCA sets out the governing principles for company restructuring and reorganisation as well as the voluntary liquidation regime. The IA sets out the procedures for insolvent liquidators and the appointment of administrative receivers.

Plan of Arrangement

A Plan of Arrangement is initiated by the directors of a company or, if the company is in voluntary liquidation, by a voluntary liquidator. There is no requirement for a company to be insolvent before a Plan of Arrangement can be considered.

The directors of a company must decide whether a Plan of Arrangement is in the best interests of the company, its creditors or shareholders.

The Plan of Arrangement may permit a company to:

- amend its memorandum and articles of association;
- reorganise, merge or consolidate, or separate its businesses;
- dispose of any assets, business, shares, debt or other securities;
- approve the dissolution of the company; or
- put in place any combination of the above.

Once the directors have approved the Plan of Arrangement, they must apply to the BVI court to approve the plan. The court has the power to approve, amend or reject the proposed Plan of Arrangement.

The court will determine to whom notice of the proposed plan should be given and whether the approval of any individual is required.

The BVI court will also determine whether any holder of shares, debt obligations or securities in the company can dissent to the proposed Plan of Arrangement. If this is the case, any dissenting party may receive payment of fair value in respect of its shares, debt obligations or other securities (section 179 of the BCA).

Provided the court approves the plan, the directors must give notice to and (if so ordered) seek approval from the relevant persons. Once the Plan of Arrangement is approved by those persons, the directors will execute (on behalf of the company) the articles of arrangement. These include the Plan of Arrangement, a copy of the court order approving the plan and details of how the plan was approved.

Scheme of Arrangement

This is a statutory mechanism that permits a company to enter into a compromise or arrangement between the company and its creditors, or between the company and its shareholders. In certain circumstances, it allows a company to restructure and avoid entering into a formal insolvency process.

A Scheme of Arrangement is initiated by the company, a creditor, a shareholder or a liquidator applying to the BVI court for a meeting of creditors or shareholders. As with the Plan of Arrangement, there is no requirement for the company to be insolvent when the application to the court is made.

A meeting will then be called and the scheme will be put to a vote. The scheme will be approved if 75% in value of the creditors or class of creditors or shareholders or class of shareholders present and voting at the meeting agree to the scheme.

If the Scheme of Arrangement is approved by the requisite proportion of shareholders or creditors, the applicants must return to the court for the scheme to be approved by a judge. The scheme will be binding on all creditors, shareholders and the company once approved by the judge. However, an order sanctioning the scheme will only take effect when filed with the BVI Registrar of Companies (the Registrar).

Solvent Liquidation

The BCA contains provisions for the winding-up of a company, provided it has no liabilities or it is able to pay its debts as they fall due.

Prior to placing the company into solvent liquidation, the directors of the company must make a declaration of solvency that the company is, and will continue to be, able to discharge, pay or provide for its debts as they fall due – section 198(1) of the BCA. The declaration of solvency has no effect where it is made more than four weeks before the date of the resolution appointing the voluntary liquidator. The resolution will also be invalid if it does not include a statement of the company's assets and liabilities as at the latest practical date before making the declaration (section 198(2) of the BCA).

It is important to note that section 198(4) of the BCA states that a director who makes a declaration of solvency without having reasonable grounds for believing that the company is, and will continue to be, able to discharge, pay or provide for its debts in full as they fall due, is committing an offence and is liable on summary conviction for a fine in the sum of USD10,000.

The directors must also approve a liquidation plan specifying:

- the reasons for the liquidation of the company;
- an estimate of the time required to liquidate the company;
- whether the liquidator is authorised to carry on the business of the company if he or she determines that to do so would be necessary or in the best interests of the creditors or members of the company;

- the name and address of each individual to be appointed as a liquidator and the remuneration proposed to be paid to each liquidator; and
- whether the liquidators are required to send all the members a statement of account prepared, or caused to be prepared, by the liquidators in respect of their actions or transactions.

A liquidation plan has no effect unless it is approved by the directors no more than six weeks prior to the date of the resolution to appoint a liquidator – 198(3) of the BCA.

When a voluntary liquidator is appointed by the shareholders, they must approve the liquidation plan. A meeting must be held for this purpose, with notice of the meeting, accompanied by the liquidation plan, being given in advance to every shareholder, whether or not they are entitled to vote on the liquidation.

Once appointed, the liquidator has 14 days to file the following with the Registrar: notice of his or her appointment in the approved form, the declaration of solvency made by the directors and a copy of the liquidation plan (section 204 of the BCA).

The liquidator must also advertise his or her appointment within 30 days of the commencement of the liquidation (section 204 of the BCA).

A voluntary liquidator's principal duties are to:

- take possession of, protect and realise the assets of the company;
- identify all creditors of and claims against the company;
- pay or provide for the payment of, or to discharge, all claims, debts, liabilities and obligations of the company;
- distribute the surplus assets of the company to its members. This must be in accordance with the terms of the memorandum and articles of association of the company;
- prepare a statement of account in respect of the actions and transactions of the liquidator; and
- send a copy of the statement of account to all members, if so required by the liquidation plan.

Insolvent Liquidation
This process involves the appointment of an independent insolvency practitioner. He or she is required to take possession of, protect and realise the company's assets for the benefit of the creditors of the company.

There are two mechanisms for placing a company into insolvent liquidation:

- passing of a shareholders' qualifying resolution – this is an alternative procedure to court-appointed liquidators. In short, members of an insolvent company may, by a majority of at least 75%, pass a resolution appointing an eligible insolvency practitioner as liquidator of the company; or
- by order of the court – the application can be made by the company itself, a creditor of the company, a shareholder, the supervisor of the Company Creditors' Arrangement or in very limited circumstances, the Attorney General of the Financial Services Commission (FSC).

The court will take into account any one of three substantive tests when considering whether to appoint a liquidator. The first is whether the company is insolvent. This is the most frequently used ground. Insolvency may be established by showing:

- a failure to comply within 21 days with a statutory demand for an undisputed debt exceeding USD2,000 (the company can apply to set aside the demand within 14 days of the date of service);
- execution issued on a judgment being returned unsatisfied;
- balance sheet insolvency; or
- an inability to pay debts when they fall due (cash flow insolvency).

The second test is whether it is just and equitable for a liquidator to be appointed. This can occur when a shareholder dies or when the relationship between shareholders has broken down irretrievably. However, many factors have been considered by the court under this limb.

In the third test, the court will also consider appointing a liquidator if it deems it is in the public interest to do so.

Company Creditors' Arrangement (CCA)
A CCA is an arrangement between a company and its debtors that allows the parties to vary the rights of the creditors and cancel the liability of a debtor in whole or in part. The legislative framework for a CCA is set out in Part II of the IA but, to date, these arrangements have not proved popular in the BVI. It may well be that the presence of a supervisor discourages companies from considering this option,preferring instead a Scheme of Arrangement under the BCA.

The process is usually initiated by the directors of the company by proposing an arrangement and nominating an interim supervisor to act. They can take this step if they believe that the company is insolvent or is likely to become insolvent. A written proposal can then be approved. In circumstances where a company is already in liquidation, the liquidator can make the proposal.

The directors must pass a resolution stating that the company is insolvent or is likely to become insolvent – section 20(1)(b) of the IA. In addition to this, a written proposal must be approved that sets out how the creditors' rights will be varied or cancelled.

It is worth noting that, unless the secured creditors agree in writing to the contrary, a CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. The position is the same when it comes to preferred creditors. Unless agreed in writing, a preferred creditor will not receive less than they would have received in a liquidation of the company had the company liquidation commenced on the same date as the CCA – section 15(4) of the IA.

The proposal must be approved by 75% of the creditors (r 83 Insolvency Rules). The percentage is calculated by reference to the value of the debt rather than on a poll vote basis.

Provided the proposal is approved by 75% of the creditors in value, the supervisor will be appointed and the CCA will be binding on the company, each creditor and shareholder.

The supervisor will immediately take possession of the assets of the company. However, the directors (or the liquidator) will remain in control of the company.

There is no statutory time period within which a CCA must be completed. It is usual, however, for a CCA to include provisions that state when the CCA will conclude.

2.2 Types of Voluntary and Involuntary Financial Restructuring, Reorganisation, Insolvency and Receivership

As set out above, the options available to companies and their creditors and shareholders are:

- voluntary liquidation;
- involuntary liquidation;
- Plan of Arrangement;
- Scheme of Arrangement; and
- Company Creditors' Arrangement.

A creditor may also seek to appoint a receiver, who may be appointed out of court by the holder of a debenture. Alternatively, a receiver may be appointed by an order of the BVI court.

Although Part III of the IA does include provisions for the appointment of administrators, at present, the administration section of the Act has not been brought into force and there are no plans to do so any time soon. Therefore, administration is not available to BVI-registered companies at this time.

2.3 Obligation to Commence Formal Insolvency Proceedings

It will usually be a creditor that commences formal insolvency proceedings. However, a company is obliged to commence formal insolvency proceedings when its director or directors become aware that the company is insolvent and there is no prospect of the company trading its way out of difficulties.

There is no specific time period for placing the company into liquidation but steps should be taken to do so at the point that the director or directors become aware that the company is insolvent and there is no prospect of recovering the business. Failure to do so may lead to the directors becoming liable to the creditors and shareholders of the company under the insolvent trading provisions of the IA.

2.4 Procedural Options

There is no obligation on a company to commence formal proceedings. However, the director(s) of an insolvent company should cease trading as soon as is practically possible after they become aware that the company is insolvent and, as appropriate, should take steps to place the company into liquidation.

They will be unable at this stage to use the voluntary insolvency option as this only applies to solvent companies. They must therefore initiate the insolvent liquidation process set out in **2.1 Overview of the Laws and Statutory Regimes** above. They can either seek the members' approval to place the company into liquidation or apply to the court for a liquidator to be appointed.

2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings

Once a company is placed into liquidation, the liquidator may seek an order from the court against a director of the company if (at any time before the commencement of the liquidation of the company) that person knew (or ought to have concluded) that there was no reasonable prospect that the company could avoid going into insolvent liquidation and continued to trade.

Therefore, directors who continue to trade beyond this point face serious liabilities. Once a director realises (or should have realised) that insolvent liquidation is inevitable, they are then liable for everything they do. The liability of directors is only qualified when they can show that they took every reasonable step open to them to minimise the loss to the company's creditors – section 256(3) of the IA.

If a director cannot show that he or she acted in this manner, then he or she will have to account personally to the creditors of the company for any losses that stem from his or her failure to place the company into liquidation at the relevant time.

The wording of the legislation in this regard is somewhat unhelpful, as the severity of the penalties may encourage directors to place companies into liquidation at a very early stage when recovery is still possible. It may also encourage directors to resign from office in order to avoid liability (the penalties relating to insolvent trading apply to current directors only). However, resignation will only save a director if they can demonstrate a clean break. If they continue to control the company and/or officers of the company continue to follow their instruction, then they may continue to be liable, as the insolvent trading provisions apply equally to shadow or de facto directors.

2.6 Ability of Creditors to Commence Insolvency Proceedings

Creditors and members of a company are able to take steps to place a company into involuntary liquidation.

Members can place a company into insolvent liquidation if a qualifying resolution to this effect is passed by a majority of 75% of the votes of the members (although this can be altered in the memorandum and articles of a company). This option is not open to members if there is an application pending before the court for the appointment of a liquidator or if a liquidator has already been appointed by the court – section 161 (1) of the IA.

Creditors may take steps to place a company into liquidation by applying to the court to appoint a liquidator. As set out above in **2.1 Overview of the Laws and Statutory Regimes**, an application will be successful if a creditor is able to prove that the company is insolvent, it is that just and equitable to do so, or that the company should be wound up on public interest grounds.

2.7 Requirement for Insolvency to Commence Proceedings

Insolvency is not required to place a company into voluntary liquidation under the provisions of the BCA. Indeed, voluntary liquidation under the BCA is not available to insolvent companies and a declaration of solvency must be provided by the directors before a company can enter voluntary liquidation.

A creditor or member of a company also does not need to show that a company is insolvent to place it into involuntary liquidation. Insolvency is just one of the grounds for placing a company into insolvent liquidation. A creditor or member can place a company into liquidation if they can prove that it is just and equitable to do so or if it is in the public interest to do so.

However, by far the most common ground for applying to the court to appoint a liquidator is that the company is insolvent. As set out in **2.1 Overview of the Laws and Statutory Regimes** above, a creditor or member will be able to prove that a company is insolvent if it can show:

- a failure to comply within 21 days with a statutory demand for an undisputed debt exceeding USD2,000 (the company can apply to set aside the demand within 14 days of the date of service);
- execution issued on a judgment being returned unsatisfied;
- balance sheet insolvency; or
- an inability to pay debts when they fall due (cash flow insolvency).

2.8 Specific Statutory Restructuring and Insolvency Regimes

A resolution to appoint a voluntary liquidator under Section 199 of the BCA shall not be passed by the directors or members of a company who are regarded as a regulated person unless the Financial Services Commission has given its prior written consent to the company being put into voluntary liquidation and has approved the appointment of the individual proposed as voluntary liquidator.

A regulated person is someone who holds a prescribed financial services licence. A licence is required for any person or company operating: in banking or insolvency and fiduciary services or any insurance companies or providers; or investment businesses; or as a registered agent.

In certain circumstances, where a voluntary liquidator is to be appointed over a regulated person, at least one of the liquidators must be an insolvency practitioner licensed in the BVI.

In relation to insolvent liquidations, members of a company who qualify as a regulated person may not appoint a liquidator (by way of resolution) unless at least five business days' written notice of the resolution (or such other period of notice that the Financial Services Commission shall agree) has been given to the commission.

3. Out-of-court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-court Workouts and Restructurings

The BVI regime does not require mandatory consensual restructuring negotiations before the commencement of a formal statutory process. Informal workouts are entered into on a practical basis, however, where these are perceived to be in the best interests of the parties concerned. Given the nature of the jurisdiction, there are no regular market participants in such matters in BVI, because the entities with whom BVI companies would deal are mostly located in other jurisdictions and not in BVI. As a result, there is no standard approach to such issues.

Ideally, any informal restructuring or workout strategies should take place prior to placing a company into liquidation. In some cases, however, formal proceedings will be initiated and then practical solutions worked out, whilst in other cases, formal proceedings will be followed through to conclusion. It is entirely dependent upon the stakeholders and the issues encountered. Insolvency proceedings in BVI are largely overseen by the BVI Commercial Court which is the BVI division of the Eastern Caribbean Supreme Court having jurisdiction over complex commercial matters. Whilst liquidators are open to discussions with creditors (both individually and in committee), any settlement is usually ratified by the court and must be in the interests of the creditors as a whole.

As explained in **2.5 Liabilities, Penalties or Other Implications for Failing to Commence Proceedings**, a director may be exposed to potential liability for fraudulent trading if a company is permitted to continue trading whilst insolvent. Therefore, once a director becomes aware that the company is insolvent or its insolvency is imminent, this obviously adds time pressure to any informal or consensual restructuring. However, if the discussions are likely to deliver a better return to the creditors, then a director may be justified in delaying the formal insolvency process.

3.2 Typical Consensual Restructuring and Workout Processes

There are no specific statutory regulations regarding intercreditor arrangements. It is largely for the creditors themselves to agree what information and documentation will be provided and when. Equally, it is for the creditors to determine timescales and the level of involvement that each type of creditor will have. Standstills may also be agreed and are frequently used to provide time for an agreement to be reached.

The only timing issue relates to the individual needs of the creditors, as most creditors are only prepared to wait a moderate length of time for an arrangement to be reached. If it appears to one or more creditors that an amicable or acceptable arrangement cannot be reached then they may decide that appointing a liquidator is the best option for getting a better return.

Once an arrangement has been put in place, the terms of that agreement (as far as the ranking of intercreditor debt is concerned) will prevail over any statutory provisions for priority.

3.3 Injection of New Money

There are three main methods of injecting money into BVI companies, namely, bonds, loans and promissory notes. In the majority of cases, there are no statutory requirements governing these funding arrangements. This is largely because most lenders operate outside the territory and are therefore not required to be licensed or approved to lend.

Creditors and companies therefore have wide scope when it comes to negotiating the terms of any funding arrangement to include prioritising any borrowing or granting liens.

Other methods of raising new funds are subscription for new shares and debt-for-equity swap-type arrangements. Again, as most BVI companies do not operate within the territory, BVI companies and their investors/creditors benefit from a flexible regime as far as injecting cash into a business is concerned.

3.4 Duties of Creditors to Each Other, or of the Company or Third Parties

Section 184(I) of the BCA (an amendment to the BCA) introduced a statutory unfair prejudice remedy. In short, a member of a company who considers that the affairs of the company have been, are being or are likely to be conducted in a manner that is (or any act or acts of the company have been, or are likely to be) oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity, may apply to the BVI court for an order.

This remedy is only available to members of a BVI company and does not therefore extend to a creditor. The BVI has found that a claim may be brought by a beneficial owner of shares where the registered shareholder is acting as nominee. However, more recently the BVI court has sought to limit the remedy to registered shareholders only (see Tipp Investments PCC v Chagala Group Limited).

To succeed in a claim, the claimant must show that the conduct complained of was oppressive, unfairly discriminatory, or unfairly prejudicial towards him or her. Unfairly prejudicial conduct can include:

- being excluded from management;
- misappropriation of a company's business to the majority or a company owned by them (this would also be classed as a breach of fiduciary duty);
- excessive remuneration;
- failure to pay a reasonable dividend;
- bad faith or illegitimate purpose on the part of the company's directors when carrying out their fiduciary duties; and
- improper shares and rights issues.

Where a company or the majority has been found to have committed an act of unfair prejudice again the minority, the usual remedy is that the minority is bought out for fair value. However, section 184(I)(2) of the BCA does provide for other remedies, such as requiring the company or any person to pay compensation to the member, regulating the future conduct of the company's affairs, appointing a receiver or appointing a liquidator.

In addition to the above, section 120 of the BCA imposes upon all directors of a BVI company statutory duties to act honestly and in good faith and in what he or she believes to be the best interest of the company. A director must also exercise his or her powers for a proper purpose and must not act, or agree to the company acting, in a manner that contravenes the BCA or the memorandum or articles of association.

4. Secured Creditor Rights and Remedies

4.1 Type of Liens/Security Taken by Secured Creditors

In relation to immovable property, the most common forms of security are:

- mortgages – these can be legal or equitable;
- equitable fixed charge – this does not transfer legal or equitable title to the lender and does not provide a right of possession of the secured interest. Instead, the terms of the charge usually provide the lender with the ability to sell the asset and prevent the borrower from disposing of the asset subject to the charge, without the lender first releasing the charge; and
- floating charge – usually granted by a company over all its assets. The charge must be created by deed, evidenced in writing and signed by the debtor if the charge is over land.

The most common forms of security over movable property are:

- floating charges;
- equitable mortgage or charge; and
- a pledge – this is a possessory security which allows a lender to take possession of an asset which provides the pledgee with a common law power of sale. A pledge cannot be granted over shares registered in the BVI as they are intangible assets.

4.2 Rights and Remedies for Secured Creditors

The document granting the security to the chargee/pledgee will usually set out what remedies are available to the chargee in the event of default. Typically, a creditor will enforce its security and take control of the assets. When the asset is sold, the secured creditor will be paid first up to the level of the company's indebtedness to the secured creditor. The debt will be determined by the security but will usually include principal, interest and realisation expenses. Any surplus will be returned to the company.

The rights of secured creditors are not affected by the appointment of a liquidator. A secured creditor will still be able to take control of the asset and sell it. On the sale of assets subject to a security interest, the secured creditor will be paid first, up to the level of the debt. If there are insufficient proceeds to discharge the debt from the disposal of the assets subject to the security, then the secured creditor will rank as an unsecured creditor for any shortfall.

4.3 The Typical Timelines for Enforcing a Secured Claim and Lien/Security

Secured creditors are not strictly speaking classed as creditors, or considered as participating in the insolvency process. Their claims against the assets of the company fall outside the winding-up process. Therefore, there are no timelines for enforcing a secured claim. It is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return.

4.4 Special Procedures or Impediments That Apply to Foreign Secured Creditors

There are no special procedures or impediments that apply to foreign secured creditors.

4.5 Special Procedural Protections and Rights for Secured Creditors

As stated above in **4.3 The Typical Timelines for Enforcing a Secured Claim and Lien/Security**, secured creditors technically fall outside the winding-up process.

In relation to CCAs, unless the secured creditors agree in writing to the contrary, a CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. The position is the same when it comes to preferred creditors. Unless agreed to in writing, a preferred creditor will not receive less than they would have received in a liquidation of the company had the liquidation commenced on the same date as the CCA.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities Among Classes of Secured and Unsecured Creditors

Section 207(2) of the IA states that within each class of claims the creditors will rank pari passu. As set out above, secured creditors do not technically fall within the winding-up process. Whilst preferential creditors normally rank behind secured creditors (and will continue to rank behind secured creditors holding fixed charges) they will rank ahead of secured creditors' floating charges if the assets in the estate are insufficient to pay the preferential claims and the costs and expenses of the estate – see sections 208(1)(a) and (b) of the IA.

It is shown below that liquidation expenses rank above preferred creditors. However, assets that are the subject of a floating charge are segregated from the general assets of the company and are available to the floating charge holder, subject to the satisfaction of the costs and expenses of the estate and the claims of the preferred creditors.

5.2 Unsecured Trade Creditors

All unsecured creditors rank equally in a restructuring process in the BVI.

5.3 Rights and Remedies of Unsecured Creditors

Plans of Arrangement

At the approval hearing of a Plan of Arrangement, the BVI court can determine what notice of the proposed arrangement is to be given to any person and can order that certain persons (to include creditors) give their consent before the plan is entered into. There is therefore a clear system whereby dissenters can be identified, but there is no guarantee that the objections of any one creditor will take priority over the needs of another. The court will always be mindful of any unfair prejudice that a plan may cause to a shareholder or creditor and will only approve the plan if it is satisfied that the plan is not prejudicial.

Schemes of Arrangement – A Scheme of Arrangement will only be approved if 75% in value of the creditors approve the scheme. There is therefore scope for an unsecured creditor to block any proposed scheme provided they hold 25% or more of the total debt of the company.

Applications to the court to appoint a liquidator must be advertised to ensure (as far as practicably possible) that all creditors are made aware that the company may be placed into liquidation. A creditor may appear at the hearing of the application to appoint a liquidator and raise objections or seek to have the application stayed. The court has wide discretion when it comes to appointing liquidators and an application to appoint a liquidator may be dismissed or stayed if the appointment prejudices the position of a particular creditor or places one creditor in a better position to the disadvantage of others.

5.4 Pre-judgment Attachments

Pre-judgment attachments are not available as such, but a creditor may seek some form of security payment if certain criteria are met.

5.5 Typical Timeline for Enforcing an Unsecured Claim

If a creditor is seeking judgment against a BVI company then it must first file a claim at the BVI court. The company must file with the court within 14 days of an acknowledgment of service. Provided the company does this, it will have 28 days from the date of service of the claim to file a defence. If no acknowledgment of service or defence is filed, a creditor can apply to the court for judgment to be entered against the company. It can take several weeks for such applications to be heard, but applications can be heard urgently if the creditor can show that time is of the essence.

Once a creditor has received judgment, it can seek to enforce that judgment. The enforcement options in BVI are, however, often of little assistance since most BVI companies do not hold assets within the territory. If a BVI company holds shares in another BVI company, then a charging order can be obtained relatively quickly but it is often quicker and preferable to apply to the BVI court at the outset to appoint a receiver over the shares, as this allows the receiver to take control of the shares. Alternatively, a creditor can seek to appoint a provisional liquidator pending determination of an application to appoint a liquidator. The provisional liquidator can protect the assets of the company until the application to appoint has been heard. Again, such applications can be dealt with on an urgent basis if the creditor can show that there is a risk that the company will dissipate its assets before a liquidator can be appointed.

5.6 Bespoke Rights or Remedies for Landlords

Landlords are not included in the class of preferred creditors in the BVI and have no bespoke rights or remedies.

5.7 Special Procedures or Impediments or Protections That Apply to Foreign Creditors

No special procedures or impediments apply to foreign creditors, due to the fact that most BVI-registered companies do not operate within BVI and the majority of creditors will therefore be foreign.

5.8 The Statutory Waterfall of Claims

The statutory waterfall of claims is set out in section 207 of the IA and distributions are made in the following order:

- secured creditors (who are not strictly speaking participants in the insolvency process);
- expenses of the liquidation;
- preferred creditors;
- unsecured creditors;
- statutory interest on claims subsequent to the commencement of liquidation;
- creditors whose claims arise from their rights as a member or former member; and
- claims of members.

Rule 199 of the Insolvency Rules, 2005 (the IR) provides a prescribed priority for all costs and expenses paid. The order of priority is:

- the costs and expenses properly incurred by the liquidator in preserving, realising or getting in the property of the company or in carrying on the company's business, including the costs and expenses of any legal proceedings which the liquidator has brought or defended whether in his or her own name or in the name of the company; and the costs of, and in connection with, an examination ordered under section 285 of the IA;
- the costs and expenses of complying with a notice issued by the Official Receiver under section 271(2) of the IA;
- the remuneration of the provisional liquidator;

- the deposit lodged on an application for the appointment of a provisional liquidator;
- the costs of the application on which the liquidator was appointed, including the costs of any person appearing on the application whose costs are allowed by the court;
- any costs allowed in respect of the preparation of a statement of affairs;
- the costs in respect of any creditors' committee appointed in the liquidation;
- any disbursements properly paid by the liquidator;
- the remuneration of anyone employed by the liquidator;
- the remuneration of the liquidator; and
- any other fees, costs, charges or expenses properly incurred in the course of the liquidation, or properly chargeable by the liquidator in carrying out his or her functions in the liquidation.

As far as preferred creditors are concerned, Schedule 2 of the IR states that preferred creditors include:

- amounts due to past or present employees (up to a maximum of USD10,000);
- amounts due to the BVI Social Security Board, in respect of employees' deductions and employer's contributions for the six months prior to liquidation, up to an unlimited amount;
- amounts due in respect of employees' personal contributions or medical insurance for the 12 months prior to liquidation (up to a maximum of USD5,000 per employee);
- amounts due to the BVI government in respect of taxes, duties, licence fees or permits, up to a maximum of USD50,000; and
- sums due to the commission in respect of any fee or penalty, up to a maximum amount of USD20,000.

5.9 Priority Claims

See **5.8 The Statutory Waterfall of Claims** above.

5.10 Priority Over Secured Creditor Claims

As explained previously, secured creditors fall outside the liquidation regime. A secured creditor can simply enforce its security in the usual way. If there is a deficit following the sale of the secured asset, any balance due will be considered an unsecured debt and the secured creditor will rank equally with other secured creditors.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation

As set out in **2.1 Overview of the Laws and Statutory Regimes** above, there are three primary methods of financial restructuring available in the BVI.

Scheme of Arrangement

As in England and Wales, the purpose of a Scheme of Arrangement is for the company to agree to a compromise with its creditors or shareholders to enable it to carry on as a going-concern without entering into formal insolvency proceedings. A scheme may be initiated by the company, its creditors, its shareholders or (if one has been appointed) its liquidator.

A scheme may then be proposed by the company, a creditor, a member, an administrator (if the company is in administration) or a liquidator (if one has been appointed, whether solvent or insolvent). Once a scheme is proposed, an application must be made to the court for an order that a meeting of creditors or shareholders be convened.

At the hearing of this application the court will consider issues of class composition and jurisdiction. Members and creditors are regularly divided into classes depending on the respective rights that exist between them and the company, and the extent to which these rights stand to be varied by the scheme. The result is that different classes of creditors and members are often treated differently and a separate scheme meeting will be required for each different class.

If at the meetings a majority in number of the following, representing 75% in value of the company's creditors or shareholders, agree to the scheme it is then subject only to the court's approval:

- all creditors or shareholders (as the case may be);
- the company;
- any liquidator that has been appointed; and
- any contributory.

If the requisite majority reject the scheme, however, it will not be approved (see section 179A of the BCA).

If the creditors or shareholders vote to approve the scheme, an application must be made for the court's approval. The court will then assess whether the scheme represents a true compromise, whether it is fair and reasonable, and whether it will be efficacious.

There is no fixed duration for a Scheme of Arrangement, and its length will be determined by the directions given by the court. In the BVI, there is also no moratorium protection during the negotiation and approval process for Schemes of Arrangement. Only liquidation provides this. However, once approved, a Scheme of Arrangement becomes binding on all creditors and shareholders, and the provisions of the BCA relating to mergers and consolidations of companies, Plans of Arrangement, disposition of large assets, redemption of minority shareholdings, and the rights of dissenters cease to apply – see section 179A(8) of the BCA.

Plan of Arrangement
A Plan of Arrangement is initiated by the directors of a company. They must assess whether it is in the best interests of the company (or the members or creditors of the company) to enter into a Plan of Arrangement with the company's creditors. If they are satisfied that this is the case, then the directors may formally adopt the proposed plan.

Again, any plan is subject to the approval of the BVI court and an application must be made once the terms have been set by the directors.

The court will then issue directions to ensure that all relevant individuals are notified of the plan and (if necessary) that approvals are sought. The court will also assess whether there should be a mechanism for creditors and members to dissent to the plan.

The directors are required to submit the plan to any person whose approval the court directs must be obtained. Once all necessary consents have been given, the company must execute articles of arrangement and file copies with the Registrar of Corporate Affairs.

Company Creditors' Arrangement (CCA)
CCAs are governed by the IA rather than the BCA and therefore fall under the insolvency regime.

Interestingly, a company may enter into a CCA even if it is already in liquidation – see section 17(4) of the IA.

CCAs may be proposed by any person, but a majority of 75% of the company's unsecured creditors must vote in favour of the arrangement in order to approve it. Once the requisite number of votes has been obtained, any dissenters are bound to the terms of the arrangement (see Rule 83 of the IR). The arrangement must be supervised and the supervisor must be a licensed insolvency practitioner.

Again, there is no moratorium to protect the company from creditors' claims during the period in which a creditors' arrangement is being prepared and approved.

6.2 Position of the Company During Procedures
No moratorium exists to protect a company from creditor claims during the preparation period of a formal restructuring procedure. Only liquidation provides a moratorium. A company may, however, continue to operate during restructuring, as the purpose of these plans, arrangements and schemes is to allow a company time to trade its way out of financial difficulties. A company may also borrow money during the process. However, any creditor that lends money to the company after the plan, scheme or arrangement was approved is not bound by the terms of the plan, scheme or arrangement.

As stated in **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation** above, a supervisor, who must be a licensed insolvency practitioner, will be appointed to oversee Company Creditors' Arrangements.

6.3 The Roles of Creditors During Procedures
See **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation** above.

Insolvent liquidation – it is the court-appointed liquidator that controls the process. This includes assessing whether or not to admit a claim and determining the amount and date of payment of any dividend. However, the IA does give the creditors powers (usually at the first meeting) to form a creditors' committee and to appoint another liquidator in place of the current liquidator – section 179 of the IA. Once appointed, a creditors' committee can approve the remuneration of a liquidator and is kept informed by the liquidator regarding any claims or distributions.

Creditors are also able to challenge any decision made by the liquidator by applying to the court – section 273 of the IA. They may also apply to the court to remove a liquidator at any point during the liquidation – section 187(2)(b).

Plans of Arrangement – many plans of arrangement are agreed by all relevant parties prior to the court approving them. Therefore, the creditors are usually contacted before the scheme has been implemented to agree to its terms. Their involvement is limited once the plan has been approved.

Scheme of Arrangement – as with Plans of Arrangement, creditors must vote on the terms of the Scheme of Arrangement and therefore their involvement is front-loaded. Once approved, the Scheme is binding on all the creditors and they have little involvement after the implementation of the scheme.

CCA – the creditors play a large role before the CCA is implemented. It is the creditors that must approve the terms of the CCA and nominate a supervisor. At the point that the CCA has been approved it becomes binding on the creditors. It is the role of the supervisor to implement the CAA in accordance with its terms. Therefore, the creditors' have a lesser role after the CAA has been implemented.

6.4 Modification of Claims
See **6.1 The Statutory Process for Reaching and Effectuating a Financial Restructuring/Reorganisation** above.

6.5 Trading of Claims
Whether the trading of claims against a company undergoing restructuring, rehabilitation or reorganisation is permitted, and what disclosures and approvals are required, will

largely be governed by the terms of the scheme, plan or arrangement that has been agreed.

6.6 Using a Restructuring Procedure to Reorganise a Corporate Group

A restructuring procedure may be utilised to reorganise a corporate group for administrative efficiency, but the requisite approvals and requirements must be met at each level of the corporate structure.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Statutory Voluntary and Involuntary Insolvency and Liquidation Proceedings

Voluntary liquidations

As set out in **2.1 Overview of the Laws and Statutory Regimes** above, the BCA includes provisions for the winding-up of a business company, provided it has no liabilities and is able to pay its debts when they fall due.

A voluntary liquidator may be appointed by the shareholders – section 199(3) of the BCA – or by the directors of a company, where the company's time has expired, or an event has occurred, in each case as specified in the memorandum and articles. However, a voluntary liquidator may only be appointed where the directors have made a declaration of solvency stating that the company is, and will continue to be, able to discharge, pay or provide for its debts as they fall due – section 198(1) of the BCA. The directors must also provide a liquidation plan that sets out the reasons for the liquidation of the company, their estimate of the time required to liquidate the company, whether the liquidator is able to carry on the business of the company, the name and address of each individual to be appointed as a liquidator, and the proposed remuneration of the liquidators.

Where a voluntary liquidator is appointed, the liquidator must, within 14 days of the commencement of the liquidation, file a notice of his or her appointment in the approved form, the declaration of solvency made by the directors and a copy of the liquidation plan. Also, a voluntary liquidator must advertise notice of their appointment within 30 days of the commencement of the liquidation (section 204 of the BCA).

It is important to note that a voluntary liquidator may not be appointed by the directors or members if an administrator or liquidator of the company has been appointed under the IA. In addition to this, a voluntary liquidator may not be appointed if an application has been made to the BVI court to appoint an administrator or a liquidator under the IA and the application has not been dismissed.

The person to be appointed voluntary liquidator must also consent in writing to his or her appointment. A voluntary liquidator cannot be appointed until written consent has been provided. Also, the appointment cannot take place until the directors have provided a declaration of solvency and approved a liquidation plan.

Once appointed, a voluntary liquidator has a duty to:

- take possession of, protect and realise the assets of the company;
- identify all creditors of, and claimants against, the company;
- pay or provide for the payment of, or discharge all claims, debts, liabilities and obligations of the company;
- distribute the surplus assets of the company to the members in accordance with the memorandum and articles;
- prepare a statement of account in respect of the actions and transactions of the liquidator; and
- send a copy of the statement of account to all members.

The BCA grants voluntary liquidators all powers of the company that are not granted to the members under the BCA or the company's articles and memorandum of association. These may include the power to take custody of assets, the power to sell any assets, and to collect the debts and assets due or belonging to the company. A voluntary liquidator may also borrow money, and negotiate or compromise any claim, debt, liability or obligation of the company. A voluntary liquidator may also prosecute and defend, in the name of the company, any action or other legal proceedings and may execute contracts and agreements in the name of the company.

Section 207(2) of the BCA states that a voluntary liquidator may not, without the permission of the BVI court, continue for a period in excess of two years the business of a company that is being wound up and dissolved.

Upon completion of a voluntary liquidation, a liquidator must file a statement that the liquidation has been completed. The Registrar, upon receiving the statement, is required to strike the company from the Register of Companies and issue a certificate of dissolution. The voluntary liquidator must then arrange for the dissolution to be advertised in the BVI Gazette.

Insolvent Liquidations

In **2.1 Overview of the Laws and Statutory Regimes** above, two processes for commencing insolvent liquidations are outlined. In short, a liquidator may be appointed over an insolvent company by the BVI court or by the members of an insolvent company. An application to the BVI Court may be made by a creditor, the company, its directors, its shareholders or by the Attorney General or the Financial Services Commission.

The grounds for appointment are:

- that the company is insolvent;
- that it is just and equitable that the company be wound up; or
- that it is in the public interest that the company be wound up.

The majority of applications are brought on the grounds of insolvency. To prove that a company is insolvent, however, one or more of the following must be established:

- a failure to comply within 21 days to a statutory demand for an undisputed debt exceeding USD2,000;
- execution issued on a judgment being returned unsatisfied;
- balance sheet insolvency (rarely relied upon); or
- an inability to pay debts when they fall due.

In a case where the members of an insolvent company wish to appoint a liquidator, a majority of at least 75% is required to pass this resolution. It is also required that any liquidator appointed over an insolvent company must be licensed to practise as an insolvency practitioner in the BVI. This requirement does not apply to voluntary solvent liquidations, however.

Within 14 days of his or her appointment, a liquidator must advertise the appointment, file notice of theappointment with the Registrar of Companies and serve notice of his or her appointment to the company.

Liquidators have a great deal of discretion in how they undertake their duties (section 185 of the IA). However, a liquidator must ensure that they:

- do not allow their own interests to come into conflict with their duties;
- exercise due skill and care; and
- act impartially.

On appointment, a liquidator takes custody and control of the company's assets and the directors' powers effectively cease. Unless the BVI court orders otherwise, there is a stay against creditor action, proceedings may not be commenced by or against the company, and shares in the company may not be transferred. Secured creditors remain able to enforce their security rights. However, no amendments can be made to the memorandum and articles of association of the company.

The main duties of a liquidator are to collect and realise the assets of a company and to distribute those assets to the creditors. A liquidator has the power to disclaim onerous property, including any unprofitable contract, as well as assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act.

A disclaimer is exercised by the liquidator by filing a notice of disclaimer with the court. The liquidator must then, within a period of 14 days, give notice to every person who is affected by the disclaimer – sections 217(2) and (3) of the IA.

Where a creditor's claim is not disclaimed, the creditor can notify the liquidator of the claim by submitting a claim form. This is similar to the proof of debt forms used in England and Wales.

The liquidator must assess the claim and can require the creditor to provide further particulars of the claim or evidence in support of the claim. The liquidator must then either accept or reject the claim. However, if he or she rejects the claim, the liquidator must give reasons for the rejection. Section 273 of the IA allows an aggrieved person to challenge the decision of a liquidator to reject their claim by applying to the BVI court to reverse the decision.

It is important to note that claims are quantified at the commencement of the liquidation – section 152(2) of the IA. In relation to contingent claims, the liquidator will either agree an estimate of value or apply to the court to determine the claim. Section 152(6) of the IA states that any future/prospective debts will be discounted in accordance with the formula set out at rule 148 of the BVI Insolvency Rules.

The IA also provides a set-off provision which may permit a liquidator to reduce any claim. Section 150(1) of the IA states that if, before the date that the liquidator is appointed, there have been mutual credits, mutual debts or dealings between the company and a creditor claiming in the liquidation, then an account shall be taken of what is due by each party to the other and the sum due by one party shall be set-off against the sums due by the other. Only the balance of the account following set-off may be claimed in the liquidation.

Provided there are assets available to the liquidator, a distribution will be made. Any creditor who has not submitted a claim by the date specified is excluded from the distribution. Distributions are made in priority as follows:

- secured creditors (not strictly participants in the liquidation process);
- expenses of the liquidation;
- preferential creditors;
- unsecured creditors;
- statutory interest on claims subsequent to the commencement of liquidation;
- creditors whose claims arise from their rights as a member or former member; and
- claims of the members.

A creditor of an insolvent company may by contract agree to subordinate their claim in the insolvency to another class of creditor (section 151 of the IA). As with the voluntary liquidation regime, an insolvent liquidation terminates when the liquidator, after completing his or her duties, prepares the final report, together with a statement of realisations and distributions that is sent to creditors and members and filed with the Registrar (sections 232 and 234 of the IA).

7.2 Distressed Disposals as Part of Insolvency/Liquidation Proceedings

The liquidator will usually negotiate and authorise the sale of assets of the business. The only exception to this is if an asset is the subject of some form of security. The BVI court may also sometimes include in the order of appointment that the liquidator should seek the sanction of the court before selling certain assets. Other than that, the liquidator is able to dispose of or sell the assets of a company and is able to sell assets to a buyer free and clear of any claims. Creditors may bid for company assets and it will be for the liquidator to decide whether any offer represents fair value or is in the best interests of the creditors as a whole. It is possible to effectuate pre-negotiated sales transactions after the commencement of a statutory procedure, but only if the liquidator is satisfied that the pre-negotiated value represents good value to the estate.

7.3 Implications of Failure to Observe the Terms of an Agreed or Statutory Plan

The implications of failing to observe the terms of an agreed or statutory plan are largely governed by the terms of the plan, which are binding.

7.4 Investment or Loan of Priority New Money

New money may be invested and the new creditors will not be bound by the terms of the plan, scheme or arrangement, unless specific provision has been made within the plan, scheme or arrangement that puts restrictions on the company regarding future borrowing.

7.5 Insolvency Proceedings to Liquidate a Corporate Group on a Combined Basis

When liquidating a corporate group, each company within the group must be petitioned separately, but the BVI court will do all that it can to hear the petitions together in order to make the process more efficient.

7.6 Organisation of Creditors

There is no requirement for a creditors' committee to be formed, but the creditors may establish a committee by a resolution passed at a meeting (section 421 of the IA). This can occur at any time after the appointment of a liquidator. The resolution may only be passed at a meeting requisitioned by the liquidator for the purpose of forming a committee. At least 10% in value of the creditors of the company must agree to the resolution.

The costs of any creditors' committee appointed in the liquidation are paid out of the estate and in priority to unsecured creditors. They are classed as expenses of the liquidation under prescribed priority at Rule 199 of the IA.

7.7 Conditions Applied to the Use of or Sale of Assets

A liquidator is usually granted wide powers regarding the management of a company and may be granted power of sale in the order of appointment. However, it is usual for the court to include a provision within the order of appointment requiring the liquidator to seek the court's consent before disposing of an asset.

8. International/Cross-border Issues and Processes

8.1 Recognition or Other Relief in Connection with Foreign Restructuring or Insolvency Proceedings

Part XIX of the IA provides a statutory framework that permits the BVI court to assist insolvency proceedings in another jurisdiction. The provisions apply only to 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).

In addition to this, only a small number of foreign territories may apply to the BVI court for assistance. They are:

- Australia;
- Canada;
- Finland;
- Japan;
- Jersey;
- New Zealand; and
- the United Kingdom.

Hong Kong (Special Administrative Region of the PRC) has also been designated as a relevant foreign region.

The orders that the BVI Court can make in aid of foreign insolvency proceedings are wide and include:

- an order to restrain proceedings;
- an order requiring an individual to deliver up property; and
- an order requiring the examination of an individual who resides in the BVI.

Before making such orders, the BVI court must consider whether, by granting such relief, it is treating all persons claiming in the foreign proceedings justly, it is protecting persons in the BVI who may have claims against the company, and it is preventing preferential or fraudulent disposal of property.

As an aside, Part XVIII of the IA contains provisions based on the UNCITRAL model law on Cross-Border Insolvency for giving and seeking assistance in insolvency proceedings. However, this part of the IA is not currently in force and is unlikely to be any time soon.

8.2 Protocols or Other Arrangements with Foreign Courts

The BVI court is always mindful of the jurisdiction's position in the international market and regularly seeks to co-ordinate proceedings in the BVI and in foreign jurisdictions, if there is a crossover in the subject matter of the claims. BVI proceedings are regularly stayed to allow foreign courts time to determine issues already before them.

The onus is on the parties concerned to bring any related foreign proceedings to the attention of the BVI court. The court will then decide how best to ensure that there is as little overlap as possible between the matters being determined by the various courts.

8.3 Foreign Creditors

As stated elsewhere, most BVI companies do not operate within the territory and the majority of creditors are therefore foreign. Creditors of each class are treated equally and no preference is given to a creditor on account of where in the world it is based.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers Appointed in Proceedings

The Official Receiver can be appointed to act as liquidator in place of an insolvency practitioner. However, the vast majority of appointments are granted to insolvency practitioners. Receivers and administrative receivers may also be appointed under Part IV of the IA. Whilst the IA does include provisions for the appointment of administrators, these provisions are not currently in force.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Receivers must exercise their duties in good faith and for a proper purpose, and in the best interests of the person whoappointed them (section 128 of the IA). However, this does not mean that a receiver can disregard the interests of creditors or other persons who are claiming.

9.3 Selection of Statutory Officers

A receiver may be appointed by the court, but may also be appointed under the terms of a debenture or in accordance with another BVI statute. The BCA and the Conveyancing and Law of Property Act 1961 include provisions for the appointment of receivers. However, as most BVI-registered companies do not own property in the BVI, very few receivers are appointed under the terms of the 1961 Act.

An administrative receiver is usually appointed to enforce the terms of a floating charge and to secure the assets that are the subject of the charge. It is largely an out-of-court-appointment procedure, although the BVI court will exercise jurisdiction over both receivers and administrative receivers.

A receiver can be removed in accordance with the instrument under which he or she was appointed or by an order of the court – section 123(1) of the IA. An administrative receiver must be removed by court order – 123(2) of the IA. An application to remove can be brought by the company or its liquidator, the board of directors, a creditor or the person who appointed the receiver.

9.4 Interaction of Statutory Officers with Company Management

Receivers of any kind work closely with the board and management of a company and are required to notify them of their appointment. An administrative receiver is required to produce a report within three months of his or her appointment, setting out how they were appointed and what assets will be disposed of. This gives the directors of a company the opportunity to review the activities of the receiver and decide whether the receiver is acting in accordance with the powers granted to him or her on appointment.

9.5 Restrictions on Serving as a Statutory Officer

There are a number of individuals who cannot act as a receiver, namely:

- the mortgagee of a company's assets;
- a person who is, or within the previous two years has been, an officer or employee of the mortgagee;
- a person who is, or within the last two years has been, a shareholder of the company or a related company;
- an insolvency practitioner who has been disqualified; and
- a person who at any time in the previous years has been an auditor of the company.

Restructuring professionals, attorneys, accountants or other professionals may serve as statutory officers, but only if they do not fall into any of the categories of persons excluded from acting, as set out above.

10. Advisers and Their Roles

10.1 Types of Professional Advisers

Attorneys and accountants play an important role in the liquidation process (whether voluntary or insolvent liquidation).

In relation to voluntary liquidation, attorneys regularly advise directors regarding the process for placing a company into voluntary liquidation, and explain the consequences of taking this step. Accountants will regularly be instructed to provide an assessment of the finances of a company to ensure that it is indeed solvent and they will assist with the distribution of assets.

In insolvent liquidations, attorneys are involved at every stage and can represent a creditor, director, liquidator or the company itself. Attorneys will regularly advise creditors how best to recover any amount due and how to commence insolvency proceedings, if required. Attorneys will also advise the members and directors of a company before it is placed into insolvent liquidation.

It is usual for accountants to be appointed as liquidators and attorneys are regularly retained to advise them whilst they carry out their duties and exercise their powers as liquidators.

Attorneys acting for a creditor of a company will usually be paid by the creditor for any services provided.

An accountant who acts as a liquidator will usually require payment upfront and this is usually paid by a specific creditor or by a member of the company. Any fees incurred whilst acting as liquidator may be recovered from the assets of the company but only if there is a sufficient surplus. The costs of the liquidation are paid in priority to all other claims, but any shortfall will usually need to be met by the petitioning creditor or member.

10.2 Authorisations Required for Professional Advisers

A voluntary liquidator is appointed by a resolution of the members of a company and no judicial approval is required.

A liquidator of an insolvent company may be appointed by resolution of the members (see **2.1 Overview of the Laws and Statutory Regimes** above), provided the requisite number of votes is attained. If they are not, then an application to the BVI court is required and a liquidator can only be appointed upon order of the court.

In all liquidations, the liquidator owes duties and responsibilities to the creditors.

10.3 Roles Typically Played by the Various Professional Advisers

Accountants will usually act as liquidators (and nearly always do in insolvent liquidations). Attorneys will either advise the creditors regarding the recovery of debts, or advise the liquidators regarding any claims or the disclaimer of onerous property.

11. Mediations/Arbitrations

11.1 Use of Arbitration/Mediation in Restructuring/Insolvency Matters

Very few mediations or arbitrations take place in the BVI despite the passage of the BVI Arbitration Act, intended to facilitate and encourage arbitration of disputes. The BVI does have an international arbitration centre and initiatives have been put in place to encourage a greater number of arbitrations within the territory but, to date, this is a little-used tool in the insolvency field.

The same applies to mediations.

11.2 Parties' Attitude to Arbitration/Mediation

As mentioned above, very few arbitrations or mediations take place within the BVI.

However, it is common to see disputes involving BVI companies being resolved via arbitration, generally where a dispute resolution clause is contained within the security document or loan agreement that requires any disputes arising out of the document to be resolved by way of arbitration. Since such documents are often governed by foreign law, the arbitrations usually take place in nominated centres outside of the BVI.

11.3 Mandatory Arbitration or Mediation

Mandatory arbitration or mediation is not common in the BVI, but the BVI court will stay proceedings or refuse to appoint a liquidator, supervisor or administrator if the document that gives rise to a liability contains an arbitration clause. The Arbitration Act provides that if applicable agreements contain arbitration provisions and if a party refers to such provisions on the first substantive application in litigation proceedings, the court must refer the matter to arbitration.

11.4 Pre-insolvency Agreements to Arbitrate

As mentioned above, the BVI court does recognise such agreements and may well refuse to appoint a liquidator or a receiver if there is an agreement between the company and a creditor stating that all disputes arising out of the loan or security must be resolved by arbitration.

11.5 Statutes That Govern Arbitrations and Mediations

The BVI Arbitration Act, 2013 came into force on 1 October 2014. The Act applies to any arbitration under an arbitration agreement which names the BVI as the place of arbitration. However, as stated above, very few agreements nominate the BVI as the seat of arbitration and, to date, very few arbitrations have been held within the territory.

The Act also incorporates the UNCITRAL Model Law, but with a few minor modifications.

11.6 Appointment of Arbitrators/Mediators

The method of appointment of arbitrators is usually set out in the arbitration agreement itself.

There are no professional standards set out in the Arbitration Act that an individual must meet to be nominated as an arbitrator. An individual must consider his or her impartiality before taking up the role, but this is the only notable restriction on appointment.

However, knowledge of BVI law and familiarity with arbitration procedures would obviously be an asset and the parties to a dispute should look to appoint an appropriate individual.

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

12.1 Duties of Officers and Directors of a Financially Distressed or Insolvent Company

Where a company is financially healthy, the directors owe fiduciary and statutory duties to the company and ultimately, therefore, to its shareholders. If a company becomes insolvent, however, the directors no longer owe duties to the company, but rather to the creditors of the company,

This switch of allegiance can occur when a company is only near insolvency or of doubtful solvency – see Gwyer v London Wharf (Limehouse) Limited (2003) BCLC 153 – and in circumstances where the directors are of the view that the company cannot trade its way out of its difficulties and avoid insolvent liquidation. Any director who permits a company to continue to trade in these circumstances potentially exposes himself or herself to claims under the IA. Directors should therefore be mindful of the financial position of the company and should immediately take legal advice the moment they become aware that there is a possibility that the company will not be able to trade its way out of financial difficulty.

A director who continues to allow a company to trade after it has become insolvent may in fact be liable to the creditors of the company. A liquidator may apply to the BVI court for a declaration that a director should contribute to the company's assets in respect of any insolvent trading, as the court considers proper action (section 256 of the IA). In any application for insolvent trading, the liquidator must satisfy the court that the director knew (or ought to have known) that there was no reasonable prospect of avoiding insolvent liquidation. There is a qualification here, in that a director may avoid personal liability if he or she can satisfy the court that there was no reasonable prospect that the company could avoid going into insolvent liquidation and that he or she took every reasonable step open to him or her to minimise the loss to the company's creditors.

12.2 Direct Fiduciary Breach Claims

Any claim for insolvent trading under the IA must be brought by the liquidator.

12.3 Chief Restructuring Officers

It is not typical to appoint a chief restructuring officer in the BVI, although lawyers, accountants, insolvency practitioners and judges are used to the concept and frequently work on cases where there is a chief restructuring officer. This is usually where the restructuring involves a US element with Chapter 11 proceedings.

12.4 Shadow Directorship

The concept of shadow directors does exist in BVI. Any individual may become a shadow director if it can be shown that they give instructions to the directors of a company, or if they interfere or in some way influence/control the day-to-day running of the business of the company.

Shadow directors owe the same duties as de jure or de facto directors. Furthermore, the insolvent trading provisions of the IA extend to any individual in accordance with whose directions or instructions a director or the board of a body corporate may be required or is accustomed to act. They go further to include a person who exercises, or is entitled to exercise, or who controls, or is entitled to control, the powers which would usually be exercised by the board or a director.

A shadow director may also, therefore, be required to account for any losses suffered by a company on account of insolvent trading.

12.5 Owner/Shareholder Liability

An owner or shareholder of a company will only be liable to the creditors if the owner or shareholder has acted as a shadow or de facto director whilst the company was insolvent or on the verge of insolvency. As stated elsewhere, it must be shown that their actions have caused a loss to the company.

They may also be liable under the fraudulent trading provisions of the IA (section 255) if they allowed the business of the company to be carried on with the intent to defraud creditors of the company or for any fraudulent purpose.

In addition to this, where a company is in liquidation, the liquidator may seek an order from the court if he or she believes that a person misapplied or retained, or became accountable for any money or other assets of the company, or was guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. The class of persons against whom an order may be sought extends to any person who has been involved in the promotion, formation, management, liquidation or dissolution of the company. Therefore, shareholders or creditors may be held accountable under these provisions.

If the court finds that a shareholder or creditor has been guilty of fraudulent trading, that individual can be ordered to repay any misappropriated money or assets, pay compensation for the misfeasance or breach of duty, and pay interest at such a rate as the court considers just.

13. Transfers/Transactions That May Be Set Aside

13.1 Grounds to Set Aside/Annul Transactions

Part VIII of the IA provides for various applications which may be made by a liquidator to set aside transactions that unfairly diminish the assets available to creditors:

- Unfair preferences – Section 245 of the IA provides that an unfair preference occurs when a company takes a step which has the effect of putting a creditor in a position which, if the company goes into insolvent liquidation, will be a better position than the creditor would have been in if that step had not been taken. It must be shown that the company was insolvent at the time the preferential treatment was given, or became insolvent as a result of it.
- Undervalue transactions – Section 246 of the IA permits the court to undo any transaction that was made at undervalue. It must be shown that the company has disposed of an asset for either no consideration or consideration significantly less than the value of the asset. The transaction must also be an insolvency transaction (a transaction that was made when the company was insolvent or a transaction that caused it to become insolvent) and entered into within the statutory vulnerability period (see **13.2 Look-back Period** below). An individual may seek to challenge such a claim by proving that the company entered into the transaction in good faith and for the purposes of its business and at the time when it entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.
- Voidable floating charges – a floating charge is voidable if it is an insolvency transaction that was entered into within the vulnerability period. A floating charge will not be voidable if it secures new value. This includes monetary advances, reduction of the company's liabilities or the provision of goods and services. There is a presumption that a floating charge will be voidable if granted in favour of a connected person.
- Extortionate credit transactions – a transaction may be voidable if it is deemed that the terms of the transaction required grossly exorbitant payment. In addition to this, section 248 of the IA states that a transaction will also be voidable if it is an extortionate credit transaction that grossly contravenes the ordinary principles of trading. The BVI courts have yet to rule on what does, or does not, constitute gross contravention of the ordinary principles of trading. However, the language contained in section 248 suggests that something quite out of the ordinary would be required. It is highly likely that the BVI court would take into account the fact that lenders and other financial institutions regularly charge higher rates of interest on lending to distressed companies. Before finding a transaction extortionate, therefore, the court would need to see a credit transaction that far exceeds the usual business norms when it comes to lending to distressed companies.
- Voidable floating charges – a floating charge is voidable if it is an insolvency transaction that was entered into within the vulnerability period. A floating charge will not be voidable if it secures new value. This includes monetary advances, reduction of the company's liabilities or the provision of goods and services. There is a presumption that a floating charge will be voidable if granted in favour of a connected person.

13.2 Look-back Period

The IA provides a 'vulnerability period' for claims to set aside transactions.

For preference payments and payments at undervalue, the court can consider any payment made in the six months prior to the date that the company was placed into liquidation. This period is extended to two years if the payment was made to a connected person, which includes any promoter of the company, a director or member of a related company, any beneficiary under a trust of which the company is or has been a trustee, any related company, any nominee, relative or spouse, and any person in partnership with a promoter or director of a related company.

In relation to extortionate credit transactions, the relevant vulnerability period is five years.

13.3 Claims to Set Aside or Annul Transactions

Only a liquidator can bring a claim to set aside or annul a transaction under the IA provisions set out in **13.1 Grounds to Set Aside/Annul Transactions** and **13.2 Look-back Period** above.

The claims set out above can only be brought once a liquidator has been appointed, but there may be scope to bring similar claims against directors or shadow directors outside of the insolvency regime if it can be shown that they have breached the fiduciary duties owed by the directors to the company.

14. Intercompany Issues

14.1 Intercompany Claims and Obligations

Section 197 of the IA states that members of a company and past members of a company are precluded from claiming in the liquidation of a company any sums which are due to them in their character as a member. However, such sums are taken into account if there is a surplus of funds that allow distribution to members. Claims usually include unclaimed or unpaid dividends or unpaid redemption proceeds and the BVI courts have construed the term ‘member’ as including any former member of a company.

A parent company within a group structure will therefore rank behind unsecured creditors when it comes to distributions in the liquidation process, if the liability owed to the parent arises out of the parent being a member of the company. Any other legitimate interest, such as loans to the company, would be included in the general pool of unsecured creditors or would fall outside of the liquidation if it was a secured debt. However, such transactions may be voidable if they fall within the provisions that regulate unfair preference, undervalue transactions or extortionate credit transactions, which are explained above in **13.1 Grounds to Set Aside/Annul Transactions**.

14.2 Off-set, Set-off or Reduction

Under section 150(1) of the IA if, prior to a company going into liquidation, there have been mutual credits, mutual debits or other mutual dealings between the company and a creditor claiming in the liquidation, then an account shall be taken of what is due from each party to the other in respect of those mutual credits and debits, and the sum due from one party shall be set off against the sums due from the other party. Only the balance will be payable.

This applies equally to inter-company borrowings and independent creditors.

14.3 Priority Accorded Unsecured Intercompany Claims and Liabilities

As explained in **14.1 Intercompany Claims and Obligations** above, intercompany claims will rank behind unsecured claims if the amounts claimed are sums due to them in their character as a member.

14.4 Subordination to the Rights of Third-party Creditors

See **14.1 Intercompany Claims and Obligations** above.

14.5 Liability of Parent Entities

See **14.1 Intercompany Claims and Obligations** above in this regard. The provisions of Part VIII of the IA set out when a parent company may be liable to repay sums to a company or when they may be liable to compensate the company. This liability arises if the parent has been provided with an unfair preference by the subsidiary or where the parent has entered into an arrangement with the subsidiary that is an undervalue transaction or an extortionate credit agreement.

14.6 Precedents or Legal Doctrines That Allow Creditors to Ignore Legal Entity Decisions

As set out above, the provisions of Part VIII of the IA permit the liquidator of a company to pursue claims against affiliate companies if the arrangement between the two companies falls foul of the provisions against unfair prejudice and preference payments etc, in which case, the liquidator can claim from the affiliate company for any loss that stems from the transaction. A creditor may not bring this claim directly, as only a liquidator of a BVI company is entitled to bring such a claim but, if the liquidator is successful in recovering sums from the affiliate company, those funds will be available to the creditors of the liquidation.

A parent or affiliate company may also be liable if it acted as a director of the insolvent company. This is governed by Part IX of the IA and, as stated in **12.5 Owner/Shareholder Liability** above, the liquidator of a company may bring a claim against a director under three heads of liability, namely misfeasance, insolvent trading and fraudulent trading. Again, this is not a direct claim by the creditors but does advance their position by potentially bringing funds into the liquidation.

The BVI courts also recognise equitable tracing and conspiracy-based torts that allow a creditor to pursue an affiliate company for any losses suffered.

14.7 Duties of Parent Companies

A parent company only owes a duty to its subsidiary or the subsidiary’s creditors if it is, or has been, acting in a fiduciary role.

14.8 Ability of Parent Company to Retain Ownership/Control of Subsidiaries

In liquidation proceedings, a liquidator assumes control of a company and the directors and members have little control of the company beyond the date of the liquidator’s appointment.

In other forms of restructuring, however, the members and directors of a company retain control of the company that is undergoing restructuring.

15. The Importance of Valuations in the Restructuring and Insolvency Process

15.1 Role of Valuations in the Restructuring and Insolvency Market

Valuations have a vital role to play throughout the restructuring and insolvency process. From the outset, a valuation is required to ascertain the value of assets and liabilities and to assess whether a company is solvent or not.

Valuations are also important when considering insolvency planning, as part of a restructuring process. The value of the group, its assets and business will be vital when considering how best to restructure the group.

15.2 Initiating Valuation

Different parties may initiate a valuation, depending on the situation and the process. Creditors to a company may initiate a valuation if they are seeking to place the company into liquidation. Creditors of a company may also seek a valuation prior to putting a creditors' arrangement in place.

Directors may also seek a valuation prior to placing a company into voluntary liquidation, in order to ensure that the company meets the solvency test. They may also undertake a discrete valuation prior to making proposals for a plan or scheme of arrangement.

15.3 Jurisprudence Related to Valuations

The starting point for a valuation is usually a going-concern valuation, because in most restructurings a company will be in the middle ground: neither beyond economic redemption and incapable of generating any return on capital, nor a stable entity with good fundamentals merely requiring temporary support.

By contrast, a liquidation valuation assumes that a company is not viable as a going-concern because the value of its business as a going-concern is worth less than the break-up value of its assets. Any prolonged operation of the business will therefore compound the losses of stakeholders, making it logical to sell the assets piecemeal on an expedited basis. Any valuation on a liquidation basis requires an assessment of the value of each asset class on a balance sheet and takes into account a raft of factors such as asset type, liquidity, condition, encumbrances, degree and purpose of annexation in the case of fixtures, and the level of marketing required.

Such valuations are frequently carried out by the larger accountancy firms that have a presence in the BVI. They often work with their colleagues in their global offices, where the creditor is based or where the company operates.

Campbells
Banco Popular Building
Road Town,
Tortola VG1110
British Virgin Islands

Tel: +1 284 494 2423
Fax: +1 284 494 2475
Email: bchild@campbellslegal.com
Web: www.campbellslegal.com

Campbells