

## 2015 Insolvency and Corporate Reorganisation Report

Service area / [Dispute Resolution and Litigation, Restructuring and Insolvency](#)

Location / [British Virgin Islands](#)

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### Processes and procedures

#### What reorganisation and bankruptcy processes are available for financially troubled debtors?

The Insolvency Act 2003 (Act) and the Insolvency Rules 2005 set out the various insolvency proceedings available in the British Virgin Islands (BVI). Although included at Part III of the Act, the administration provisions are not yet in force. The BVI Business Companies Act (BC Act) includes provisions for reorganisation.

In insolvent liquidation a liquidator may be appointed: (i) by resolution of the members of the company approved by at least 75% of the members (or such higher threshold as required under the memorandum and articles of association of the company); or (ii) on application to the BVI High Court (Court) by the company, a creditor, member, a supervisor of a creditors' arrangement of the company, the BVI Financial Services Commission (Commission) or the Attorney General. The Court may appoint a liquidator if: (i) the company is insolvent; (ii) the Court believes it is just and equitable to do so; or (iii) the Court believes that it is in the public interest to do so.

The directors and other officers of the company remain in office but cease to have any powers, other than those permitted under the Act. The liquidator's principal duties are to collect in and liquidate the assets of the company in order to satisfy creditors' claims.

In a company creditors' arrangement, the directors (except when the company is in liquidation) may propose an arrangement and nominate an interim supervisor to act in relation to a proposed arrangement if: (i) they believe the company is, or likely to become, insolvent; (ii) they approve a written proposal; and (iii) nominate an insolvency practitioner as interim supervisor. Where a company is in liquidation, the liquidator may make the proposal.

The proposal needs to be approved by a 75% majority in value of the creditors, following which the supervisor is appointed. Where a proposal is approved, it is binding on the company, each creditor and each member. The supervisor takes possession of the assets of the company included in the arrangement; however, the directors or the liquidator remain in control of the company.

In a scheme of arrangement, where an arrangement is proposed between a company and its creditors or between the company and its members, the Court may, on the application of the company, a creditor, a member or a liquidator, convene a meeting of creditors or members. If a majority in numbers representing 75% in value of the creditors or members, present and voting at the meeting agrees to any arrangement, once sanctioned by the Court, it will be binding on all creditors or the members, as the case may be and the company. If the application is by a liquidator, it will be binding on the liquidator and on every person liable to contribute to

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the assets of the company in the event of its liquidation. There is no statutory requirement that the company be insolvent to propose or enter into the arrangement. Unless the company is in liquidation, the directors of the company remain in control of the company.

In a plan of arrangement a company may: 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; and, approve dissolution. If the directors believe it to be in the best interests of the company, the creditors or the members, the directors may approve a plan of arrangement (or a voluntary liquidator appointed under the BC Act may approve a plan of arrangement if in office). An application is then made to the Court to approve the arrangement. The Court may approve, amend or reject the proposed arrangement. Unless the company is in voluntary liquidation, the directors remain in control of the company.

In voluntary solvent liquidation, a solvent company can be liquidated under the BC Act. A declaration of solvency, a statement of the company's assets and liabilities and a liquidation plan for the company are approved by the directors of the company. Resolutions of directors and members are passed to approve the liquidation plan and appointment of the liquidator. The directors remain in office but have only limited powers.

#### Is a stay on creditor enforcement action available?

In a post-petition stay, where a liquidation application is filed with the Court but not yet determined, a request for a stay of an action or proceeding may be made by a person with standing under section 170(2) of the Act where an action or proceeding is pending against the company in the BVI Courts. The stay may remain until liquidators are appointed or the liquidation application is dismissed or withdrawn.

From the commencement of a liquidation under the Act, unless the Court otherwise orders, no person may commence any proceedings or exercise any right or remedy in respect of the company or its assets. The stay on proceedings will remain in place until the conclusion of the liquidation.

The stay does not affect the right of a secured creditor to deal with assets over which that creditor has a security interest.

There is no stay on proceedings available for a company creditors' arrangement, a scheme of arrangement (other than where carried out within an insolvent liquidation), a plan of arrangement or a voluntary solvent liquidation.

A company creditors' arrangement will not, without the express written agreement of the secured creditors or preferential creditors of a company concerned affect their respective rights.

#### What are the key features of a reorganisation plan and how is it approved?

Please see question 1.1.

#### Can a creditor or a class of creditor be 'crammed-down'?

In a company creditors' arrangement, where a proposal is approved by creditors, the arrangement is binding on the company, each member and each creditor of the company as if they were a party to the arrangement.

In a scheme of arrangement, an arrangement pertaining to creditors is binding on all creditors or class of creditors, and on the company. If a company is in liquidation the arrangement will bind the liquidator and every person liable to contribute to the assets of the company on its liquidation.

#### Is there a process for facilitating the sale of a distressed debtor's assets or business?

One of the liquidator's principal duties is to take possession of, protect and realise the assets of the company. The liquidator has the power to dispose of the assets or business of the company.

There is no specific prohibition in the BVI on credit bidding or stalking-horse bids. On the basis that most BVI companies do not hold assets in the BVI, this will frequently be determined, at least in part, by onshore requirements.

#### What are the duties of directors of a company in financial difficulty?

Once a company is insolvent or of doubtful solvency, it is the duty of the directors to take into account the interest of the creditors. On the insolvent liquidation of a company, the directors are subject to potential liabilities under the Act for: fraudulent trading; insolvent trading; fraudulent conduct; or misfeasance or breach of fiduciary duties.

The insolvent trading section of the Act provides that if before a company is liquidated, a director knew or ought to have concluded there was no reasonable prospect that the company would avoid insolvent liquidation and he was a director at that time, then the liquidator may apply to the Court for an order against such person to make a contribution to the company's assets. The Court will not make such an order, if on realising there was no prospect of the company avoiding insolvency, the director took every step reasonably available to minimise loss to the company's creditors.

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### What priority claims are there and is protection available for post-petition credit?

In liquidation, assets are applied in the following order: (1) in paying the costs of the liquidator; (2) in paying the preferential claims admitted by the liquidator; (3) in paying all other claims admitted by the liquidator; and (4) in paying any interest payable under the Act. Any surplus assets are distributed to the members.

Preferential claims charged by the firms are limited in amount but include: (i) BVI government for taxes and other sums up to \$50,000; (ii) the Commission for any unpaid fees up to \$20,000; (iii) employees' claims for wages for the six months prior to the liquidation (capped at \$10,000); (iv) employers' contributions to social security for six months prior to the liquidation and employees' contributions deducted from the employee (no limit); and (v) pensions contributions for 12 months (capped at \$5,000 per employee).

Post-petition credit may be provided to the company but is afforded no legislative protection and the directors potentially run the risk of being liable for insolvent or even fraudulent trading in obtaining such finance while the company is insolvent or of doubtful solvency. It is common for financing to be provided to fund the liquidator's costs and expenses, with such financing being repaid as a priority as part of the costs of the liquidation if assets are recovered.

### Is there a different regime for banks and other financial institutions?

There is no specific insolvency regime in the BVI for banks and other financial institutions. Part VII of the Act, sets out additional steps that apply to the liquidation of insurance companies.

## International/cross border issues

### Can bankruptcy or reorganisation proceedings be opened in respect of a foreign debtor?

The Court may, on application by a company, creditor, member, the Commission or the Attorney General appoint a liquidator to a foreign company if the Court is satisfied that the company has a connection with the BVI and satisfies one of the conditions set out at section 163(1) of the Act.

A foreign company has a connection with BVI if: (i) it has assets in the BVI; (ii) has carried on business in the BVI; or (iii) there is a reasonable prospect that the appointment of a liquidator will benefit the creditors of the company. Members of a foreign company are unable to appoint a liquidator under the Act by resolution of members.

### Can recognition and assistance be given to foreign bankruptcy or reorganisation proceedings?

Under Part XIX of the Act (orders in aid of foreign proceedings), a foreign representative from certain designated countries (Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the US) may apply to the Court for an order in aid of foreign proceedings. The Court has wide powers set out under section 467(3) of the Act. No such order will affect the right of a secured creditor to deal with the property of the company over which the creditor has a security interest.

In *Re C* (a bankrupt) BVIHC 0080/2013, the BVI Court permitted common law recognition of a foreign bankruptcy trustee for the first time in the BVI. However, the Court held that such recognition is limited to foreign representatives from countries designated under Part XIX of the Act. In *Singularis Holdings v PricewaterhouseCoopers* (2014), the Privy Council determined that there is a power under common law to assist a foreign insolvency practitioner in obtaining information, but that such power is limited to assistance available under the law by which the foreign office holder is appointed. This is significant for the BVI, as it may permit foreign office holders from a non-designated country to apply to the BVI Court to obtain information under common law (provided such relief is also available in the jurisdiction in which they are appointed).

Part XVIII of the Act, enacts the United Nations Commission on International Trade Law (Uncitral) Model Law on cross border insolvency. However, this part of the Act has not yet been brought into force.

## Other material considerations

### What other major stakeholders (such as governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

If a company is, or was at any time, regulated in the BVI, then the Commission will need to be notified of an appointment of an interim supervisor or supervisor. If the members of a regulated company seek to pass resolutions to liquidate the company, then they must give the Commission at least five business days' notice before doing so, otherwise the resolutions are void and of no effect.

With regard to employees and pensions please see question 1.7.

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## Current trends

### Outline any bankruptcy and reorganisation trends specific to your jurisdiction.

There has been a drop-off in the number of liquidation applications filed in the BVI Court in 2014 after a record number in 2013. However, there remains a steady flow of significant high-value liquidations.

Government and the financial services industry are in consultation about updating and improving the Act, with resulting amendments expected during 2015.

As described above, the Singularis decision may have an important impact on how cross-border insolvencies are treated in the BVI.



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