

The logo for 'The Legal 500' is displayed in a stylized, bold font. The word 'The' is in a smaller font above 'LEGAL', which is in a larger, bold font. Below 'LEGAL' is the number '500' in a very large, bold font. The entire logo is set against a dark background within a black rectangular box.

**The
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EXCLUSIVE CONTRIBUTOR
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2019

The image shows the silhouettes of three business professionals (two men and one woman) standing in a meeting. They are positioned in front of a large window that offers a panoramic view of a city skyline at dusk or dawn. The silhouettes are dark against the lighter background of the city and sky. The woman is on the left, and the two men are on the right. One man is holding a folder or a stack of papers.

The Legal 500
Restructuring & Insolvency
country comparative
guide – Q&A

British Virgin Islands

The logo for 'CAREY OLSEN' is written in a bold, white, sans-serif font. It is positioned in the bottom right corner of the page, set against a dark blue triangular background that points towards the center of the cover.

CAREY OLSEN

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At Carey Olsen, we always look at the bigger picture. In the face of opportunities or challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with outstanding client service, technical excellence and commercial insight.

BIGGER PICTURE

Security and enforcement

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?

BVI companies are usually holding vehicles, either on a stand-alone basis or as part of a wider group structure. Where BVI companies are used in holding structures, the assets that are generally the subject of a security interest are shares in BVI companies. When seeking to raise capital through debt financing, there are a number of features of BVI law that make it particularly attractive to lenders to structure a transaction through a BVI entity, or to use a BVI company as a security provider.

There are seven types of security interest that can arise under BVI law: legal mortgage, equitable mortgage, equitable charge (fixed or floating), pledge, legal lien, equitable lien, and hypothecation or trust receipt. Of these, mortgages, equitable charges, and pledges are most commonly used in relation to shares.

There are several other arrangements that parties can put in place that have the effect of giving quasi security but which do not actually create a proprietary security interest. For example, it is possible to grant a power of attorney or conditional option in favour of the secured party relating to shares, to enter into a retention-of-title agreement, or to execute undated share transfers or director's resignations/appointments. While these methods provide protection for the secured party, they do not confer a proprietary interest in the assets to which they relate, and for this reason they are not subject to the same legal considerations the courts have developed in the context of conventional proprietary security interests.

In order for a security interest to arise, it is generally necessary that six conditions be met:

1. there must be an agreement for the creation of the security. In some cases this agreement must be in writing (as where the interest to be created is a legal mortgage), and in some it must be by deed (where a legal mortgage is created in relation to land);
2. the collateral must be identifiable as falling within the security;
3. the chargor must have the power to create the security interest;
4. there must be an obligation of the chargor that the collateral is intended to secure;
5. any contractual conditions for the creation of the security must be satisfied; and
6. in the case of a pledge or a lien, possession of the collateral has been transferred.

A failure to comply with these requirements will generally mean that no security interest will arise.

In addition, if the security interest to be created is a legal mortgage, the security must be perfected by the transfer of title to the collateral to the mortgagee (though there are exceptions in relation to land, ships, and aircraft). A problem arises where the collateral for the mortgage is in the form of bearer shares, because BVI law requires that these be held at all times by a licensed custodian. In practice, this conceptual difficulty has been overcome by the custodian acting as nominee for the mortgagee rather than the mortgagor. The position is simpler in relation to registered shares: transfer instruments are executed and the register of members is updated to show the mortgagee as the new owner of the shares.

If a legal mortgage is not perfected, it will take effect as an equitable mortgage. An equitable mortgage may also be expressly created. In some cases, the mere deposit of title documents can give rise to an equitable mortgage; however, this rule does not apply in relation to shares or land in the BVI. The deposit of share certificates may, however, give rise to a pledge.

An equitable charge may be fixed or floating. Floating charges are more useful in the BVI than in some other jurisdictions: whilst they are subject to the costs of liquidation and the claims of preferential creditors, in reality there are rarely any preferential creditors and where there are, they are usually small. In addition, a properly executed and registered floating charge will take priority over fixed charges if the floating charge contains a negative pledge by the charger - and floating charges will only generally be voidable by liquidators if entered into at a time when the company was insolvent (on the cash-flow or balance sheet basis).

A pledge can only be created over a physical asset, because it requires that the secured creditor take possession of the collateral itself, in addition to the conditions outlined above. Again, a difficulty arises in relation to pledges over shares in BVI companies: as stated above, bearer shares must be deposited with a custodian, so cannot be given to the creditor; and creating a pledge by depositing a registered share certificate will create security over the certificate itself and not the shares which are located in BVI. As in relation to legal mortgages, however, the conceptual problem in relation to bearer shares may be overcome by the custodian's agreeing to act as nominee or agent for the creditor.

Registration of security interests granted by companies is optional but not mandatory, unless the collateral is land, in which case, the security interest must be registered within three months. If this deadline is not observed, a fine is payable but the security remains valid; however, unregistered security rights will be subordinated to registered charges as well as to unregistered charges that were created before the BVI Business Companies Act 2004 (BCA) commencement date, and may encounter difficulties as against a liquidator: see section 166 of the BCA and *Re Bond Worth Ltd* [1980] Ch 228.

Failure to perfect a security interest, whether, e.g. by transfer of the asset in the case of legal mortgages, or by possession of the collateral in the case of pledges, does not render it void or even voidable. It does, however, increase the risk that subsequent interests may take priority, with the effect that the creditor will have little or no recourse to the collateral. As such, it is advisable for a creditor to protect their position, by registering their security interest.

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

The enforcement of security interests is normally conducted in the jurisdiction where the relevant collateral is located. In most cases concerning the enforcement of security in assets located within the BVI, the assets in question will be shares in BVI companies. As such, most of the legal issues that arise in this context are in relation to security over shares. In practice, the common-law remedies available in the BVI are similar to those remedies available under the laws of other common-law jurisdictions.

Security Holder Remedies

As to what remedies may be available to the security holder, this question depends upon the type of security interest. In the event that there is a default on the secured obligations, the holder of a security interest over shares may have up to four primary remedies (depending upon the type of interest they hold): foreclosure; power of sale; receivership; and taking possession.

Foreclosure is a draconian equitable remedy that is only available to a legal mortgagee. The mortgagee must obtain an interim order and then a final order from the court before the mortgage can be foreclosed and the mortgagor's beneficial ownership extinguished. This can be time consuming, and the courts are reluctant to grant this remedy. In some cases, the court may reopen the foreclosure, though this does not affect the title of a bona fide third-party purchaser. If the debt owed to the creditor is less than the value of the collateral, the court will generally order the sale of the asset and an account of the proceeds

A secured creditor may be entitled to appoint a receiver over the collateral, whether out of court (if the terms of the security instrument permit it) or by order of the court. A receiver appointed over a company's shares has the power to exercise voting rights attached to them, to sell the shares, and to receive any income derived from them, such as dividends or redemption proceeds. In practice, receivers frequently exercise the shareholder's power to replace the company's directors in order to effect the sale of the company's underlying assets and distribute the proceeds by way of dividends or as direct repayment of the debt. Alternatively, the receiver may be entitled to exercise a power of sale of an asset.

Every mortgage, charge, or pledge contains an implied power of sale, and this may be exercised whether or not a receiver is appointed. There is also, for example, a power of sale implied by section 66(5)(a) of the BVI Business Companies Act 2004 where a mortgage or charge is granted over shares in a BVI company and the mortgage or charge is governed by BVI law.

In practice, the security documents will invariably include an express contractual power of sale, and it is the contractual power of sale which is the normal basis of exercise. Whether the power of sale is exercised by the creditor or a receiver they have appointed, the asset must be sold for the best price that is reasonably obtainable, and any surplus must be accounted for to the debtor.

The holder of an equitable mortgage has the same remedies as the holder of a legal mortgage, save that; the equitable mortgagee will not be able to enforce their rights against a bona fide purchaser of the asset for value without notice of the security interest; and they must seek the conveyance of the asset into their name before they can resort to remedies that are available only to a legal mortgagee, such as foreclosure.

Neither a chargee nor a pledgee has a right to seek foreclosure, but may be able to exercise a power of sale. The holder of a pledge cannot appoint a receiver. A secured creditor can usually sue upon the covenant to pay that appears in most security documents. The holder of a security interest is entitled to pursue all of its remedies concurrently or consecutively.

There are no insolvency procedures in the BVI that result in the imposition of a moratorium on secured creditors' rights to enforce their security. If a company goes into liquidation, the rights of secured creditors remain intact and they are able to enforce that security as normal. Additionally, the secured creditor can value the assets subject to the security interest and, if there is a shortfall, prove for the balance as an unsecured creditor in the liquidation, or surrender his security interest to the liquidator and prove as a wholly unsecured creditor.

Local insolvency proceedings

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?

A company is insolvent if:

- it fails to comply with the requirements of a statutory demand that has not been set aside;
- 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
- either:
 - a. the value of the company's liabilities exceed its assets, or
 - b. the company is unable to pay its debts as they fall due

Section 8(1) IA. In the BVI, there is no express duty on the directors of a company to commence insolvency proceedings at any particular time; however, there is a substantial body of case law from a number of common-law jurisdictions which confirms that the directors' common law duty to act in the best interests of the company as a whole requires them to take account of the interests of the company's creditors ahead of those of the company's members. The logic being that, when the company is insolvent or on the verge of insolvency, it is the creditors' assets (as opposed to the members' capital or profits) that are being placed at risk by the decisions of the directors. The point has recently been considered in the English case of *Sequana SA* [2019] EWCA Civ 112 where it was found that the creditors' interest duty arose when the directors knew or should have known that the company was or was likely to become insolvent. In that context, "likely" meant probable. In some cases, therefore, acting in the best interests of the company will mean recommending that the members put the company into liquidation or causing the company to apply for the appointment of a liquidator.

Section 162 IA provides that the court may appoint a liquidator because of the company's insolvency, on just and equitable grounds, or if it is in the public interest. The same section states that such an application may be brought by the company (which must act by its directors), a creditor, or a member (among others). It is noteworthy that the IA does not, expressly, list a director as having standing in their personal capacity to apply for the appointment of a liquidator (contrary to the position in England), which does leave open arguments as to whether the directors have the power to cause the company to apply for the appointment of a liquidator.

There is some English case law (that has been overtaken in England by the English Insolvency Act 1986) which suggests that the board of directors cannot cause the company to make an application to appoint liquidators unless the company's articles of association expressly confer the power to do so. These authorities suggest that the board of directors only have the power to do so with a resolution of the company's members (see *In re Emmadart Ltd* [1979] Ch 540). Those authorities have since been rejected in other common law countries (such as Australia and Bermuda) and it is possible (albeit, not certain) that the BVI Court would also adopt the more flexible approach towards the exercise of corporate powers and thus find that a board of directors has ostensible power to cause the company to make the application. This approach is particularly so when you consider the personal liability that can attach to a director for breaching their common law to act in the interest of creditors (as noted above) and statutory duties (as noted below).

If a director acts in breach of their duties, there are consequences. If a company goes into insolvent liquidation and the court is satisfied that a director "at any time before the commencement of the liquidation of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into insolvent liquidation", then it can order any director to make such contribution to the assets of the company as it considers proper. Whilst there is a defense if the director took every step reasonably open to him to minimise the loss to the company's creditors, it is often, in practice, a high threshold to meet: section 256 IA (insolvent trading).

If the court does make an order under Section 256 IA, it must be compensatory rather than penal. In addition, the court has broad powers to order persons (including director) to repay, restore or account for the money or assets, or pay compensation for any misfeasance or breach of any fiduciary or other duty owed to the company.

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 corporate insolvency procedures available in the BVI include creditor arrangements, receiverships and liquidations (including provisional liquidations). Although the IA contains provisions for administration, these have not yet been brought into force. The most common insolvency procedure in BVI is liquidation.

Liquidation

If a member wishes to apply for the appointment of a liquidator on the insolvency ground, they must first seek the leave of the court, which must be satisfied that there is a prima facie case that the company is insolvent. The court may make an order appointing a liquidator on the just and equitable ground in a variety of circumstances, including where the company was created for the purposes of fraud, or even where there is a pressing need to investigate the company's affairs.

The BVI courts will exercise insolvency jurisdiction over a company registered in the BVI as of right, even if the company does not have any assets in the BVI or has its centre of main interests in another jurisdiction.

If a court grants an application to appoint a liquidator, it will usually appoint the liquidator proposed by the applicant, provided consents to act have been given. The result is that the liquidator will immediately take office on the liquidation order being made, which avoids any delays that are sometimes occasioned in other jurisdiction by an intervening official receiver. Whilst the liquidator appointed by the applicant is initially appointed, they can be removed by the company's creditors at the first creditors' meeting. Directors' powers, functions, and duties cease on the appointment of a liquidator, save to the extent they are permitted by the IA or authorised by the liquidator. Additionally, the members of a company may collectively resolve to put the company into liquidation without the need for an application to court by passing a qualifying resolution.

Liquidations are conducted by the liquidator who is an officer of the court, though the liquidator must report to a committee of creditors in cases where a creditors' committee is formed (except in certain circumstances where the liquidator concludes that there is no real prospect of a distribution). As an officer of the court, the court exercises a supervisory jurisdiction over the liquidation and it is common for the order appointing the liquidator to require the liquidator to seek the court's sanction before exercising certain powers, such as compromising claims and entering into arrangements with the body of creditors. It is also common for the liquidator to apply to the court for directions, where he is faced with difficult issues or requires the court's assistance.

The liquidator's fundamental statutory duties are to gather in and preserve the company's assets, to decide on claims, to make distributions to creditors in accordance with the statutory priorities, and to distribute any surplus to the company's members. At the conclusion of the liquidation, the company will be dissolved.

Provisional Liquidation

The BVI courts generally hear commercial matters quickly and efficiently. It is possible to petition the court for a winding-up order and obtain the appointment of provisional liquidators within 48 hours, if the matter is very urgent. The order will be issued at the time of the hearing unless the decision is reserved. If judgment is reserved, it is typical for a decision to be given within a matter of days if very urgent, or two to three weeks if not.

In contested liquidations, it is usually possible to arrange a hearing very quickly if the matter is very urgent and if there would be significant consequences arising for one or more of the parties if the hearing were to be delayed.

In cases where no provisional liquidator is sought, the time between filing the initial application and the first hearing of the petition is generally around six weeks. This gives enough time to serve the application, advertise the hearing, and deal with other formal steps prior to the hearing.

[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 \(e.g. equitable subordination\)?](#)

In general, the following priorities apply:

- Set-off: An unsecured creditor may be able to take advantage of statutory set-off provisions where there is mutuality between credits and/or debts to the extent that there are any funds of the debtor's in its hands.
- Secured creditors: secured creditors can enforce against their collateral notwithstanding the supervening liquidation, and may also add interest to their security, subject to the note at 3 below.
- The costs and expenses of the liquidation: this includes inter alia the costs and expenses incurred by the liquidator and the liquidator's own remuneration which are themselves paid in an order of priority, see Rule 159 of the BVI Insolvency Rules, 2005.
- Preferential creditors: this class includes -
 - a. the wages and salary of present and past employees in respect of the period of six months immediately before the commencement of liquidation up to US \$10,000,
 - b. accrued holiday pay in respect of the period before the commencement of liquidation up to US \$10,000,
 - c. any amount due by the debtor to the BVI Social Security Board in respect of employees' contributions deducted from the employee and in respect of employers' contributions payable for six months immediately before the commencement of the liquidation,

- d. any amount due in respect of pension contributions or medical-insurance contributions payable in the period of twelve months immediately before the commencement of the liquidation, including amounts deducted from employees, up to the amount of US \$5,000 per employee,
 - e. sums due to the government of the Virgin Islands in respect of any tax, duty (including stamp duty), license fee, or permit, up to the total amount of US \$50,000, and
- sums due to the Financial Services Commission in respect of any fee or penalty up to the total amount of US \$20,000. Preferential claims rank equally between themselves, and if the assets of the company are insufficient to pay them all in full, they are paid rateably. Floating charges that are secured against the assets of the company (see Section 208 IA).
 - All unsecured creditors' claims.
 - Subordinated claims: a creditor may acknowledge or agree 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 under the IA, that acknowledgment or agreement takes effect. This may have the effect of making a secured creditor rank *pari passu* with unsecured creditors or an unsecured creditor only ranking after the general body of unsecured creditors have been paid.
 - Post-commencement interest: any creditor in a liquidation is entitled to claim interest on its debt in respect of the period after the commencement of the liquidation. Payment of post-commencement interest will be made out of any surplus that remains after all claims in the liquidation have been paid in full before being applied for any other purpose.
 - Non-provable unsecured creditors (possibly): in the English case of *Re Nortel Companies and others* [2013] UKSC 52, the existence of a category of debts that were not provable, and were not payable as expenses of the insolvency process were recognised. It remains to be seen if the BVI Courts will be prepared to recognise non-provable debts in the same way.
 - Members: Any surplus remaining after paying the costs and expenses of liquidation, claims and interest must be distributed to the members of the company in accordance with their rights under the company's memorandum and articles of association.

[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?](#)

The IA provides a number of voidable-transaction claims that a liquidator may make to seek recover of assets for the benefit of the company and its creditors.

There are four types of voidable transaction that a liquidator can bring upon a company going into insolvent liquidation: unfair preferences, undervalue transactions, voidable floating charges and extortionate credit transactions. In relation to most of these, several defined terms are used: 'insolvency transaction', 'vulnerability period', and 'connected person'.

Insolvency Transactions and the Vulnerability Period

In relation to unfair preferences, undervalue transactions, and voidable floating charges, the liquidator must show that the transaction was an 'insolvency transaction': in order to be an insolvency transaction, the transaction must either have been made at a time when the company was insolvent, or have caused the company to become insolvent. For these purposes, 'insolvency' means cash-flow insolvency or technical insolvency and expressly does not include balance-sheet insolvency. The liquidator is not required to prove that an extortionate credit transaction is an insolvency transaction. In some contexts, the court will presume that the transaction was an insolvency transaction, as explained below.

In relation to unfair preferences, undervalue transactions, and voidable floating charges, the 'vulnerability period' is the period beginning six months before the onset of insolvency and ending on the date on which the liquidator was appointed unless the transaction was with a person connected to the company, in which case the period is two years. In the case of extortionate credit transactions, the vulnerability period begins five years before the onset of insolvency and again ends with the appointment of the liquidator. A person is treated as being 'connected' to a company if they fall within the list of persons set out in Section 5 IA which includes *inter alios* directors or members of the company or of a related company, a different company that has a common director with the company, a company that is a subsidiary or holding company of the company, and relatives of directors.

The term 'onset of insolvency' is defined as the date on which the application for the appointment of a liquidator was filed (in the case of insolvent liquidations by order of the court), or the date on which the liquidator was appointed (in the case of voluntary insolvent liquidations).

Unfair Preferences

Looking at each claim in turn, a company gives an unfair preference if it enters into a transaction within the vulnerability period that has the effect of putting a creditor in a better position in the event of the company's liquidation than the position in which the creditor would have been if the transaction had not occurred: section 245 IA. The transaction is not an unfair preference if it is undertaken in the ordinary course of business and if the transaction is with a connected person, it is presumed that the transaction was not in the ordinary course of business.

Of note, unlike in many other common-law jurisdictions, it is not necessary for the liquidator to prove that the transferor had any intention or desire to prefer the recipient.

Transaction at an Undervalue

A company enters into a transaction at an undervalue if it transfers an asset to another for no consideration, or sells an asset for consideration that is worth significantly less than the asset's market value: section 246 IA. The transaction must be an insolvency transaction and it must have taken place within the vulnerability period.

The transaction will not be an undervalue transaction if it can be shown that the company acted in good faith and for the purposes of its business, and if at the time of the transaction there were reasonable grounds for believing the transaction would benefit the company. If the transaction is entered into between the company and a connected person, the court will presume that the transaction was an insolvency transaction and that the company did not act in good faith or have reasonable grounds for believing the transaction would benefit the company, though these presumptions can be rebutted.

If the grant of a floating charge took place within the vulnerability period and was made at a time when the company was insolvent, or caused the company to become insolvent (i.e., was an insolvency transaction), it will be voidable, to the extent that it secured previously unsecured debt: section 247 IA. It will not be voidable if it secured new borrowing or liabilities. If a charge was created in favour of a connected person, it is presumed that the charge was an insolvency transaction.

Extortionate Credit Transaction

A transaction is an extortionate credit transaction if it is concerned with the provision of credit to the company and either the terms of the credit arrangement require grossly exorbitant payments to be made in respect of the provision of credit (whether unconditionally or on the occurrence of certain contingencies) or otherwise grossly contravenes ordinary principles of fair trading: section 248 IA. It is not necessary to show that the extortionate credit transaction was an insolvency transaction.

The Relief

Despite these claims being termed 'voidable transactions', a successful claim by the liquidator does not necessarily (or ordinarily) result in the transaction being voided. In practice, the court has a very broad discretion as to what relief it grants and can make any order it deems appropriate. It may order that the transaction be set aside in whole or in part, or alternatively/additionally, it may order the defendant to make a contribution to the company to restore the parties to their original positions or otherwise.

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?

N/A

Local restructuring proceedings

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?

For companies seeking to reorganise a company's capital or debts there have, historically, been three main routes available:

- Plans of arrangement;
- Schemes of arrangement; and
- Creditors' arrangements.

Plans and schemes of arrangement are governed by the BCA and creditors' arrangements are governed by the IA.

None of these routes is directly analogous either to the English regime relating to company voluntary arrangements under Part 1 of the Insolvency Act 1986 or to that concerning company reorganisation under Chapter 11 of the United States Bankruptcy Code.

Recently, the BVI has joined other offshore jurisdictions, such as the Cayman Islands and Bermuda, in recognising that provisional liquidators can be used, in appropriate circumstances, for restructuring purposes. See in the Matters of Constellation Overseas Ltd and others BVIHC (COM) 2018/0206. It will be interesting to see whether the use of soft-touch provisional liquidations will now become more common place in the BVI.

Plans of Arrangement

Unlike schemes of arrangement and creditors' arrangements, which are based on English law, plans of arrangement were developed under Canadian law and first introduced into the BVI by the International Business Companies Act 1984. The current regime is governed by section 177 of the BCA, which defines the term "arrangement" as including:

- a. an amendment to the memorandum or articles;
- b. a reorganisation or reconstruction of a company;
- c. a merger or consolidation of one or more companies that are companies registered under the BCA with one or more other companies, but only if the surviving or consolidated company is incorporated under the BCA;

- d. a separation of two or more businesses carried on by a company;
- e. any sale, transfer, exchange or other disposition of any part of the assets or business of a company to any person in exchange for shares, debt obligations or other securities of that other person, or money or other assets, or a combination thereof;
- f. any sale, transfer, exchange or other disposition of shares, debt obligations or other securities in a company held by the holders thereof for shares, debt obligations or other securities in the company or money or other property, or a combination thereof;
- g. a dissolution of a company; and
- h. any combination of any of the things specified in paragraphs (a) to (g).

This definition is very broad. If a company's directors determine that it is in the best interests of the company, or the creditors or members of the company, they may approve a plan of arrangement. The plan must contain details of the proposed arrangement, and once the directors have approved the plan, the company must apply to the court for approval.

If the company is in voluntary liquidation, the voluntary liquidator may approve a plan of arrangement and apply to the court for approval; if, however, the company is in insolvent liquidation, the liquidator must authorise the directors to approve the plan and take the other steps set out in the BCA.

On hearing an application for approval, the court may make a variety of directions as to how the plan is to proceed, including requiring the company to give notice of the plan to specified persons or classes of persons, determining whether or not the approval of another person or class of person must be obtained, determining whether or not any shareholder or creditor of the company is entitled to dissent from the plan, conducting a hearing in relation to the adoption of the plan, and deciding whether to approve or reject the plan. If the court determines that a shareholder is entitled to dissent from the plan, that shareholder is permitted to demand payment of the fair value of his shares. If the fair value of shares cannot be agreed between the shareholder and the company, there is a statutory framework for referral of the question to a panel of appraisers, whose decision is binding.

Once the plan has been approved by the court, the directors (or voluntary liquidator) must then confirm the plan and comply with the court's directions relating to notice and obtaining the approval of specified parties. Once this has been done and the necessary approvals have been obtained, the company must execute articles of arrangement, which must contain the plan, the court's order, and details of the manner

of approval. These articles must then be filed with the Registrar of Corporate Affairs, who will issue a certificate. The arrangement comes into effect when it is registered and its implementation is overseen by the company's directors.

There is no statutory moratorium available in relation to plans of arrangement; therefore, throughout the devising, proposing, and approval phases of a plan of arrangement, the company remains vulnerable to creditors' claims.

Scheme of Arrangement

The second type of restructuring procedure is referred to as the scheme of arrangement, though this term is not referred to in the statute: section 179A of the BCA refers to 'compromise or arrangement' and further provides that 'arrangement' includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of them.

The section does not contain a great deal of detail with regard to the procedure for obtaining the court's sanction of a scheme of arrangement; consequently, the BVI court has based its approach on the practice followed by the English courts, hence the adoption of the English terminology.

Whereas plans of arrangement may be very broad, schemes of arrangement specifically relate to the company's relations with its shareholders and/or creditors. Schemes are aimed at facilitating an agreement that can enable the company to continue as a going concern and avoid formal insolvency proceedings. They are only available in relation to companies that have been formed under the BCA or companies incorporated under earlier BVI legislation or incorporated in another jurisdiction but continued under the BVI legislation, including companies in solvent or insolvent liquidation.

If a company proposes to enter into an arrangement with its creditors or members (or a class of either of those groups), the company will apply to court for an order that it should convene a meeting of creditors or members, as the case may be, to vote on whether or not to approve the scheme (the Convening Hearing). An application for such an order may be made by the company, a creditor, a member, or, if the company is in liquidation (whether solvent or insolvent), the liquidator.

At the Convening Hearing the court will consider issues concerning class composition and jurisdiction. As with an English scheme of arrangement, members and creditors are divided into classes depending on the respective rights that exist between them and the company, and the extent to which those rights stand to be varied by the scheme. The result is that often different classes of creditors and members are treated differently and a separate scheme meeting will be required for each different class.

If, at the meeting(s), a majority in number representing 75 per cent in value of the company's creditors or shareholders (or class thereof) present or by proxy vote to approve the scheme, the scheme will bind:

- all creditors or shareholders (as the case may be),
- the company,
- any liquidator that has been appointed, and
- any contributory,
- subject only to the court's approval. If the majority rejects the scheme, it will not be approved.

If the creditors and/or shareholders vote to approve the scheme, then an application must be made for the court's approval. The court will not rubber-stamp the scheme simply because it has been approved at the scheme meetings: it will have to be sure that the scheme is fair and reasonable, and that it will be efficacious.

Once a scheme has been sanctioned it must be filed with the Registrar of Corporate Affairs. The scheme takes effect from the moment of filing, and from that date onwards every copy of the company's memorandum issued after that date must have a copy of the order annexed to it.

Unless the company is insolvent when it proposes to enter into a scheme of arrangement, the directors will remain in control of the company; if the company is in liquidation, the liquidator will have control.

There is no fixed duration for a scheme of arrangement, and its length will be determined by the directions given by the court, the expedience with which meetings are convened, and the terms contained within the scheme itself.

In the BVI, the process of devising and obtaining sanction of a scheme of arrangement outside liquidation is not protected by any moratorium on creditors' claims; however, once the court sanctions the scheme, it becomes binding on all creditors and shareholders, and the provisions of the BCA relating to mergers and consolidations of companies, plans of arrangement, disposition of large assets, redemption of minority shareholdings, and the rights of dissenters cease to apply. Only creditors whose claims arise subsequently will be able to claim against the company during the term of the scheme. The company therefore remains at risk of aggressive creditors' action unless it persuades the court to use its extensive discretionary powers to stay any proceedings or suspend the enforcement of any judgment or order for a specified period of time.

Creditors' Arrangement

The third restructuring procedure is the creditors' arrangement. The aim of a creditors' arrangement is to facilitate arrangements between a financially distressed company and its unsecured creditors in order to avoid or mitigate the risk of insolvency. This is designed to be a simple process without any court involvement. A company may enter into a creditors' arrangement even if it is in liquidation.

A creditors' arrangement may affect all or part of the company's debts and liabilities and may affect the rights of creditors to receive all or only part of the debts they are owed. This is subject to the exception that the rights of secured creditors cannot be compromised without their written consent. Also, a creditors' arrangement cannot result in a preferential creditor receiving less than he would in liquidation without their written consent.

The arrangement may be proposed by any person, but a majority of 75 per cent of the company's unsecured creditors by value must vote in favour of the arrangement in order to approve it and bind dissenters. A licensed insolvency practitioner must be appointed as supervisor of the arrangement to oversee its implementation.

By contrast with plans and schemes of arrangement under the BCA, a creditors' arrangement does not require the court's approval or registration with the Registrar of Corporate Affairs. This appears to be in order to make it a quicker and simpler procedure to invoke, and any disgruntled creditor or member may apply to the court for relief on the basis that their interests have been unfairly prejudiced. There have been few creditors' arrangements in the BVI since the provisions were enacted.

Again, there is no moratorium; however, as stated above, the effect of the decision by the majority of the company's unsecured creditors to adopt a plan is to cram down any creditors who may have dissented, even where they did not receive notice of the meeting at which the arrangement was considered (although in such a case they may be able to bring a claim for unfair prejudice).

Provisional Liquidation

Lastly, as noted above, soft-touch provisional-liquidations have recently been recognised by the BVI courts. The essence of a "soft touch" provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. The purpose is to give a company the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation. It may be appropriate where there is no alleged wrongdoing of the directors.

In the *Constellation Overseas* case, it was noted that, in principle the court has a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect the assets owned or managed by the Company, and that the jurisdiction includes making such appointments to aid the company's reorganisation including cooperating with cross border reorganisational efforts aimed at achieving that overriding objective.

In order to secure a soft-touch provisional liquidation, a Court application is required and on that application, the Court can appoint a provisional liquidator where (as will be the case in soft-touch provisional liquidations) where the company consents. Also, as part of or by way or separate application, a stay to proceedings against the company can be sought; see Section 174(1) IA.

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

None of the restructuring procedures specifically contemplate post-commencement financing; however, if a scheme or plan of arrangement that provides that the company may incur new borrowing is approved by the court, there is no reason in principle why such funding cannot be obtained. The position is similar in relation to creditors' arrangements; however, if financing is obtained without the consent of the creditors and/or members, it may be that this would found a claim for relief or other sanction.

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?

N/A

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?

N/A

Existing contracts and assets / business sales

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?

The commencement of liquidation does not prima facie affect existing contracts, though the liquidator has a power to disclaim an unprofitable contract into which the company has entered by filing a notice of disclaimer with the court under section 217 of the IA. In many cases, however, the contract will include express provisions in contemplation of either party's

insolvency. The liquidator also has a power to carry on the business of the company so far as this is best interests of the company.

Nothing in the BVI's insolvency legislation invalidates termination, retention-of-title, or set-off provisions in commercial contracts, though the general common-law rules concerning these principles apply, such as the need in retention-of-title cases for the assets in question to remain identifiable and not to have been worked into new property or transferred to an innocent third party. As stated above, the IA expressly provides for a right of set-off in relation to mutual credits.

A contractual counterparty may apply to the court for an order rescinding the contract on such terms as to payment between the company and the counterparty of damages for non-performance as the court may think fit. If a counterparty is awarded damages, these may be claimed as a debt in the liquidation. No contractual counterparty may commence or proceed with any proceedings against the company without permission of the court having jurisdiction in the insolvency.

Again, the legislative provisions relating to restructuring procedures do not make express provision in relation to existing contracts.

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?

From the date of their appointment, the liquidator has custody and control of the company's assets and also the power to sell the company's property, subject only to the supervision of the court or the creditors' committee, depending on the type of liquidation. The only other qualification on the liquidator's power to sell company property and give clear title is the requirement that the liquidator notify the creditors' committee of any sale to a person connected with the company.

However, the liquidator cannot give a purchaser better title to property than the company had, though if the company has legal title, a bona fide purchaser for value without notice affecting the property will take that legal title free of equities.

The appointment of a liquidator does not affect the right of a secured creditor to take possession of and realise or otherwise deal with his collateral. A secured creditor may therefore exercise rights to foreclosure, sale, the appointment of a receiver, and so forth, that are generally available to holders of security interests (see above).

Alternatively, the secured creditor may choose to place a value on the assets that are subject to their security interest and submit a claim in the liquidation for the unsecured balance. If they do so, the liquidator may give notice of an intention to

redeem the security interest. On the expiry of 28 days, if the creditor has not sought to revise the valuation placed on the assets, the liquidator may redeem the security at the value placed on the assets.

If a secured creditor omits to disclose its security interest when submitting a claim in the liquidation of the company, the security is surrendered, though the creditor may apply to the court for relief. A secured creditor may also elect to surrender their security for the benefit of the estate, and submit an unsecured claim for the entirety of the debt they are owed.

There are no specific rules concerning credit bidding, though a secured creditor exercising a power of sale cannot purchase the asset themselves. A receiver selling on behalf of a creditor may accept a credit bid from the creditor, however. In certain cases concerning secured assets, the liquidator may cause a public sale by auction, and in those circumstances both the liquidator and the secured creditor may bid for the assets

There is no legislation dealing, specifically, with pre-packaged sales and the BVI has not enacted the parts of the IA dealing with administrations, where pre-packaged sales are more commonly seen. An office-holder is under an obligation to achieve the best return for creditors and if, on balanced and reasonable judgment, a pre-packaged sale offers the creditors the best return, there are no prohibitions on an office holder entering into an agreement.

Liabilities of directors and others

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?

Directors in the BVI owe a range of fiduciary and common-law duties to their companies, and these duties do not terminate with the appointment of a liquidator, though directors cease to have any role in the management of the company save to the extent permitted by the IA and/or the liquidator.

As stated above, when a company nears insolvency, the focus of the directors' duty to act in the company's best interests shifts from the members to the creditors. As such, the directors must be mindful of the effect their conduct of the company's affairs may have on creditors' likelihood of being repaid what they are owed.

Part IX of the IA deals with malpractice and the principal ways in which a director may be ordered to contribute assets to an insolvent company, including liability for misfeasance, fraudulent trading and insolvent trading. An application pursuant to Part IX can only be brought by a liquidator, but the provisions are not limited territorially.

In the event that a director or officer of the company has misapplied or retained or become accountable for any money of the company, or if the director could be described as being 'guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company', then the court has broad powers to make orders that such director or officer repays, restores, or accounts for money or assets or any part of it to the company as compensation for the misfeasance or breach of duty. The IA misfeasance action merely puts the powers at common law on a statutory footing, which provides for a simplified process to bring the claim (as an insolvency application) rather than as a general directors' duties claim.

The court can make an order against a company's directors if 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 the intent to defraud creditors of the company or creditors of any other person; or for any fraudulent purpose'. In such cases, the court can declare that the director is liable to make a contribution that the court considers proper towards the company's assets. This is not limited to directors and officers, but applies to anyone who has been involved in carrying on the business in a fraudulent manner. There is no statutory defence to fraudulent trading, but it is necessary that actual dishonesty be proved.

Directors' liability for insolvent trading has been summarised above, and as stated in that context any contribution that the court orders under Part IX is compensatory and not penal, and will be used to swell the assets available for distribution to the company's general body of creditors.

Who is a Director?

Other than claims against directors and other officers in respect of misfeasance, fraudulent trading, or insolvent trading, or other general grounds on which personal liability may be incurred, such as assisting in a breach of fiduciary duty or fraud, there are no routes by which other parties connected to the liquidation of a company may be liable for the debts of an insolvent debtor. However, in deciding who is a 'director' the Court is prepared to look beyond the *de jure* directors and, if other persons have actually been managing the company, *de facto* directors can be found liable too. "Shadow" directors (i.e. persons in accordance with whose directions or instructions the directors are accustomed to act) are not within the definition of directors under the BCA but are within the definition of the IA.

At present, there is no regime applicable to insolvent partnerships, though the bankruptcy of a partner will trigger the dissolution of the partnership in the absence of agreement to the contrary. The court has jurisdiction to order the dissolution of a partnership where its business can only be carried on at a loss, but only the partners can apply for such an order, and creditors have no recourse. There is no specific regime relating to voidable transactions (though section 81 of

the Conveyancing Act remains available). If the partnership is a limited partnership, only the general partner may be sued personally, and commonly limited liability companies are used as sole general partners, effectively removing the risk of personal liability for partnership debts.

Only if there is a specific contractual provision will parent or group companies become liable for the debts of a related company, unless it is possible to pierce the corporate veil and identify the parent with the subsidiary.

[Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?](#)

The effect of restructuring proceedings on directors' liabilities, etc., will depend on the terms of the arrangement in question. If there is no express provision releasing directors, they remain liable.

Directors of a company that is dissolved following its liquidation will be given a reprieve in relation to potential claims; however, in certain circumstances a dissolved company may be restored into liquidation for the purpose of realising an asset or pursuing a claim that was not dealt with during the liquidation. A claim against a malfeasant director may be sufficient grounds on which to seek such a restoration.

[Foreign debtors and recognition issues](#)

[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?](#)

Part XVIII of the IA adopts the UNCITRAL Model Law on Cross-Border Insolvency for recognising foreign office holders, and for giving and seeking assistance in insolvency proceedings; however, this Part has not been brought into force, and there are no indications that it will come into force in the near future. As such, there is no formal procedure by which foreign office-holders may seek recognition in the BVI courts and thereby be afforded the same powers as a locally appointed office-holder.

Foreign Office Holders: Assistance

Part XIX of the IA does, however, provide a basic statutory framework for judicial assistance in insolvency proceedings. It allows foreign representatives in certain types of insolvency proceedings to apply to the BVI court for assistance. It also preserves the court's common-law powers to provide aid in relation to foreign proceedings. The proceedings to which Part

XIX applies are collective judicial or administrative proceedings in which the property and affairs of the debtor are subject to control or supervision by a foreign court taking place in designated territories. This definition is wide enough to encompass certain types of foreign restructuring procedures.

The BVI court, when faced with such an application, is required to do what will best ensure the economic and expeditious administration of the foreign proceedings, to the extent that this is consistent with certain guiding principles. Section 467 IA states that the orders that the court can make in aid of the foreign proceedings are wide, and include orders:

- restraining the commencement or continuation of proceedings against a debtor or in relation to the debtor's property,
- restraining the creation, exercise or enforcement of any rights against the debtor's property,
- requiring a person to deliver up the property of the company to the foreign representative,
- making any order or granting any relief the court considers appropriate to facilitate, approve or implement arrangements that will result in the coordination of BVI insolvency proceedings with foreign insolvency proceedings,
- appointing an interim receiver of any property of the debtor, and
- making such other order or granting such other relief as it considers appropriate.

The provisions appear to be wide enough for the BVI court not only to provide procedural assistance but also to apply substantive principles of BVI insolvency law, and the BVI court has discretion whether to apply the law of the BVI or the law applicable to the foreign proceedings.

It is important to note that the court will only be able to assist the foreign office holder under these statutory provisions if the proceedings are taking place in one of the following jurisdictions: Australia; Canada; Finland; Hong Kong; Japan; Jersey; New Zealand; the UK; and the USA. If the foreign office-holder was appointed in proceedings in a different jurisdiction, the support they may receive will be very limited, though they will be able to bring certain claims based on their title to assets contained in the insolvent estate (including causes of action), if they can evidence that sufficient title is vested in them.

The BVI courts have had a number of opportunities to consider the scope of Part XIX. In *Irving H Picard v. Bernard L Madoff Investment Securities LLC BVIHCV 140 of 2010*, unreported (2010), Mr Pickard, the trustee appointed in the US liquidation of Bernard L Madoff Investment Securities LLC, sought (1) recognition in the BVI as a foreign representative, (2) permission to apply to the BVI court for orders in aid of the

foreign proceedings, and (3) permission to require any person to deliver up to him any property belonging to the company. Deciding the case against Mr Pickard, Bannister J held that foreign representatives are confined to relying upon Part XIX, because the legislature had decided not to bring the alternative provisions in Part XVIII into force. The key difference between the two Parts was that whereas Part XVIII conferred status on foreign representatives through recognition of the foreign proceedings, Part XIX merely gave the foreign representative express rights to apply to the court for orders in aid, but without conferring status. The codification of rules on recognition of foreign office holders in Part XVIII had resulted in the implied repeal of the common-law rules of recognition, so Mr Pickard could only rely on the support afforded by Part XIX. The court then held that because Part XIX operated on an 'application-by-application' basis it could not give Mr Pickard any general authority or special status, but would have to hear individual applications for specific orders.

In *Re FuturesOne Diversified Fund SPC Ltd BVIHCM (COM) 113, 114, 115 and 116 of 2012, unreported (2013)*, the court had to consider the position of a receiver appointed by the United States District Court for the Northern District of Illinois on the application of the United States Commodity Futures Trading Commission. An application had been made by the joint liquidators of certain funds incorporated in the BVI for a declaration that they had been validly appointed. The receiver applied to be added to the proceedings, either under the court's inherent jurisdiction or under Section 273 of the IA as a person 'aggrieved by an act, omission or decision' of a company liquidator so that he could oppose the liquidators' application and seek orders reversing everything that had been done, on the basis that it was done to avoid the effect of the order by which the receiver had been appointed. He also sought an order under Section 467 of the IA in support of the Illinois proceedings staying the BVI liquidations.

This case was also heard by Bannister J. In relation to the latter application, his Lordship held that the ability to make orders in aid of foreign proceedings was limited to foreign proceedings for the purpose of 'reorganisation, liquidation or bankruptcy', and that on the evidence before the court it appeared that the purpose of the US receivership was to protect investors rather than for any of the specified purposes. Accordingly, Bannister J held that the US-court-appointed receiver had no standing to make any application under Section 467 of the IA. In relation to the receiver's application to reverse the acts of the liquidators, the court held that the liquidators' claim that they had been appointed was not an 'act, omission or decision' of the joint liquidators within the meaning of the Act, so the receiver did not have standing under Section 273 of the IA. In any event, having concluded that the liquidators were validly appointed, the judge held that there was nothing that could have prejudiced the receiver.

The case of *In the Matter of C (a bankrupt)* concerned an application brought by trustees in bankruptcy who had been appointed under the laws of Hong Kong for recognition in the BVI of the Hong Kong proceedings and the trustees' appointment. Bannister J reviewed his earlier decision in *Pickard v. Bernard Madoff Investment Securities LLC (supra)* and stated that Part XIX was not an exhaustive code in relation to the court's jurisdiction to assist foreign insolvency officials: the effect of Section 470 of the IA was to preserve the common-law jurisdiction to assist foreign representatives as defined in Section 466 IA. (This Section requires that the foreign office holder be a person acting as an office holder in insolvency proceedings in a relevant foreign country designated as such by the Financial Services Commission of the BVI. If the jurisdiction in which the foreign office holder was appointed has not been designated by the FSC, Section 470 is of no assistance.

Foreign Proceedings and Foreign Companies

If a BVI company has been wound up or is in the process of being wound up by a foreign court, it can nevertheless be placed in liquidation in the BVI by either of the two routes available (i.e., the appointment of a liquidator by the court or by the members of a company). A foreign company that is in liquidation abroad may also be placed in liquidation in the BVI, but only through the mechanism of a court-appointed liquidator. In such situations, the liquidation of the company in its place of incorporation will generally be regarded as the primary liquidation and, in common-law countries at least, all others will be treated as 'ancillary' or secondary liquidations in which the liquidator's powers will be confined to collecting and distributing the assets in that jurisdiction.

If a liquidator is appointed over a BVI company, he or she becomes the appropriate person to deal with the company's assets in place of the directors. The liquidator will be recognised as having the authority to administer the assets of the company worldwide, but the recognition of his or her authority abroad is effectively a matter for the foreign courts in the relevant jurisdiction. Most common-law jurisdictions will generally recognise a liquidator of a foreign company appointed by the court of the place of incorporation.

The JIN Guidelines

Recently, the BVI has taken steps to promote the efficient management of cases involving concurrent insolvency or restructuring proceedings in multiple jurisdictions. In May 2017 the BVI Commercial Court formally adopted new guidelines for communication and cooperation between courts in cross-border insolvency matters. The initiative, which was the fruits of the Judicial Insolvency Network's activities (the JIN), has proved very popular among offshore practitioners and judges alike. The membership continues to grow with Florida, Seoul and the Cayman Islands joining during 2018.

The guidelines are designed primarily to enhance communication between courts, insolvency representatives, and other parties as they deal with the challenges of global restructurings and insolvency. One of the key objectives is that with the increase in efficiency stakeholders will see a reduction in delay and cost.

The guidelines are intended to be flexible and subordinate to local laws and sovereignty; however, they reflect the view of the judiciary on the importance of coordination and cooperation in cross-border insolvency proceedings: for example, the first guideline encourages practitioners to communicate and cooperate with their foreign counterparts from the outset of proceedings.

Although the JIN guidelines may not end turf wars between appointees, they are likely to bring these disputes before the courts at an earlier stage, to open the debate to the relevant courts, and to promote collaboration rather than conflict, and these aspects alone may well promote a culture of cooperation that will benefit stakeholders in cross-border insolvency procedures.

[Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?](#)

Section 163 IA gives the court power to appoint a liquidator over an insolvent company that is not incorporated in the BVI, but only if that company has a sufficient connection to the BVI. Such a connection will exist if the company has or appears to have assets in the BVI, if it is carrying on or has carried on business in the BVI, or if there is a reasonable prospect that the appointment of a liquidator in the BVI will benefit the creditors of the company. Even if such a connection is established, the BVI court retains discretion regarding whether or not to appoint a liquidator.

[Corporate groups](#)

[How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders?](#)

There are no specific provisions of the IA that deal with the restructuring or liquidation of groups, though it is possible that an arrangement could be tailored towards rescuing a group of companies in financial difficulties. In such a situation, the relevant approvals would be needed from the different classes of stakeholder and (save in the case of creditors' arrangements) the court would need to be satisfied that the arrangement satisfied the relevant requirements. Although a creditors' arrangement might be formulated to rehabilitate a group of companies, there might be a greater risk that a disgruntled shareholder or creditor might allege that their interests were unfairly prejudiced.

[Opinion](#)

[Is it a debtor or creditor friendly jurisdiction?](#)

While there are measures that are designed to protect both types of stakeholder, and the BCA provides significant advantages for companies while they are solvent, the onset of insolvency triggers a number of important protections for creditors. As such, the BVI is likely to be seen as a creditor-friendly jurisdiction. There is no real parallel to the 'debtor-in-possession' principle that applies in some jurisdictions, and, as noted above, company directors only retain such powers after the making of a liquidation order as the liquidator permits.

[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 \(e.g. availability of state support\)?](#)

As noted above, there are relatively few categories of preferential creditors. Because BVI companies generally operate exclusively outside the BVI, there is rarely any specific public-policy issue concerning employees or other protected group within the territory. In addition, many BVI companies are holding companies, so do not employ many people.

[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?](#)

There is no route by which a moratorium can be triggered for the benefit of companies in distress. This means that in some situations where the rescue of a company may be possible, an uncooperative creditor or member could upset the process of negotiating a sensible plan or scheme of arrangement, or creditors' arrangement, by bringing an application for the appointment of a liquidator.

This has been mitigated, in part, by the BVI Court's opening the door to provisional liquidations to support the restructuring of companies (as noted above).

Finally, the BVI has not brought provisions enacting the UNCITRAL Model Law into force, so the routes by which a validly appointed foreign office-holder can seek recognition and support are limited.

About Carey Olsen

Carey Olsen is a leading offshore law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey from a network of nine international offices.

We provide legal services in relation to all aspects of corporate and finance, trusts and private wealth, investment funds, insolvency, restructuring and dispute resolution.

Our clients include global financial institutions, investment funds, private equity and real estate houses, multinational corporations, public organisations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

We work with leading onshore legal advisers on international transactions and cases involving our jurisdictions.

In the face of opportunities and challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with consistently high levels of client service, technical excellence and commercial insight.

Our Restructuring and Insolvency practice

Our restructuring and insolvency lawyers apply their knowledge of insolvency, corporate and banking law, regulatory guidance and litigation to the full spectrum of cross-border restructuring, recovery and insolvency matters involving our offshore jurisdictions.

We work in partnership with the world's leading insolvency practitioners, onshore law firms, accountancy and forensic practices, advising the whole spectrum of stakeholders, including liquidators, receivers, creditors, investors, directors and professional service providers. Our institutional client base includes private equity, venture capital, banking, real estate, financial services, corporate and private trusts and investment managers.

Our lawyers have been involved in a very significant number of the major formal insolvency proceedings in recent years in the jurisdictions in which we practice, and have played a key role in the development of the law in many key areas. They have a practical and deep technical understanding of the issues that can arise in restructuring situations, whether around merger, acquisition, reorganisation, workout or recapitalisation activities. They focus their advice on furthering our clients' commercial aims; typically preserving the assets of a business or the value of an investment, and building a viable restructuring transaction, exit strategy or litigation plan.



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The Legal 500 & The In-House Lawyer

Comparative Legal Guide British Virgin Islands: Restructuring & Insolvency (3rd edition)

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

This Q&A is part of the global guide to Restructuring & Insolvency (3rd edition).



PLEASE NOTE

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