The Legal 500 Country Comparative Guides

British Virgin Islands: Restructuring & Insolvency

This country-specific Q&A provides an overview to restructuring & insolvency laws and regulations that may occur in British Virgin Islands.

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

In the British Virgin Islands ("BVI") the following forms of security can be granted over immovable property:

a. Mortgage (legal or equitable)

Both legal and equitable mortgages are recognised in the BVI. A legal mortgage requires the transfer of title from the mortgagor to the mortgagee. The most common asset held by BVI incorporated companies is shares. A legal mortgage over shares will necessitate a transfer of ownership of the share from the shareholder (mortgagor) to the mortgagee, which will in turn require a change to the Register of Members of the company. This will enable the mortgagee, for instance, to receive a dividend. Due to the impracticality of this, legal mortgages are not often utilised forms of security over shares. An equitable mortgage, on the other hand, enables the mortgagor to stay as named shareholder as there is no requirement for a transfer of ownership. An equitable mortgage can arise where a legal mortgage has failed or where an agreement has been made to create a legal mortgage.

b. Equitable charge (fixed)

A charge is defined in the BVI Business Companies Act, 2004 (the "BCA") as any form of security interest over property, wherever situated, other than an interest arising by operation of law. As with an equitable mortgage, it does not involve a transfer of ownership of shares, for instance, and can be easily and quickly created. A charge can be 'fixed', secured on a specific asset of the company, or 'floating', secured over all assets of the company.

The following forms of security can be created over movable property:

a. Pledge

Whilst a pledge is available in the BVI as a form of security, it is rarely, if ever, utilised as a form of security over shares. This is due to the fact that physical possession of an asset is needed for the formation of a pledge under BVI law. Physical possession of the share certificate does not automatically lead to an update of the Register of Members and, as such, the mere holding of the share certificate would not entitle the holder to any of the entitlements usually carried by the share (i.e. right to vote or a dividend).

b. Floating charge

A floating charge is available over moveable assets due to its ability to remain unfixed over

the assets of a company. The advantage of this is that it enables the company to dispose of assets as the floating charge is not fixed on any particular asset. The crystallisation of floating charges will usually occur upon the appointment of a receiver or a liquidator.

c. Mortgage (equitable)

As stated above, an equitable mortgage does not require the transfer of legal ownership to the creditor (mortgagee). Upon creation of an equitable mortgage, the creditor will have an enforceable equitable interest.

The type of security available will depend on the asset over which the security is granted. For instance, as stated above a pledge over the shares of a BVI incorporated company is largely unworkable.

In the BVI security may be created quickly and easily over shares. The requirements for creating security are (1) it must be in writing (2) it must indicates the intention of the parties to create the security over the asset (3) it must states the amount secured by the charge and be signed by the security issuer. Another advantage to taking security over shares in BVI incorporated companies is that the parties will have a choice of governing law in respect of the share security. This gives flexibility to companies and creditors when entering into negotiations for establishing security over shares. An additional advantage is that security interests over shares do not attract stamp duty upon creation or enforcement, except in very limited circumstances and, as mentioned above, they are easily created with little formal requirements.

If the statutory formalities are not complied with the security is not created. Additionally, a legal mortgage will fail in circumstances where legal title is not transferred from the mortgagor to the mortgagee. In these circumstances the legal mortgage will, in certain circumstances, become an equitable mortgage.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

Much depends on the terms of the security given. Many written security agreements entitle the holder of a security interest to appoint a receiver in the event of a default. There is no need to apply to the Court for an order to appoint a receiver in the event that the security deed permits this. However, there are strict notice procedures that must be followed when appointing a receiver over a BVI company that holds shares in another BVI company. Failure to provide the requisite notice can result in the appointment being invalidated. Also, it is important to appoint a receiver that is familiar with BVI corporate structures and with securing assets held by BVI companies in foreign jurisdictions.

The appointment of a liquidator of a chargor that is a BVI company will not affect a secured

creditor's right to enforce their security. The secured asset does not form part of the pool of assets available to unsecured creditors and the secured creditor may exercise any rights granted to it under the terms of the security deed. Therefore the appointment of a liquidator present no discernable issues to a secured creditor.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

   The test for insolvency is contained within the Insolvency Act, 2003 ("**IA**"). Pursuant to section 8(1) IA, a company will be considered insolvent if:

   a. it fails to comply with the requirements of a statutory demand that has not been set aside;

   b. execution or other process issued on a judgment, decree or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied; or

   c. either:

   i. the value of the companies liabilities exceeds its assets; or

   ii. the company is unable to pay its debts as they fall due.

   In certain circumstances there will be an obligation upon directors of a company to initiate insolvency proceedings. For instance, in circumstances whereby a director (or former director) knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, a liquidator, upon being appointed over the company, may apply to the Court for an order against that director. The Court may order that that the director or former director concerned makes such contribution, if any, to the company's assets as the Court considers proper. However, the Court shall not make an order against a director if it is satisfied that after he first knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation, he took every step reasonably open to him to minimise the loss to the company's creditors.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

   The following insolvency procedures are available in the BVI:

a. Involuntary/Insolvent Liquidation

Pursuant to the IA a liquidator may be appointed over a company through a qualifying resolution of its members or by the BVI High Court upon the application by the company, a creditor, a member, the supervisor of a creditors' arrangement in respect of the company, the Financial Services Commission, the International Tax Authority or the Attorney General. Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn the Court may appoint a provisional liquidator. An application for the appointment of a provisional liquidator will usually be made where there is a real concern of the dissipation of assets, prior to the appointment of a liquidator.

The Court will appoint a liquidator over a company if one of the following is proven by the applicant:

a. the company is insolvent;

b. the Court is of the opinion that it is just and equitable that a liquidator should be appointed; or

c. the Court is of the opinion that it is in the public interest for a liquidator to be appointed.

The applicant will usually propose a liquidator for the Court to appoint. The applicant's choice of liquidator will not usually be challenged without good cause, for example if it is believed that the liquidator has a conflict of interest.

Once a liquidator is appointed by the Court, the directors of the company are not able to conduct any business on behalf of the company (however see below for an exception to this). The Court will have a remaining supervisory role. Liquidators will have powers as specified in the appointing order, which usually include those outlined in Schedule 2 of the IA, subject to modifications by the Court. The liquidator will have to apply to the Court to exercise any powers that are outside the scope of the powers specified in the appointing order.

A change in board structure does not always arise as a matter of course upon the appointment of a liquidator. For instance, recently the Commercial Division of the BVI High Court allowed the appointment of 'soft touch' provisional liquidators which enabled the applicants to restructure with the oversight of joint provisional liquidators but without a change in board structure (BVIHCOM2018/0206, 0207, 0208, 0210, 0212 *In the matters of Constellation Overseas Ltd.; Lone Star Offshore Ltd.; Gold Star Equities Ltd.; Olinda Star Ltd.; Snover International Inc.; Alpha Star Equities Ltd.*).

With regard to the timeline, an application to appoint a liquidator must be determined within six months of the date of the application notice being filed with the court. This period can be

extended by court application. Uncontested applications are usually resolved within 2-4 months but contested applications can take 6-12 months to be determined. Once a liquidator has been appointed the length of the liquidation process will depend upon the factual circumstances of each individual case, including the location and nature of the assets, the degree of cooperation from the company and its officers and the number of claims submitted to the liquidator.

b. Administration (currently not in force in the BVI)

The IA contains provisions as to the appointment of administrators. However, these provisions are currently not in force.

c. Receivership

A receiver is usually appointed by the Court or under a debenture or other instrument.

Appointment under a debenture or other instrument

Appointment of a receiver out of Court shall be made in writing and will take effect from the time upon which the receiver receives the written notice of appointment. The appointment will not be effective unless the receiver accepts it before the end of the next business day following the day on which he receives the written appointment. There is provision for joint receivers to be appointed outside of Court. Where a receiver is appointed out of court he shall confirm his acceptance in writing to the person who appointed him within 7 days. This provision of the Act will not apply whereby an appointment is accepted in writing. Written acceptance or confirmation will state the time and date of receipt of the notice of appointment and the time and date of the acceptance.

Upon being appointed a receiver shall send notice of his appointment to the company; and file a notice of his appointment (i) with the Registrar of Companies; and (ii) if the company is or has been a regulated person, with the Financial Services Commission.

A receiver appointed out of court, other than an administrative receiver, is deemed to be the agent of the company unless the charge or instrument under which he was appointed expressly provides otherwise. An administrative receiver is deemed to be the agent of the company in receivership unless a liquidator is subsequently appointed, in respect of a company in receivership, which will terminate the agency of any receiver, including an administrative receiver. A receiver appointed by the Court will be deemed to be an agent of the Court, not the company.

The specific powers of a receiver should be as set out in the charge document and/or the Court order appointing him/her. Unless the charge or other instrument under which, or court

order by which, he was appointed expressly provides otherwise, a receiver may:

a. demand and recover, by action or otherwise, income of the assets in respect of which he was appointed;

b. issue receipts for income recovered;

c. manage, insure, repair and maintain the assets in respect of which he was appointed; and

d. exercise, on behalf of the company, a right to inspect books or documents that relate to the assets in respect of which he was appointed in the possession or under the control of a person other than the company.

Appointment of an Administrative Receiver

Pursuant to the IA, an administrative receiver may be appointed by the Court or by a debenture or by the holder of another instrument of the company secured by a floating charge. Unless the debenture or other instrument states otherwise an administrative receiver may execute all documents necessary or incidental to the exercise of his powers in the name of and on behalf of the company in receivership; and use the company's seal.

Additionally, unless the debenture or other appointing instrument states otherwise, the powers conferred on an administrative receiver shall include those as stated in Schedule 1 of the IA.

5. **How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

Upon the appointment of a liquidator over a company, distributions will be made in a statutorily prescribed order, pursuant to the provisions of the IA, and are as follows:

a. in paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;

b. after payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;

c. after payment of the preferential claims, in paying all other claims admitted by the liquidator (these claims rank equally between themselves, however if the assets of the

company are insufficient to meet the claims in full, they shall be paid rateably); and

d. after paying all admitted claims, in paying any interest payable.

Preferential creditors rank equally between themselves and, if the assets of the company are insufficient to meet the claims in full, they shall be paid ratably. Preferential claims include (1) the amount due to a person as a present or past employee of the debtor to include wages and salary and accrued holiday, (2) any amount due to the social security board, (3) any amount due in respect of pension contributions, (4) sums due to the Government of the British Virgin Islands, and (5) any sums due to the Financial Service Commission.

Any surplus assets remaining after payment of the costs, expenses and claims shall be distributed to the members in accordance with their rights and interests in the company.

Where, before the relevant time, a creditor acknowledges or agrees that, in the event of a shortfall of assets, he will accept a lower priority in respect of a debt than that which he would otherwise have, that acknowledgement or agreement takes effect notwithstanding the provisions of the IA, except to the extent that a creditor of the debtor who was not a party to the agreement is prejudiced.

6. **Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

A debtor's pre-insolvency transactions may be challenged if certain circumstances are present that point to a voidable transaction including, an unfair preference, an undervalue transaction, a voidable floating charge or an extortionate credit transaction.

Unfair preference

A transaction will be considered as an unfair preference given by the company to a creditor if the following circumstances are present:

a. if the transaction is an insolvency transaction (a transaction entered into at a time when the company is insolvent or it causes the company to become insolvent);

b. if the transaction is entered into within the vulnerability period (in the case of a transaction entered into with a connected person, the period commencing 2 years prior to the onset of insolvency and ending on the appointment of the administrator or liquidator; and in the case of a transaction entered into with any other person, the period commencing six months prior to the onset of insolvency and ending on the appointment of the administrator or the liquidator); and

c. if the transaction has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if the transaction had not been entered into.

A transaction will not be considered an unfair preference if the transaction took place in the ordinary course of business.

Where a transaction entered into by a company within the vulnerability period has the effect specified in (c) above in respect of a creditor who is a connected person, unless the contrary is proved, it is presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business.

Undervalue transaction

A company enters into an undervalue transaction with a person if:

a. the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or

b. the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and

c. in either case, the transaction concerned

i. is an insolvency transaction; and

ii. is entered into within the vulnerability period.

A company does not enter into an undervalue transaction with a person if the company enters into the transaction in good faith and for the purposes of its business and at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Where a company enters into a transaction with a connected person within the vulnerability period and the transaction falls within (a) or (b) above, unless the contrary is proved, it is presumed that the transaction was an insolvency transaction and that it was not entered into by the company in good faith or for the purposes of its business.

Voidable floating charge

A floating charge created by a company is voidable if it is created within the vulnerability period and it is an insolvency transaction. A floating charge is not voidable to the extent that it secures:

a. money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;

b. the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;

c. the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and

d. the interest, if any, payable on the amount referred to in (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

Where a company creates a floating charge in favour of a connected person within the vulnerability period, unless the contrary is proved, it is presumed that the charge was an insolvency transaction. The value of assets or services sold or supplied is the amount in money which, at the time they were sold or supplied, could reasonably have been expected to be obtained for the sale or supply of the goods or services in the ordinary course of business and on the same terms, apart from the consideration, as those on which the assets or services were sold or supplied to the company.

Extortionate credit transaction

An extortionate credit transaction is a transaction entered into by a company:

a. within the vulnerability period (for the purposes of extortionate credit transactions, the vulnerability period is the period commencing 5 years prior to the onset of insolvency and ending on the appointment of the administrator or, if the company is in liquidation, the liquidator); or

b. involving the provision of credit to the company

is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit the terms of the transaction are or where such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit or the transaction otherwise grossly contravenes ordinary principles of fair trading.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

   Once a liquidator has been appointed, unless the Court orders otherwise, no person may commence or proceed with any action or proceeding against the company or in relation to its assets or exercise or enforce, or continue to enforce any right or remedy over or against assets of the company. However, a secured creditor may take steps to enforce the terms of the security granted to him or her.

   Pursuant to section 174 of the IA, where an application for the appointment of a liquidator of a company has been filed but not yet determined the company, a creditor or member may apply for a stay of proceedings.

   The stay will only have extra-territorial effect if the jurisdiction in which a claim is commenced or continued recognises the liquidator's appointment.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

   Plan of arrangement

   Plans of arrangement are governed by the BCA. A plan of arrangement may enable 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. There is no requirement for the company to be insolvent for a plan of arrangement to be validly entered into.

   If the directors of a company determine that it is in the best interests of the company, its creditors or members, the directors of the company may approve a plan of arrangement that contains details of the proposed arrangement. Upon approval of the plan by the directors, the company shall make application to the Court for approval of the proposed arrangement. A voluntary liquidator may also approve a plan of arrangement.

   Where the Court makes an order approving a plan of arrangement, the directors of the company will confirm the plan as approved whether or not the Court has directed any amendments to be made thereto. The directors of the company, upon confirming the plan of arrangement, shall give notice to the persons to whom the order of the Court requires notice to be given; and submit the plan of arrangement to those persons for such approval, if any, as

the order of the Court requires. After the plan of arrangement has been approved by those persons by whom the order of the Court may require approval, articles of arrangement shall be executed by the company and shall contain the plan of arrangement, the order of the Court approving the plan of arrangement; and the manner in which the plan of arrangement was approved, if approval was required by the order of the Court.

The articles of arrangement shall be filed with the Registrar. Upon the registration of the articles of arrangement, the Registrar shall issue a certificate certifying that the articles of arrangement have been registered. An arrangement is effective on the date the articles of arrangement are registered by the Registrar or on such date subsequent thereto, not exceeding 30 days, as is stated in the articles of arrangement.

Scheme of arrangement

Schemes of arrangement are also dealt with by the BCA. Where a compromise or arrangement is proposed between a company and its creditors, or between the company and its members, the Court may, on the application of the company, a creditor, a member, the administrator, or by a liquidator, order a meeting of the proposed scheme participants. If a majority in number representing 75% in value of each class of scheme participants, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the arrangement, if sanctioned by the Court, is binding on the company, all scheme participants and the liquidator (if any). An order of the Court shall have no effect until a copy of that order has been filed with the Registrar. A copy of an order of the Court shall be annexed to every copy of the company's memorandum issued after the order has been made.

Company creditors' arrangement

Company creditors' arrangements pursuant to the IA may be used by BVI incorporated companies where the board of directors reasonably believes that the company is (or is likely to become) insolvent and it has passed a resolution stating its belief that the company is (or is likely to become) insolvent, approving a written proposal containing the information prescribed, and nominating an eligible insolvency practitioner to be appointed as interim supervisor. The arrangement may not be proposed by the board of directors when the company is in liquidation or administration.

9. **Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?**

There are no statutory restrictions on a company obtaining new financing upon entering into a restructuring process. The new creditors will not be bound by the terms of the agreed Plan, Scheme or Arrangement unless specific restrictions have been made regarding borrowing.

10. **Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?**

    The IA does not specifically provide for the release of claims against non-debtor parties.

    It is, however, important to note that restructuring procedures are voluntary and consensual and terms of contracts or third party liabilities can be disclaimed or varied through a restructuring procedure provided the relevant approval percentages are attained.

11. **Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities do they have? Are they permitted to retain advisers and, if so, how are they funded?**

    Creditor committees may be formed following the appointment of a liquidator, administrator or an administrative receiver and by a resolution of the members at a meeting that complies with section 421 of the IA. Where the liquidator, administrator or administrative receiver is satisfied that a creditors' committee has been validly established he or she shall, within five business days of the passing of the resolution, file a notice to that effect. The creditors' committee cannot act until the relevant notice is filed.

    The functions of a creditors' committee are:

    a. to consult with the office holder about matters relating to the insolvency proceeding;

    b. to receive and consider reports of the insolvency holder;

    c. to assist the officer holder in discharging his functions; and

    d. to discharge any other functions assigned to it under this Act or the Rules.

    A creditors' committee may call a meeting of creditors, require the office holder to provide the committee with reports and other information concerning the insolvency proceeding and require the office holder to attend before the committee to provide information and/or an explanation with respect to the insolvency proceeding. Additionally, the committee may apply to the Court to replace the liquidator and may approve the fees of the liquidator, otherwise an application to the Court is needed for approval of interim fees.

12. **How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is**

there any ability for either party to disclaim the contract?

This will depend on the contractual agreement between the parties to the contract. The restructuring and insolvency process will not explicitly change the parties' obligations pursuant to the contract. Indeed, dependent upon the contract, it is likely that the agreement will contain provisions in the event of the insolvency of one party.

Pursuant to the IA, the liquidator of a company may disclaim an unprofitable contract by filing a notice of disclaimer with the Court. The liquidator must, within 14 days of the date on which the disclaimer notice is filed, give notice to every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer. However, it will not affect the rights or liabilities of any other person except in so far as is necessary to release the company from liability. A person suffering loss or damage as a result of a disclaimer may claim in the liquidation of the company as a creditor for the amount of the loss or damage.

Prior to the commencement of liquidation, where there have been mutual credits, debts or other mutual dealings between a debtor and a creditor claiming or intending to claim in the insolvency proceeding, an account shall be taken of what is due from each party to the other, the sum due from one party shall be set-off against the sums due from the other party and only the balance of the account, if applicable, may be claimed in the insolvency proceeding or will be payable to the debtor. A creditor is, however, not entitled to claim the benefit of a set-off (under section 150 of the IA) if he had actual notice that the debtor was insolvent at the time he gave to, or received credit from, the debtor or at the time he acquired any claim against the debtor or any part of or interest in such a claim.

13. **What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?**

Pursuant to Schedule 2 of the IA, a liquidator, once appointed, has the power to sell or otherwise dispose of property. However, it is common for the Court to include in the order appointing a liquidator a requirement for the liquidator to seek sanction prior to selling any assets of the company. This is largely because the Court has an inherent supervisory jurisdiction over BVI liquidations and this is one mechanism available to the judiciary that assists them in fulfilling this role.

Additionally, in circumstances where the creditors or members of a company have raised objections to the sale of assets, liquidators will regularly apply to the court for sanction to ratify the sale and to provide him or her with protection against any potential claims.

Generally, the liquidator is able to sell assets to a buyer free of any claims. However, where a liquidator disposes of any assets of the company to a person connected of the company, he must first notify the creditors' committee to ensure that any buyer takes the asset free of

claims.

If a liquidator is appointed over a company, a secured creditor may still exercise his security and, until the security is discharged, any purchaser will take the asset subject to that security.

In the event that a secured creditor surrenders its security or the company holds an assets that are not subject to security, any purchaser will take that asset free and clear of claims.

14. **What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?**

Whilst directors are appointed they must adhere to the duties as contained in the BCA and exercise his or her powers honestly, in good faith and in what he or she believes to be in the best interests of the company. When managing a company in financial distress a director must be mindful of the provisions under the IA with regard to:

a. voidable transactions (as discussed above);

b. fraudulent trading;

c. insolvent trading (as discussed above); and

d. summary remedies against delinquent officers and others.

Fraudulent trading

The liquidator of a company may apply to the BVI High Court for an order pursuant to the fraudulent trading provisions under the IA. The Court may make an order where it is satisfied that, at any time before the commencement of the liquidation of the company, any of its business has been carried on with intent to defraud creditors of the company or creditors of any other person; or for any fraudulent purpose. If the Court decided to make such an order it may declare that any person who was knowingly a party to the carrying on of the business in such manner is liable to make such contribution, if any, to the company's assets it considers proper.

Summary remedies against delinquent officers and others

On the application of the liquidator of the company, the Court may make an order that the officer, liquidator, supervisor, administrator, administrative receiver or any person who has

been concerned in the promotion, formation, management, liquidation or dissolution of the company repays, restores or accounts for the money or other assets, to the company as compensation for the misfeasance or breach of duty. Upon hearing such an application the Court must be satisfied that the officer, liquidator or other office holder has misapplied or retained, or become accountable for any money or other assets of the company or has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. This provision of the IA is wide in scope enabling the Court to have a broad remit with respect to those found to have been involved in wrongdoing at the detriment of the company.

In addition to the above, and dependent on the satisfaction of one of the circumstances outlined in section 262(1) of the IA, the Official Receiver has the power to apply to the Court for a disqualification order not more than six years after the date on which the company became insolvent.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Restructuring or insolvency proceedings generally will not release directors and other officers from liability unless a release is explicitly stated in the final arrangement.

A director can, therefore, still be held liable for decisions made and actions taken whilst he was a director of the company once he has resigned or been removed. As discussed above, pursuant to the provisions in the IA and upon an application by the appointed liquidator, the Court may make an order against an individual who is or who has been a director of the company if it is satisfied that 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 would avoid going into insolvent liquidation, and he or she was a director of the company at the relevant time. However, the BVI Court will not make an order against a director if it is satisfied that after he first knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation, he took every step reasonably open to him to minimise the loss to the company's creditors.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?**

Pursuant to Part XIX of the IA the BVI High Court may make orders in respect of foreign proceedings. However, such orders may only be made in respect of proceedings in jurisdictions designated by the BVI Financial Services Commission. This list is currently limited to the following jurisdictions: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom, and the United States of America. A foreign appointed

representative may apply to the BVI Court for the following orders in respect of aid for foreign proceedings (a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property):

a. restrain the commencement or continuation of any proceedings against a debtor or in relation to any of the debtor's property;

b. restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

c. require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

d. make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a BVI insolvency proceeding with a foreign proceeding;

e. appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

f. authorize the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding in respect of a debtor;

g. stay or terminate or make any other order it considers appropriate in relation to a BVI insolvency proceeding; or

h. make such other or grant such other relief as it considers appropriate.

In making an order the Court may apply the law of the BVI or the law applicable in respect of the foreign proceeding. Additionally, the BVI High Court may, on the application of an insolvency officer, authorise him to act in a foreign country on behalf of a BVI insolvency proceeding as permitted by the applicable foreign law.

The Eastern Caribbean Supreme Court has adopted the Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. These came into force in the BVI on 18 May 2017.

Currently, the BVI is not a signatory to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. Part XVIII of the IA contains provisions (sections 436-465) reflecting provisions of the UNCITRAL Model Law on Cross Border Insolvency. However, these provisions are not currently in force in the BVI. It appears that

these provisions will not come into force until the Model Law is adopted in many jurisdictions.

17. **Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?**

Yes. Pursuant to the IA the BVI High Court may appoint a liquidator of a foreign company (a company incorporated, registered or formed outside the BVI) if the Court is satisfied that the company has a connection with the BVI and satisfies the following requirements:

a. the company is insolvent;

b. the Court is of the opinion that it is just and equitable that a liquidator should be appointed;

c. the Court is of the opinion that it is in the public interest for a liquidator to be appointed;

d. the company is dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered;

e. the company has ceased to carry on business; or

f. the company is carrying on business only for the purpose of winding up its affairs.

A foreign company will be considered as having a connection with the BVI only if it 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 creditors of the company.

18. **How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?**

It is often that companies entering into the restructuring or insolvency process in the BVI are part of a wider group structure of companies. The fact that a company is a member of a wider group structure does not affect their treatment before the Courts in the BVI. Indeed, if the Court is aware of one of more companies within the same group structure involved in a restructuring or insolvency process before it, the proceedings can often be better coordinated and streamlined.

The scope for cooperation between office holders will depend upon a number of factors including the scale of the group structure (e.g. a large structure with multiple subsidiaries or

a small structure with two or three subsidiaries), the nature of the restructuring or insolvency process entered into (for instance, if a liquidator is appointed he or she will assume control of the company), the position of the company in the structure over which the office holder is appointed (e.g. holding company or subsidiary) and the attitude of the office holders. Dependent on the scale and nature of the restructuring or insolvency it may be that cooperation between office holders is a necessity e.g. investigation of suspected a wide-scale fraud throughout the group structure.

19. **Is it a debtor or creditor friendly jurisdiction?**

The BVI is a largely creditor friendly jurisdiction. For example, creditors are able to obtain interim relief, pursuant to the BVI Arbitration Act, 2013, from the BVI High Court if there is a concern regarding the dissipation or concealment of assets prior to, or during, arbitration. A party can seek help from the Court regardless of whether the arbitral proceedings have been, or are about to be, commenced in the BVI. The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006), subject to a few modifications and provides a clear and substantive framework for the provision of interim relief prior to, and during, arbitration proceedings. The construction of the Act suggests that it was intended by the legislature to provide the BVI High Court with a wide scope to provide protection to parties with concerns regarding the dissipation of assets outside of the Jurisdiction prior to, or during, arbitral proceedings. This provides reassurance to parties considering arbitration as they will still have the protection of the BVI High Court, outside of the formal litigation process and regardless of where the arbitral proceedings have been, or are to be, commenced.

However, recently, the Commercial Division of the BVI High Court allowed the appointment of 'soft touch' provisional liquidators which enabled the applicant companies to restructure with the oversight of joint provisional liquidators but without a change in their respective board structures.

20. **Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?**

It is rare that BVI companies will be subject to sociopolitical factors involving employees or pensions. The majority of companies incorporated in the BVI do not hold assets located in the BVI and, as such, rarely have offices located in the BVI. The majority of BVI incorporated companies employ locally based Registered Agents that provide BVI companies with a registered address enabling the company to receive correspondence and be served in the BVI.

Employees of an insolvent company are deemed 'preferential claims'. Pursuant to the IA, preferential claims admitted by the liquidator are paid second to the remuneration and fees

of the liquidator. What constitutes a 'preferential claim' is as prescribed by Schedule 2 of the BVI Insolvency Rules, 2005, and include:

a. the amount due to a person as a present or past employee of the company that represents wages and salary and accrued holiday pay up to US$10,000.00;

b. 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 6 months immediately before the commencement of liquidation of the company; and

c. the amount due in respect of pension contributions or contributions in respect of medical insurance payable during the 12 months immediately before the commencement of the liquidation of the company by the company as the employer of any person, including any amounts deducted from the employee up to US$5,000.00 per employee.

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

The BVI is a jurisdiction with a small economy derived from two main sectors: tourism and financial services. Any support that is available from the BVI Government is generally directed towards locally operating businesses and locally based entrepreneurs, such as the National Business Bureau which assists small and medium enterprises by way of loans, business training and technical assistance and support. Additionally, further help is available via the National Business Bureau Loan Guarantee Programme is available at the community level to small startup or existing businesses that have experienced difficulty obtaining financing through traditional means.

21. **What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?**

It is unfortunate that the BVI has not adopted the provisions of the UNCITRAL Model Law on Cross-Border Insolvency, in particular, as this would facilitate a cohesive approach between the BVI and other jurisdictions that have adopted this within their domestic legal framework. As stated in our response to Question 16, it is unlikely that the provisions reflecting the UNCITRAL Model Law will come into force in the BVI in the near future.