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Insolvency 2021

British Virgin Islands: Law & Practice
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BRITISH VIRGIN ISLANDS

Law and Practice

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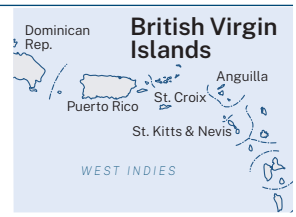

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1. STATE OF THE RESTRUCTURING MARKET

1.1 Market Trends and Changes

Throughout 2021, the British Virgin Islands (BVI) has remained one of the most significant offshore jurisdictions. According to the latest statistical bulletin from the BVI Financial Services Commission (FSC), dated June 2021, there were 364,980 active business companies in the BVI with a further 1,290 active limited partnerships. Further, Q2 2021 saw a 68% increase in company incorporation and almost a three-fold (269%) increase in the registration of limited partners compared to Q2 2020 as market confidence and activity was restored following the outbreak of COVID-19.

The BVI has retained its status as one of the most significant jurisdictions in the international corporate service sector and, in particular, the insolvency and restructuring sector. Throughout this period, and during its recovery, the BVI has proved to be a resilient and agile jurisdiction.

In recent years, the BVI court has clarified the scope of its restructuring jurisdiction under the common law which has resulted in an increased number of restructurings. In 2019, the BVI court appointed, for the first time, "soft touch" provisional liquidators with a mandate to restructure a company's debts with a view to ensuring that a company can continue as a viable going concern whilst providing creditors with a better outcome than they could otherwise expect to receive in a liquidation (being the other realistic alternative). In a subsequent 2020 decision, the court granted a blanket statutory moratorium on prospective claims following the appointment of provisional liquidators in order to provide the company with essential breathing room to implement the restructuring without creditors taking action against the company. These decisions have brought the BVI into line with other common law jurisdictions such as the Cayman Islands and promotes the concept of restructuring debt as an alternative to a liquidation.

The BVI court has also been at the forefront in promoting efficient, orderly and coordinated multi-jurisdictional restructurings involving BVI entities including the entering into of protocols for cross border co-operation within the framework of the Judicial Insolvency Network (JIN) Guidelines for Communications and Cooperation between Courts in Cross Border Insolvency Matters, which were adopted by the BVI in 2017.

2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS

2.1 Overview of Laws and Statutory Regimes

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 IA sets out the procedures for insolvent liquidations and the appointment of administrative receivers. The BCA sets out the statutory framework for company restructuring and reorganisation as well as the voluntary liquidation regime.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The key insolvency and restructuring procedures available in respect of corporate entities registered in the BVI are:

- voluntary liquidation;
- provisional liquidation;
- official liquidation; and

• schemes of arrangement.

It is also possible for receivers to be appointed over BVI companies (either by the BVI court or by a creditor of the company with suitable security).

Plan of Arrangement

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

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 director(s) have approved the Plan of Arrangement, they must apply to the BVI court to approve the plan.

The court will determine to whom notice of the proposed plan should be given and whether the approval of any individual is required. The court will also determine whether any holder of shares, debt obligations or securities in the company can dissent from the proposed plan. If so, any dissenting party may receive payment of fair value in respect of its shares, debt obligations or other securities (Section 179 of the BCA).

Once the plan is approved by those persons (if so ordered), the director(s) will execute (on behalf of the company) the articles of arrangement.

Scheme of Arrangement

A scheme is a statutory form of compromise or arrangement between a company and its creditors (or any class of them) or its shareholders (or any class of them). There is no statutory definition of the terms "compromise" or "arrangement". The BVI Court will construe them broadly but they must involve some element of accommodation or "give and take" between the company and the scheme creditors or shareholders.

The principal uses of BVI schemes are to reorganise the company's share capital, to enable a company to restructure its liabilities and avoid an insolvent liquidation, or to alter the distribution rights of creditors and/or shareholders in the company's liquidation.

Scheme proceedings can be commenced by the company, by any creditor or shareholder of the company or (where the company is being wound up) by a liquidator. Scheme proceedings commenced by a creditor or shareholder would, however, require the company's support.

If a moratorium is required during the scheme process, the company will present a winding up petition and apply for an order appointing provisional liquidators prior to filing the scheme petition.

If the scheme is supported by more than 50% by number and 75% by value of those attending and voting in each scheme class, and is subsequently approved by the court, it will bind all scheme creditors/shareholders (including those who did not vote or who voted against the scheme) in accordance with its terms.

The scheme process is not confidential. Detailed scheme documentation will be sent to all

scheme participants and may also be advertised, depending on the circumstances.

If the scheme is agreed by the requisite majority of creditors/shareholders of the company, the applicants must return to the court for the scheme to be approved. However, an order sanctioning the scheme will only take effect when filed with the BVI Registrar of Companies (the Registrar).

All scheme participants have the right to appear by counsel at the scheme sanction hearing. They may also appear at the convening hearing, although the convening application will typically be made on an ex parte basis unless there are contentious issues of class composition or jurisdiction.

If there is any uncertainty over creditors' claims, this will principally be relevant for the purposes of voting at the scheme meetings and distributions to be made under the scheme. As regards the former, the BVI court might give directions at the convening hearing regarding the valuation of claims for voting purposes, or it may leave that issue to be addressed by the chairperson of the scheme meetings. As regards the latter, the scheme document will typically contain a mechanism for determining claims, post-sanction of the scheme, for distribution purposes.

There is no fixed duration for a Scheme of Arrangement, and its length will be determined by the directions given by the court.

Voluntary Liquidation

The BCA contains provisions for the winding-up of a company, provided it has no liabilities or is able to pay its debts as they fall due. See **7.1 Types of Voluntary/Involuntary Proceedings**.

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:

- the passing of a shareholders' qualifying resolution – 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 or the 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. In practice, this is the most frequently relied upon, and may be established by showing:

- a failure to comply with a statutory demand for an undisputed debt exceeding USD2,000 within 21 days (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. By way of example, this can occur when a company is

deadlocked or where the relationship between shareholders has broken down irretrievably.

In the third test, the court will 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.

The process is usually initiated by the director(s) of the company 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 director(s) must pass a resolution stating that the company is insolvent or is likely to become insolvent – Section 20(1)(b) of the IA. Additionally, a written proposal must be approved that sets out how the creditors' rights will be varied or cancelled.

Unless otherwise agreed in writing by a secured creditor, 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.

The proposal must be approved by a majority of the creditors representing 75% or more in value of the creditors (Rule 83 of the Insolvency Rules, 2005 (the IR)). Provided the proposal is approved by a majority in number of the creditors representing 75% of the creditors by value, the supervisor will be appointed and the CCA will be binding on the company, each creditor and each shareholder.

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

There is no statutory time period within which a CCA must be completed.

Receivership

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

Although Part III of the IA includes provisions for the appointment of administrators presently, the administration section of the Act has not been brought into force. Therefore, administration is not available to BVI-registered companies at this time.

2.3 Obligation to Commence Formal Insolvency Proceedings

In practice, it will usually be a creditor that commences formal insolvency proceedings. However, a company is obliged to commence proceedings when its director(s) becomes aware that the company is insolvent and there is no prospect of the company trading its way out of difficulties.

Steps should be taken to commence proceedings at the point that the director(s) becomes aware that the company is insolvent or there is no prospect of the company continuing as a viable going concern. Failure to do so may lead to liability under the insolvent trading provisions of the IA.

Once a company is placed into liquidation, the liquidator may seek relief 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 known) 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. 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 they acted in this manner, they will have to account, personally, to the creditors of the company for any losses that stem from their failure to place the company into liquidation at the relevant time.

2.4 Commencing Involuntary Proceedings

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.

2.5 Requirement for Insolvency

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.

A creditor or member of a company 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. As set out in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, a creditor or member will be able to prove that a company is insolvent if it can show:

- a failure to comply with a statutory demand for an undisputed debt exceeding USD2,000 within 21 days (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).

2.6 Specific Statutory Restructuring and Insolvency Regimes

Although there are no statutory restructuring and insolvency regimes which are applicable to specific types of entity or business, Section 200 of the BCA does set out additional requirements for the appointment of a voluntary liquidator over a regulated company. This may extend to banks and commercial lenders as well as insurance companies and other entities operating in financial markets, such as trust companies, but only if they operate in the territory of the BVI.

Specifically, a regulated entity cannot be placed into voluntary liquidation unless and until the FSC has given prior written consent to the company being put into voluntary liquidation (Section 200(3)(a) BCA). Regularly, the FSC will require at least one of the voluntary liquidators to be a licensed insolvency practitioner (Section 200(3A) BCA) and therefore present in the BVI, which allows the FSC to have oversight of the liquidation.

As regards 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 any such other period of notice that the FSC shall agree) has been given to the FSC.

3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

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

Due to the nature of the BVI as an offshore jurisdiction, restructuring market participants, company management and lenders are invariably based onshore. As such, their views and preferences on consensual work-outs and restructurings tend to reflect the prevailing market views and preferences in the onshore jurisdiction(s) where they are based. These vary from case to case, but the most common jurisdictions (in no particular order) are London, New York and Hong Kong. A consensual work-out will always be the preferred approach but this will depend on all creditors of the same class agreeing to compromise their debt on the terms proposed. Where this is not possible, the company will need to promulgate a court-sanctioned scheme of arrangement in order to cram down any dissenting minority.

The recent adoption of "soft touch" liquidations by the BVI court invokes a statutory moratorium on claims and provides the company and the restructuring provisional liquidators appointed by the court time to engage with stakeholders without the threat of a dissenting creditor seeking to disrupt the process for a perceived strategic advantage.

3.2 Consensual Restructuring and Workout Processes

The processes adopted in a consensual restructuring will tend to vary, based on the prevailing processes in the onshore jurisdiction(s) where the majority of the participants are based. Institutional creditors will typically understand the benefits of a restructuring and the alternative outcome if the company is placed into liquidation and therefore engage in a consensual workout with the largest creditors forming a steering committee to negotiate the terms of any proposal on behalf of that class of creditors. As any proposed scheme of arrangement will require the consent of a requisite majority of class creditors, the company will typically seek to engage with the largest creditors at the outset and enter into a restructuring support agreement or a standstill agreement to facilitate the restructuring which allows the company breathing space to engage with the remaining creditors.

3.3 New Money

There are no statutory provisions which allow for super-priority liens or rights to be accorded to new-money investors. The rights of existing secured creditors will remain intact until such time as their rights are compromised, either consensually or through a scheme of arrangement. It is common for new capital to be raised as part of a restructuring with any rights or security to be granted to the new lender forming part of the scheme to be sanctioned by the court.

3.4 Duties on Creditors

Consensual/out-of-court restructurings in the BVI require the agreement of 100% of creditors, so in most circumstances the provision of a creditor's consent would preclude it from subsequently challenging the restructuring. Remedies may, however, exist at common law and/or in equity if a creditor gave consent based on some form of misinformation. Without a separate contractual agreement between creditors, or one

creditor voluntarily assuming a duty to another, there is no basis on which creditors would owe duties to each other in a consensual restructuring governed by BVI law.

3.5 Out-of-Court Financial Restructuring or Workout

Creditors cannot be crammed down in a consensual, out-of-court restructuring under BVI law. This can only be done through the use of a scheme of arrangement, which involves a court process. Once a scheme of arrangement has been approved by the requisite majority of creditors or shareholders, the applicant must return to the BVI court for the scheme to be approved by the court. A creditor or member may attend the hearing of the approval application (although most are dealt with without a hearing) to oppose the application for approval, but there has been no known occasion where an objecting creditor or shareholder has successfully overturned the will of the majority and convinced the court not to approve a scheme.

Shareholders' rights can be crammed down in certain circumstances without court proceedings, most commonly through a merger or consolidation under Part IX of the BCA. Under this procedure, a shareholder's shares can be acquired for "fair value" if the merger or consolidation is approved by a special resolution of the shareholders, requiring a two-thirds majority unless the articles impose a higher threshold, see Section 179 BCA. However, although a dissenting minority shareholder does not have the ability to block the merger/consolidation, it is entitled to be paid fair value for its shares, and the question of what fair value is will have to be resolved by the court if the company and the shareholder are unable to agree a fair-value price.

4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

4.1 Liens/Security

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

- mortgages – these can be legal or equitable;
- equitable fixed charges – 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 charges – usually granted by a company over all its assets.

The most common forms of security over movable property are:

- floating charge;
- 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

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 asset. 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. On the sale of assets, subject to the terms of the 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 sale proceeds, the secured creditor will rank as an unsecured creditor for any shortfall.

A secured creditor whose debt is more than the value of their security may prove in the liquidation for the unsecured balance. When filing a proof of debt in the liquidation, the secured creditor is required to state particulars of the security held and the value which he or she puts on the security. If a secured creditor omits to disclose their security in their proof of debt, they shall surrender their security for the general benefit of creditors, unless the court relieves them from the effect of this rule on the ground that their omission was inadvertent or the result of an honest mistake.

4.3 Special Procedural Protections and Rights

The enforcement of security falls outside the winding-up process. It is for the secured creditor to determine when to take control of the secured asset and when to sell it.

In relation to CCAs, unless the secured creditor agrees 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.

5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

5.1 Differing Rights and Priorities

Section 207(2) of the IA states that, within each class of claims, the creditors will rank pari passu. As stated, secured assets do not form part of the estate and secured creditors can only prove participation in the liquidation in respect of any shortfall. Whilst preferential creditors 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.

The expenses of the liquidation rank in priority to 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 of the same class rank equally in a restructuring process in the BVI.

5.3 Rights and Remedies for Unsecured Creditors

Plan of Arrangement

At the approval hearing of a Plan of Arrangement, the BVI court shall determine what notice of the proposed arrangement is to be given to any person and order that certain persons (including creditors) notify the court of any objections within a specified period of time. There is, therefore, a clear system whereby dissenters can be identified, but there is no guarantee that the views of one creditor will take priority over the needs of another.

Scheme of Arrangement

A moratorium on unsecured creditors' claims in a restructuring will only arise if provisional liquidators are appointed. Without such a moratorium, unsecured creditors may be able to disrupt a restructuring by obtaining and enforcing judgment on their claims. The BVI court does, however, have jurisdiction to stay an action brought by a creditor in the BVI, pending the outcome of the restructuring. Alternatively, unsecured creditors could disrupt a restructuring by filing a winding-up petition against the company. Although an unpaid creditor of an insolvent company is entitled to a winding-up order ex debito justitiae (as of right), the making of a winding-up order remains a matter for the BVI court's discretion, which may adjourn or dismiss the creditor's petition if other creditors are opposed to the winding-up because of the proposed restructuring.

In addition to the above, a Scheme of Arrangement will only be approved by the court if approved by a majority in number representing 75% in value of the creditors of those present and voting at the scheme meeting.

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.

Also, in the BVI, Mareva (or freezing) injunctions are available as an interim remedy to a claimant who can show a good, arguable case and a real risk that, if the injunction is not granted, the defendant will remove the relevant assets from the jurisdiction or otherwise dissipate them.

These injunctions are available in the Commercial Court in respect of substantive proceedings brought in the BVI and in relation to proceedings which have been or are about to be commenced in a court outside the BVI and which could give rise to a judgment which may be enforced in the BVI under any BVI statute or at common law.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

The statutory priority 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 IR prescribes a priority for all costs and expenses paid and Schedule 2 of the IR sets out a list of preferred creditors.

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

6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS

6.1 Statutory Process for a Financial Restructuring/Reorganisation

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

scheme of arrangement, a plan of arrangement and CCAs.

6.2 Position of the Company

The company can and will continue to operate its business during the restructuring process. If the company is not in provisional liquidation, the incumbent management will continue to manage the company. If the company is in provisional liquidation, the appointment order will specify whether and to what extent the incumbent management or the provisional liquidators will manage the business during the restructuring.

The company can borrow money during the process, but this will require Commercial Court approval if the company is in provisional liquidation.

No moratorium is available if the scheme is initiated when the company is not in liquidation. If the scheme is initiated during a provisional liquidation, an automatic stay prohibits the commencement or continuance of any suit, action or other proceeding against the company without the court's leave.

6.3 Roles of Creditors

Insolvent Liquidation

The court-appointed liquidator controls the process. However, the IA gives the creditors powers 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 will be 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).

Plan 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 plan has been implemented to agree to its terms. Their involvement is limited once the plan has been approved.

Scheme of Arrangement

Creditors must vote on the terms of the Scheme of Arrangement. 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 significant role before the CCA is implemented. It is the creditors who 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.

6.4 Claims of Dissenting Creditors

See **2.1 Overview of Laws and Statutory Regimes** and **3.5 Out-of-Court Financial Restructuring or Workout**. In summary, dissenting creditors' rights will be crammed down in accordance with the terms of the scheme if the statutory majorities are obtained in each class and the scheme is sanctioned by the BVI court.

6.5 Trading of Claims against a Company

There is no statutory prohibition on the trading of creditor claims, but notice of the assignment would need to be given to the company.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

A restructuring procedure may be utilised to reorganise a corporate group on a combined

basis. A separate scheme would be required for each scheme company, but the procedure can be co-ordinated and streamlined by the court to minimise inefficiencies.

6.7 Restrictions on a Company's Use of Its Assets

If a scheme is implemented when a company is not in provisional liquidation, no restrictions or conditions will be applied to the use or sale of the company's assets, other than any applicable contractual restrictions. If the company is in provisional liquidation, any disposition of assets would be subject to the approval of the BVI court. Contractual consents would be enforceable unless the applicable right was itself compromised by the scheme.

6.8 Asset Disposition and Related Procedures

If a scheme is implemented when a company is not in provisional liquidation, the sale of assets will be executed by the duly authorised representatives of the company, typically its directors. If a scheme is implemented when a company is in provisional liquidation, the terms of the appointment order (or subsequent orders) will determine whether and to what extent the sale is executed by the directors or by the provisional liquidators. In either case, the company would only transfer such right, title and interest as it had in the assets. In particular, any security over the assets would remain in place unless it was compromised by the scheme.

There is no specific prohibition in the BVI on creditor bidding or stalking-horse bids. However, most BVI companies do not hold assets in the BVI and a director should be mindful of restrictions on such practices in any jurisdiction in which the company operates or trades.

There is no legislation dealing specifically with pre-packaged sales, largely because the BVI did not enact the sections of the IA that deal with administration. However, if a pre-packed sale offers the creditors the best return, there are no prohibitions on an office-holder or director entering into such an agreement.

6.9 Secured Creditor Liens and Security Arrangements

Secured creditor liens and security arrangements may be released pursuant to a scheme, but it is very unlikely that secured creditors and unsecured creditors would be in the same scheme class and, therefore, secured creditors' rights could be crammed down by the votes of unsecured creditors.

6.10 Priority New Money

New money can be given priority by the company granting security to the lender or by subordinating the claims of scheme creditors through the scheme itself. Pre-existing security over an asset would take priority over any new security granted to the lender.

6.11 Determining the Value of Claims and Creditors

The process is not prescribed by statute, but if there are disputed, contingent or unliquidated claims, the scheme document will include an adjudication mechanism.

6.12 Restructuring or Reorganisation Agreement

As previously noted in **6.1 Statutory Process for a Financial Restructuring/Reorganisation**, the scheme, as embodied in the scheme document, must be approved by the requisite majorities in each scheme class and sanctioned by the BVI court, which will not do so unless satisfied as to the fairness of the scheme terms.

6.13 Non-debtor Parties

In certain circumstances, a scheme can release non-debtor parties from liabilities, provided that

there is a sufficiently close connection between the subject-matter of the scheme and the relationship between the company and its creditors/members.

6.14 Rights of Set-Off

The question of whether creditors can exercise rights of set-off or netting in a proceeding would need to be addressed in the scheme documentation.

6.15 Failure to Observe the Terms of Agreements

The implications of a company/creditor failing to observe the terms of a scheme would depend on the particular circumstances in question.

6.16 Existing Equity Owners

Existing equity owners can receive/retain any ownership or other property on account of their ownership interests.

7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS

7.1 Types of Voluntary/Involuntary Proceedings

Voluntary Liquidations

The BCA includes provisions for the voluntary winding-up of a business company, provided it has no liabilities or 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 director(s) of a company, where the purpose of the company no longer exists, or a specified event has occurred, in each case as specified in the memorandum and articles. However, a voluntary liquidator may only be appointed where the director(s) has made a declaration of solvency – Section 198(1) of the BCA. The director(s) must also provide a liquidation plan.

Where a voluntary liquidator is appointed, the liquidator must, within 14 days of the commencement of the liquidation, file a notice of their appointment in the approved form, the declaration of solvency made by the director(s) and a copy of the liquidation plan. Furthermore, 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 director(s) or members if an administrator or liquidator of the company has been appointed under the IA. Additionally, 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 individual to be appointed voluntary liquidator must also consent, in writing, to their appointment.

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.

Section 207(2) of the BCA states that a voluntary liquidator may not, without 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 Virgin Islands Official Gazette.

Insolvent Liquidations

A liquidator may be appointed over an insolvent company by the BVI court or by the members of an insolvent company. An application may be made by a creditor, the company, its directors, its shareholders or by the Attorney General or the FSC. The majority of applications are brought on the grounds of insolvency.

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, however, does not apply to voluntary solvent liquidations (unless, of course, it is a solvent liquidation of a regulated company, in which case section 200(3A) BCA states that the liquidator has to be a licensed insolvency practitioner).

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

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 and 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.

The main duties of a liquidator are to collect and realise the assets of the company and to distribute the proceeds 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 – Section 217(2) and (3) of the IA.

Unsecured creditors prove in the estate by submitting a claim form. The liquidator must then either accept the claim or reject it with reasons. Section 210(1)(a) permits a creditor to apply to the court if it is not satisfied with the liquidator's decision to expunge or reduce the claim.

It is important to note that the value of any claim is quantified by reference to the date that the liquidation commenced – Section 152(2) of the IA. A liquidator need not determine the value of each claim until there are sufficient assets available to make a distribution to creditors.

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 IR.

The IA also provides a set-off provision which may permit a liquidator to reduce any claim - Section 150(1) of the IA.

Provided there are assets available to the liquidator, a distribution will be made in accordance with the statutory order of priority (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

As with the voluntary liquidation regime, an insolvent liquidation terminates when the liquidator 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

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 sometimes include in the order of appointment that the liquidator should seek sanction of the court before selling certain assets. 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.

7.3 Organisation of Creditors or Committees

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 1% in value of the creditors of the company must agree to the resolution.

The expenses 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.

8. INTERNATIONAL/ CROSS-BORDER ISSUES AND PROCESSES

8.1 Recognition or Relief in Connection with Overseas 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).

A small number of relevant foreign countries may apply to the BVI court for assistance. They are:

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

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;
- an order requiring the examination of an individual who resides in the BVI.

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

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 in force and is unlikely to be any time soon.

8.2 Co-ordination in Cross-Border Cases

The BVI court is 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 cross-over in subject-matter. The onus is on the parties concerned to bring any related foreign proceedings to the attention of the BVI court.

In May 2019, the Judicial Committee of the Privy Council handed down judgment in the case of UBS AG New York and others v Fairfield Sentry Ltd (In Liquidation) and others [2019] UKPC 20. This appeal arose from the decision of the Eastern Caribbean Court of Appeal which dismissed the appellants' appeal from the refusal of the High Court to grant an application for an anti-suit injunction to restrain the liquidators from proceeding with their claims in the United States under Section 249 of the IA. Section 249 IA is a provision in Part VIII IA, which deals with voidable transactions within the insolvency regime. These include unfair preference payments, transactions at undervalue, voidable floating charges and extortionate credit transactions. Section 249 IA permits a liquidator to apply to the BVI court to set aside such a transaction or to vary the terms of any agreement. In Fairfield, the Appeal Board dismissed the appeal reasoning that Section 249 does not preclude foreign courts from exercising the powers under this section in a BVI liquidation.

In a recent development, the BVI High Court granted an application appointing "soft touch" provisional liquidators over a group of companies to aid restructuring in both Brazil and the United States. This is a welcome development in BVI common law and serves to illustrate further the flexibility of the BVI courts when faced with complex cross-border restructurings (see In the Matters of Constellation Overseas Ltd & others BVIHC (Com) 2018/0206). A similar approach was taken in the 2020 restructuring of In the matter of Century Sunshine Group Holdings Limited, where the BVI High Court appointed soft touch provisional liquidators over six BVI companies which formed part of the same group as part of a co-ordinated wider group restructuring across the BVI, Cayman Islands and Bermuda.

8.3 Rules, Standards and Guidelines

See **8.1 Recognition or Relief in Connection with Overseas Proceedings** and **8.2 Co-ordination in Cross-Border Cases**.

8.4 Foreign Creditors

Creditors of each class are treated equally and no preference is given to a creditor on account of where they are situated.

8.5 Recognition and Enforcement of Foreign Judgments

The BVI has a well-established regime for the enforcement of foreign monetary judgments made in personam. Final and conclusive monetary judgments are capable of recognition and enforcement in the BVI under either the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) or the common law. The BVI is not a party to any international conventions or agreements in relation to the enforcement of domestic or foreign court judgments.

The Reciprocal Enforcement Act applies only to judgments given in certain jurisdictions, namely the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia,

Grenada, Jamaica, and New South Wales (Australia).

Under the common law, the judgment creditor can apply for summary judgment on the foreign judgment as a cause of action under the doctrine of obligation by action. As long as this test is met, a foreign default judgment can be enforced, subject to considerations such as due service, fairness and public policy.

The doctrine of obligation by action does not arise in respect of non-money foreign judgments. In certain circumstances, a party with the benefit of a non-monetary foreign judgment can rely on the equitable doctrine of estoppel to obtain summary judgment in the BVI where the foreign judgment is based on a cause of action recognised by BVI law and from proceedings between identical parties with identical issues. This is on the basis that it would be an abuse of process for the claim to be re-litigated.

Under the common law, foreign monetary judgments can be enforced where:

- the court issuing the judgment had personal jurisdiction over the defendant;
- the judgment is final and conclusive; and
- the judgment has not been obtained by fraud or in breach of natural justice, and is not contrary to BVI public policy.

Therefore, the legal issues concerning the enforcement of foreign judgments typically involve challenges to enforcement on the grounds that one or more of these requirements has not been fulfilled.

As to the requirement for the foreign court to have had personal jurisdiction over the judgment debtor, the BVI court must be satisfied that the debtor was either present in the foreign jurisdiction at the time the proceedings were instituted, participated as a plaintiff or counter-claimant in those proceedings, voluntarily appeared as a defendant, or submitted to the foreign court's jurisdiction as a defendant by prior agreement. By definition, this means that the foreign proceedings must have been served upon the debtor.

Finality of Judgments

As to finality, a foreign judgment will be treated as final and conclusive if it is regarded as res judicata by the foreign court. A judgment entered in default of appearance by a defendant who has had notice of the foreign court's intention to proceed may be final and conclusive even though the court has the power to set aside its own judgment. However, the principle of res judicata is to be applied with caution to earlier proceedings resolved by a judgment in default, and the BVI court may give leave to defend if the case was decided upon documentary evidence alone and the issue upon which the defendant seeks to rely was not a necessary element in the foreign court's judgment. Judgment will not be considered final for the purposes of BVI enforcement unless/until any foreign appeals procedure has been exhausted.

As to fraud or breach of natural justice, the judgment debtor will be estopped from pleading any such challenge if they consented to the judgment. A foreign judgment will be impeachable for fraud only on the basis of newly discovered material facts that were not before the foreign court. Likewise, it will be assumed that foreign proceedings have been conducted according to the proper procedure unless the contrary is shown.

The procedure for enforcing a foreign judgment involves issuing a fixed date claim form suing for the foreign judgment debt, serving the writ upon the defendant and then ordinarily seeking summary judgment (or default judgment in the

absence of an acknowledgment of service). The court will usually not re-hear the merits of the underlying action, although the court will hear any challenge to the recognition and enforcement of the judgment. Upon judgment being granted in the writ action, it will be enforceable in the same manner as a domestic judgment.

9. TRUSTEES/RECEIVERS/STATUTORY OFFICERS

9.1 Types of Statutory Officers

The Official Receiver can be appointed to act as liquidator in the place of an insolvency practitioner. However, the 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

Voluntary liquidators are officers of the company over which they are appointed and owe statutory and fiduciary duties to the company and its stakeholders.

Provisional and official liquidators are officers of the BVI court and act as agents of the company over which they are appointed. They stand in a fiduciary position towards the company and must act in the interests of the general body of the company's stakeholders. An official liquidator is required to make "himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court" (see Gooch's Case 1872, 7 Ch App 207). Official liquidators have various statutory duties, including the duty to ensure that the assets of the company are secured, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.

Receivers must exercise their duties in good faith and for a proper purpose, and in the best interests of the person who appointed them (Section 128 of the IA).

9.3 Selection of Officers

Voluntary liquidators are appointed by a resolution of the company's shareholders. Provisional and official liquidators are nominated by the petitioner and appointed by the BVI court (which may have regard to any alternative nominees put forward by other stakeholders).

See **7.1 Types of Voluntary/Involuntary Proceedings** for a description of how statutory officers interact with company management and directors and **9.1 Types of Statutory Officers** for a description of who can and cannot serve as a statutory officer.

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, few receivers are appointed under the terms of the 1961 Act.

There are a number of individuals who cannot act as a receiver, as outlined in Section 116(1) of the IA.

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.

Restructuring professionals, attorneys, accountants or other professionals may serve as statutory officers, provided they are not excluded under Section 116(1) of the IA.

10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

10.1 Duties of Directors

As a general principle of BVI law, directors' duties are owed to the company, rather than directly to shareholders or creditors. A number of duties might be engaged in circumstances of financial difficulty, but the fiduciary duty to act in the best interests of the company will always be prevalent.

When a company is insolvent or of doubtful solvency, the directors' duty to act in the best interests of the company requires them to have regard for the interests of its creditors. It is in the interest of the creditors to be paid, and it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay. Although there is no definitive statute indicating at which point a company must enter a restructuring or insolvency process, directors can be made personally liable to the company for losses which they cause to the company if they act in breach of that duty; an example of this might be incurring additional liabilities when they knew, or should have known, that there was no reasonable prospect of the company avoiding insolvent liquidation.

10.2 Direct Fiduciary Breach Claims

A creditor could only bring a claim directly against the directors if the directors had voluntarily assumed a direct duty to the creditor. Once the company has entered into official liquidation, claims against a company's directors for breach of their fiduciary duty to the company would be pursued by the liquidator in the name of the company.

11. TRANSFERS/ TRANSACTIONS THAT MAY BE SET ASIDE

11.1 Historical 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 enters into a transaction during the statutory vulnerability period (see **11.2 Look-Back Period**) which has the effect of putting a creditor in a better position than other creditors in the company's liquidation. 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 **11.2 Look-Back Period**).

- 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. 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. Additionally, 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 a 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.

11.2 Look-Back Period

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

For preference payments and payments at an undervalue, the court can consider any payment made 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.

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

11.3 Claims to Set Aside or Annul Transactions

Only a court-appointed liquidator can bring a claim to set aside or annul a transaction under the IA. Such claims 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 their fiduciary duties.

Campbells advises on Cayman Islands and British Virgin Islands law, and has offices in Cayman, the BVI and Hong Kong. The group acts for local and overseas insolvency professionals, creditors, investors, directors and other professional service providers in connection with all aspects of the restructuring and winding up of companies, investment funds, limited partnerships and structured finance entities. Lawyers have specific experience of co-ordinating cross-border appointments, obtaining injunctions, assisting with gathering evidence and obtaining recognition and assistance from overseas courts. The team is involved in many of the jurisdiction's most high-profile disputes, liquidations and restructurings.

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