Restructuring and Insolvency in British Virgin Islands: Overview

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A Q&A guide to restructuring and insolvency law in the British Virgin Islands.

The Q&A gives a high level overview of the most common forms of security granted over immovable and movable property; creditors' and shareholders' ranking on a company's insolvency; mechanisms to secure unpaid debts; mandatory set-off of mutual debts on insolvency; state support for distressed businesses; rescue and insolvency procedures; stakeholders' roles; liability for an insolvent company's debts; setting aside an insolvent company's pre-insolvency transactions; carrying on business during insolvency; additional finance; and multinational cases

Forms of Security

1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

Immovable Property

Common forms of security and formalities. The most common forms of security granted over immoveable property are as follows:

- **Mortgage.** A mortgage can be a legal mortgage or an equitable mortgage. However, it is rare for a true legal mortgage to be granted (that is, where the legal title to the asset of the mortgagor is transferred to the mortgagee as collateral for a debt or other obligation owed to a lender, subject to a right to have the asset re-conveyed to the mortgagor once the debt or obligation has been satisfied). A legal mortgage is now usually created by the mortgagor by executing a document creating a charge by way of legal mortgage, which provides the lender with a legal interest in the asset. Therefore, the term "charge" and "mortgage" are often used synonymously although they are two distinct legal concepts.
- **Equitable fixed charge.** An equitable fixed charge does not:
    - transfer legal or equitable title to the lender; or
    - provide a right of possession of the secured asset.

The terms of the equitable charge usually provide the lender with the ability to sell the asset and prevent the chargor from disposing, in whole or in part, of the asset subject to the charge without the chargee releasing the charge, in whole or in part. A fixed charge will be created if:

- the asset is, or is capable of being, ascertained; and
- the charge gives the lender control of the asset.

- **Floating charge.** A floating charge is often granted by a company over all its assets. Provided the floating charge has not crystallised, the company is usually still permitted to dispose of assets that are subject to the floating charge (in the ordinary course of business).

A charge or mortgage over land must be:

- Created by deed.
- Evidenced in writing.
- Signed by the debtor.

Formalities: general requirements. The *BVI Business Companies Act (as amended)* (Companies Act) provides that both the:

- Governing law of a charge created by a BVI business company can be the law of such jurisdiction as may be agreed between the BVI business company and the secured party.
- Charge will be binding on the BVI business company to the extent, and in accordance with, the requirements of that governing law.

It is therefore possible, and relatively common, for the security to be governed by foreign law so, in those circumstances, consideration will need to be given to the requirements of the applicable foreign law.

If BVI law applies, then the following general requirements will need to be met:

- There must be an agreement for security conforming to statutory formalities (if any).
- The asset to be given in security must be identifiable as falling within the scope of the agreement.
- The debtor must have the power to give the asset in security.
- There must be some current obligation of the debtor to the creditor which the asset is designed to secure.
- Any contractual conditions for the attachment must have been fulfilled.

In addition, for a legal mortgage, title to the asset must be transferred.

It is beyond the scope of this Q&A to go into the variety of consequences that may arise where the above formalities of any particular type of security have not been met.

Registration. A BVI company must keep a private register of all the relevant charges that it creates at its registered office. This register is not publicly available for inspection in the BVI.

A BVI company can register a charge on its public register of charges to obtain priority ranking for the secured party. This register is maintained by the *BVI Registrar of Corporate Affairs* (BVI Registrar). Public registration is not mandatory, but (generally speaking) it is the public register and not the private register that determines the priority of security under BVI law. If the charge relates to land in the BVI, it should be registered with the Land Registry in the BVI.

Effects of non-compliance. Failure to maintain the mandatory private register of charges can result in a fine of up to USD5,000 for the company. However, an unregistered charge would still be valid and enforceable in accordance with its terms.

If a company or a chargee fails to register the charge in the company's public register of charges and where there is no inter-creditor agreement to the contrary (subject to the exceptions for charges granted under the *International Business Companies Act 1984* (as amended) or by companies prior to continuing into the BVI from another jurisdiction), any charge over the same immovable asset filed at the BVI Registry will take priority over a charge granted under the Companies Act that is not registered at the BVI Registry. Consequently, while failure to register a charge on a BVI company's public register of charges will not render the security void or voidable, the consequences of failing to register a charge can be very serious.

Movable Property

Common forms of security and formalities. The most common forms of security granted over moveable property are as follows:

- **Floating charge.** See above, *Immovable Property*.
- **Equitable mortgage or charge**. See above, *Immovable Property*.
- **Pledge.** This is a possessory form of security in which a lender takes possession of an asset which provides the pledgee with a common law power of sale. A pledge is not appropriate for registered shares of a BVI company which are an intangible asset. It may be possible to grant a pledge over bearer shares where the authorised custodian holding the bearer shares agrees with the lender to act as agent of the lender. However, there is some debate in the BVI as to whether such a pledge would be valid and enforceable. In terms of compliance with formalities, possession of the collateral will need to be transferred. A pledge will need to be registered in the same manner as any other charge.

Formalities: general requirements. For formal requirements, see above, *Immovable Property*.

In addition, for security over BVI bearer shares, the secured party (or its nominee) needs to take possession of the bearer shares certificate. This will therefore necessarily require the involvement of the custodian holding the bearer shares.

Further, for legal liens and pledges, actual or constructive possession must be given to the creditor.

Registration. For registration formalities, see above, *Immovable Property*.

Effects of non-compliance. The effects of non-compliance are the same as for immovable property (see above, *Immovable Property*).

Creditor and Contributory Ranking

2. Where do creditors and contributories rank on a debtor's insolvency?

The appointment of a liquidator does not affect the right of a secured creditor to enforce any security interest it may have over the assets of the company. In general, a secured creditor will seek to either:

- Enforce its security and take control of the assets subject to its security interest.
- Reach an agreement with the liquidator as to how the assets will be dealt with as part of the liquidation.

On the sale of the assets subject to a security interest, secured creditors are paid first, up to the level of their debts. If there are insufficient funds from the disposal of the assets subject to the security interest, the secured creditor will rank as an unsecured creditor for any shortfall. The important exception to this relates to floating charge assets. Section 208 of the *Insolvency Act 2003* (Insolvency Act) provides that the costs and expenses of a liquidation, and any preferential creditors, take priority over floating charge creditors where the company's assets are insufficient to pay such claims and expenses.

In a liquidation (see *Question 7*), subject to the rights of secured creditors (see above), the assets of a company are distributed in the following order:

- Costs and expenses, in accordance with the prescribed priority under Rule 199 of the *Insolvency Rules 2005* (as amended) (Insolvency Rules):
    - costs and expenses properly incurred by the liquidator in preserving, realising or getting in the property of the company or carrying on the company's business;
    - the costs and expenses of the company complying with a notice issued by the Official Receiver under section 271(2) of the Insolvency Act;
    - the remuneration of the provisional liquidator;
    - the deposit lodged on an application for the appointment of the provisional liquidator;
    - the costs of the application on which the liquidator was appointed;
    - any costs allowed in respect of the preparation of a statement of affairs;
    - the costs of any creditors' committee appointed in the liquidation;
    - any disbursements properly paid by the liquidator;
    - the remuneration of anyone employed by the liquidator;
    - the remuneration of the liquidator; and
    - any other fees, costs, charges or expenses properly incurred in the course of the liquidation.

- Preferential claims admitted by the liquidator in accordance with Schedule 2 of the Insolvency Rules which include claims by employees, debts owed to the BVI Social Security Board, sums due in respect of pension contributions and medical insurance, taxes and duty owed to the BVI Government and fees payable to the *BVI Financial Services Commission* (FSC). Most claims made under these categories are subject to a maximum amount which may be regarded as preferential. Preferential claims rank equally between themselves and, if the assets of the company are insufficient to meet the claims in full, they will be paid rateably.
- All other claims admitted by the liquidator. If the company has insufficient assets to meet all these claims, the claims will rank *pari passu* among themselves.
- All interest payable under section 215 of the Insolvency Act.
- Any surplus assets that remain will be distributed to the members of the company.

Unpaid Debts and Recovery

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

Retention of title clauses (that is, where the seller retains legal title over goods until they are paid for in full) are recognised and enforceable under BVI law.

There is no reported BVI case law which considers retention of title clauses. However, the English legal precedents are persuasive in the BVI.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Questions 6* and *7*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

The most common debt enforcement mechanism available in respect of a BVI company is the statutory demand, which is a formal written demand for the payment of an undisputed debt. The demand must meet the requirements of the legislation and be properly served on the company. If the demand is not settled in full or set aside following an application by the debtor made within strict time limits, the company will be deemed insolvent and vulnerable to an application to appoint liquidators.

The following alternative procedures are available:

- **Court judgment.** A creditor can issue a civil claim against a debtor for a due and outstanding debt. If the court finds in the creditor's favour, the creditor can obtain judgment for the debt. If the debtor fails to file an acknowledgement of

service or defence, the creditor may be able to obtain default judgment. Alternatively, where a debtor files a defence but has no real prospect of successfully defending the claim, the court may give summary judgment in the creditor's favour.

If the debtor fails to pay the judgment debt, the creditor can (in appropriate circumstances):

- apply to the court to appoint a liquidator to the debtor;
- obtain a charging order over the debtor's assets;
- apply to the court for the appointment of a receiver by way of enforcement; and/or
- obtain an attachment of debts order.

- **Receivership and administrative receivership.** A secured creditor can appoint a receiver over the assets of a debtor to exercise its:
  - statutory rights (for example, where a mortgage has been granted over property or a mortgage or charge has been granted over shares); or
  - contractual rights (for example, under a debenture or other security document).

  The holder of a debenture or other instrument secured by a floating charge over the whole or substantially the whole of the debtor's company's assets can (by way of an application to court or pursuant to the powers in the security document) appoint an administrative receiver.
- **Insolvency set-off.** Mutual debts are set-off in insolvency proceedings (section 150, Insolvency Act). However, it is possible for parties to waive their right to claim an insolvency set-off. Set-off will not be available where a creditor knew that the debtor was insolvent at the time of the transaction(s) which gave rise to the debt.
- The above procedures are available to foreign creditors as they are to BVI creditors.

State Support

5. Is state support for distressed businesses available?

There is no state support for distressed businesses in the BVI.

Rescue and Insolvency Procedures

6. What are the main rescue/reorganisation procedures in your jurisdiction?

Company creditors' arrangement (CCA)

Objective. A CCA is a compromise between a debtor and its creditors under which the debtor and its creditors can implement a debt restructuring pursuant to a creditor-agreed arrangement the effect of which may be to:

- Vary the rights of the creditors.
- Cancel a liability of the debtor (in whole or in part).

Initiation. While there is no fixed obligation for directors of a company to initiate a particular insolvency procedure in any particular circumstance, where there is no reasonable prospect of the company avoiding insolvency, the directors owe a duty to act in the company's creditors' interests by minimising the creditors' losses. This obligation may include considering a CCA.

The directors of the company (or the liquidator, if the company is in liquidation) propose an arrangement and nominate an interim supervisor to act in relation to a proposed arrangement if they:

- Believe the company is insolvent, or is likely to become insolvent.
- Approve a written proposal.
- Nominate an insolvency practitioner as interim supervisor (see below, *Company creditors' arrangement (CCA)*).
- A director who votes in favour of a resolution proposing a creditors' arrangement without having reasonable grounds for believing that the company is insolvent or is likely to become insolvent commits an offence.

Substantive tests. The directors of the company must believe on reasonable grounds that the company is insolvent or is likely to become insolvent.

Consent and approvals. Other than where a liquidator is in office, the directors of the company must pass a resolution to:

- State that the company is insolvent or is likely to become insolvent.
- Approve a written proposal, and nominate an insolvency practitioner as interim supervisor. Unless the secured creditor(s) or preferred creditor(s) agree in writing to the contrary, an arrangement does not affect:
    - the right of a secured creditor of the debtor to enforce its security interest or vary the liability secured by the security interest; or
    - result in a preferential creditor receiving less than they would in a liquidation of the debtor had it commenced at the date of the arrangement.

The proposal must be approved by a 75% majority in value of the creditors, following which the supervisor is appointed. If the proposal is approved, it will be binding on the company, each creditor and each shareholder.

Supervision and control. 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.

Protection from creditors. The arrangement binds all unsecured creditors once approved. However, a CCA will not, without the express written agreement of the secured creditors or preferential creditors of a company concerned, affect their respective rights.

In addition, any shareholder, creditor, surety or co-debtor of the company has the statutory right to make an application to revoke or suspend any decision approving an arrangement on the grounds of unfair prejudice, and on receiving such an application the court may direct for the proposal for the CCA to be amended or reconsidered.

Length of procedure. There is no statutory time period within which a company creditors' arrangement must be completed. The terms of the company creditors' arrangement will usually determine when the arrangement will conclude.

Conclusion. Within 28 days of the completion or termination, the supervisor must:

- File a notice of completion or termination of the CCA with the BVI Registrar.
- Send a notice of completion or termination to each creditor of the company bound by the CCA and each shareholder of the company.

The supervisor will prepare a report stating any material differences between the implementation of the company creditors' arrangement and the proposal approved by the creditors.

If successfully completed in accordance with the terms of the arrangement, the company's debts will have been successfully discharged. If not successfully concluded, then an alternative procedure may be commenced.

Plan of Arrangement

Objective. A plan of arrangement will contain details of a proposed arrangement which may permit a company to:

- Amend its memorandum and articles of association (articles).
- Reorganise, merge or consolidate or separate its businesses.
- Dispose of any assets, business, shares, debt or other securities.
- Approve dissolution of the company.
- Complete a combination of the above.

Initiation. If the directors believe that a plan of arrangement is in the best interests of the company, the creditors or shareholders, they can approve a plan (alternatively, a voluntary liquidator appointed under the BC Act can approve a plan of arrangement if in office). An application is then made to the court to approve the plan of arrangement. The court has the power to approve, amend or reject the proposed plan of arrangement.

Whilst there is no fixed obligation for directors of a company to initiate a particular insolvency procedure in any particular circumstance, where there is no reasonable prospect of the company avoiding insolvency, the directors owe a duty to act in the company's creditors' interests by minimising the creditors' losses. This obligation may include considering a plan of arrangement.

Substantive tests. Only a BVI company that is active or in liquidation may be subject to a plan of arrangement. There is no statutory requirement that the company be insolvent to propose or enter into a scheme of arrangement.

Consent and approvals. The directors or the voluntary liquidator of the company (as applicable) must first approve the plan of arrangement. An application is then made to the court to approve the arrangement. The court will determine:

- To whom notice (if any) of the proposed plan of arrangement should be given.
- Whether the approval of any person is required.

The court will also determine whether any holder of shares, debt obligations or securities in the company can dissent to the proposed plan of arrangement and receive payment of fair value in respect of its shares, debt obligations or other securities under section 179 of the BC Act.

Once the plan is approved by the court, the directors must give notice and/or seek approval from the relevant persons as ordered by the court. Once the plan of arrangement is approved by those persons, the articles of arrangement are executed by the company. These articles contain:

- The plan of arrangement.
- The order of the court approving the plan of arrangement.
- Details of the manner in which the plan of arrangement was approved (if approval was required by the order of the court).

The articles of arrangement are then filed with the BVI Registrar who will issue a certificate certifying that they have been filed.

Supervision and control. If a plan of arrangement is proposed and approved by the directors, the directors remain in control of the company. However, if the plan of arrangement is approved by the voluntary liquidator, the voluntary liquidator will remain in control of the company.

Protection from creditors. There is no stay on proceedings available for a company subject to a plan of arrangement.

Length of procedure. The plan of arrangement takes effect from the date the articles of arrangement are registered by the BVI Registrar or on such date subsequent thereto, not exceeding 30 days, as may be stated in the articles of arrangement. There is no statutory time period within which a plan of arrangement must be completed.

Conclusion. The terms of the plan arrangement will usually determine when the arrangement will conclude. If successfully concluded in accordance with the terms of the arrangement, the company's debts will have been successfully discharged. If not successfully concluded, then an alternative procedure may be commenced and, in any event, there is no stay on proceedings available for a company subject to a plan of arrangement so insolvency proceedings may be commenced at any time.

Scheme of Arrangement

Objective. The purpose of a scheme of arrangement is to enable the company to enter into a compromise or arrangement between the company and its creditors or between the company and its shareholders. In appropriate circumstances a scheme can be used to enable the company to restructure and avoid entering into a formal insolvency process.

Initiation. A scheme of arrangement is commenced by sending an application to the court to order a meeting of creditors or shareholders of the company (as applicable). The application can be made by the company, a creditor, a shareholder or a liquidator of the company.

Substantive tests. There is no statutory requirement for the company to be insolvent to propose or enter into a scheme of arrangement.

Consent and approvals. If a majority in numbers representing 75% in value of the creditors or class of creditors or shareholders or class of shareholders (as applicable), present and voting at the meeting agrees to the arrangement, it will be binding on all creditors, shareholders and the company once sanctioned by the court. If the application is by a liquidator, it will be binding on the liquidator and every person liable to contribute to the assets of the company in the event of its liquidation. An order of the court sanctioning the scheme of arrangement will only take effect when filed with the BVI Registrar.

Supervision and control. Unless the company is in liquidation, the directors of the company remain in control of the company.

Protection from creditors. There is no stay of proceedings available for a company subject to a scheme of arrangement.

Length of procedure. There is no statutory time period within which a scheme of arrangement must be completed.

Conclusion. The terms of the scheme of arrangement will usually determine when the arrangement will conclude. If successfully concluded in accordance with the terms of the scheme of arrangement, the company's debts will have been successfully discharged. If not successfully concluded, an alternative procedure may be commenced and, in any event, there is no stay on proceedings available for a company subject to a scheme of arrangement so insolvency proceedings may be commenced at any time.

"Light touch" Provisional Liquidators

Objective. Provisional liquidation in the BVI has traditionally been used in situations of fraud where an interim appointment is required to prevent asset dissipation. However, more recently the concept of "light touch" provisional liquidation has been endorsed by the BVI court to assist a company, or group of companies, to restructure 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 by directors or the company. The directors remain in day-to-day control of the company but can be protected against actions by individual creditors, thanks to the court's ability to stay proceedings under section 174 of the Insolvency Act (although there is no general moratorium on claims in provisional liquidation).

Initiation. Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, the court may appoint provisional liquidators. An application can be made by the company itself, a creditor, a shareholder, the supervisor of a creditors' arrangement in respect of the company and, in certain circumstances, be the Attorney General, the FSC and the International Tax Authority.

Substantive tests. The court may appoint provisional liquidators if the company consents or the court is satisfied that the appointment is necessary for the purpose of maintaining the value of assets owned or managed by the company or is in the public interest.

Consent and approvals. The company may consent. The appointment of provisional liquidators requires an application for the appointment of liquidators to have been filed but not yet determined or withdrawn. It is generally a pre-requisite that the company is insolvent, or liable to be wound up on just and equitable grounds.

Supervision and control. The directors remain in day to day control of the company but are subject to the supervision of the provisional liquidators. The court may appoint the provisional liquidators on such terms as it considers fit. While the provisional liquidators have the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company, the court may limit the powers of the provisional liquidators in such manner as it considers fit. The court may therefore determine the extent of the provisional liquidator's supervision and control.

Protection from creditors. The appointment of provisional liquidators does not act as a moratorium on claims by creditors, although the court may exercise its powers under section 174 of the Insolvency Act to stay proceedings.

The appointment of provisional liquidators does not infringe on the right of a secured creditor to enforce its security.

Length of procedure. There is no fixed period for which provisional liquidators are appointed and the length of their appointment may depend on a number of factors including, for example, the value, location and nature of the company's assets.

Conclusion. The appointment of provisional liquidators may be terminated on the application of the provisional liquidators or any person capable of appointing the provisional liquidators (listed above). The court can also terminate the appointment on its own motion. The appointment of provisional liquidators will also terminate if the court appoints a liquidator.

7. What are the main insolvency procedures in your jurisdiction?

Insolvent Liquidation

Objective. The effect of an insolvent liquidation is to put the affairs of the company in the hands of an independent insolvency practitioner who is required to take possession of, protect and realise the company's assets for the benefit of the company's creditors.

Initiation. A company can be placed into insolvent liquidation either by:

- Passing a shareholders' qualifying resolution (requiring at least 75% approval of shareholders (the company's memorandum or articles may provide for a higher threshold). In the case of a regulated company, five days' notice must be given to the FSC).
- Court order, following an application to the court and a hearing.

An application to court can be made by:

- The company itself.
- A creditor.

- A shareholder.
- The supervisor of a company creditors' arrangement.
- In limited circumstances, the Attorney General or the FSC.
- Where an application is being made by a creditor, that creditor should ordinarily serve a statutory demand on the debtor company prior to issuing an application, unless there are good reasons for not doing so.

Substantive tests. The court can appoint a liquidator when any of the following are applicable:

- The company is insolvent (as defined by the Insolvency Act).
- In the court's opinion, it is just and equitable for a liquidator to be appointed.
- In the court's opinion, it is in the public interest for a liquidator to be appointed.

The Attorney General or the FSC can only make an application on the last of these grounds (that is, where it is in the public interest).

Consent and approvals. Unless the application is made by the company itself, the applicant must serve a copy of the application on the company. The company is entitled to attend the hearing and present its own evidence before the court.

Notice of the hearing of the application must be advertised, and other interested parties (such as other creditors) can appear and make submissions at the hearing if they have filed a notice of their intention to appear. Upon hearing the application, the court can:

- Appoint a liquidator.
- Dismiss the application.
- Adjourn the hearing.
- Make any other interim order that it considers fit.

Supervision and control. The liquidator must be an insolvency practitioner licensed to practice and be resident in the BVI, although a joint appointment with a foreign insolvency practitioner may be permitted. Once appointed, the liquidator has control and custody over the assets of the company. The directors remain in office but they cease to have any powers or duties, unless specifically authorised by the liquidator or under the Insolvency Act. The BVI's insolvency regime does not currently include any debtor-in-possession type procedures.

Protection from creditors. With the exception of secured creditors, and subject to a court order to the contrary, once the liquidator has been appointed no person can:

- Commence or proceed with any action or proceedings against the company.
- Commence or proceed with any action in relation to the company's assets.
- Exercise or enforce any rights or remedies over or against the assets of the company.

The appointment of a liquidator does not infringe upon the right of a secured creditor to enforce its security.

Length of procedure. Where the liquidator is appointed by way of a shareholders' qualifying resolution, the appointment is effective immediately. The period between the filing of an application to court and the hearing is typically six weeks.

The application must be determined by the court within six months or it will be deemed dismissed. The court can extend the period for determining the application, each extension not exceeding three months at a time.

Once the liquidator is appointed, the length of the liquidation process is indeterminate and depends on a number of factors including the:

- Value, type and location of the company's assets.
- Speed with which the liquidator can deal with creditors' claims and collect, realise and distribute the company's assets.

Conclusion. At the conclusion of the liquidation, and once any distributions are made to the creditors, the liquidator must prepare a final report and serve it on every creditor of the company whose claim has been admitted and all shareholders of the company. That report must also be filed with the BVI Registrar.

The liquidator will then apply to the court to be released from his/her appointment. The company is then dissolved and ceases to exist from that point.

Stakeholders' Roles

8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Stakeholders

In an insolvent liquidation, the company's creditors are the key stakeholders.

Influence on Outcome of Procedure

Liquidation proceedings are a class remedy based on the *pari passu* treatment of unsecured creditors. The creditors can form a creditors' committee which will liaise with the liquidator in relation to the strategy of the liquidation and has a limited formal role in the conduct of the liquidation. This includes approving the remuneration of the liquidator.

Liability

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

Director

For claims brought against directors under the Insolvency Act, a director will include *de jure* directors, *de facto* directors and shadow directors and, in certain instances, a person who exercises, or is entitled to exercise, or who controls, or is entitled to control, the exercise of powers which, part from the memorandum or articles, would fall to be exercised by the board. Generally, under BVI law, directors owe duties to the company so that claims against them for breach of duty can be brought by the liquidator on behalf of the company against the director. In addition, various statutory remedies are available to the liquidator (see below).

Previously, claims by creditors directly against directors were often problematic, not least because of the principle of reflective loss. Following the UK Supreme Court's decision in *Sevilleja v Marex [2020] UKSC 31*, creditors may have more potential avenues available to them.

Insolvent trading. On the application of a liquidator of a company, the court can declare that a director should make a contribution (if any) to the company's assets in respect of any insolvent trading as the court considers proper (section 256, Insolvency Act). However, the court must first be satisfied that, at any time before the commencement of the liquidation, the director knew (or ought to have known) that there was no reasonable prospect of avoiding insolvent liquidation.

A director will escape liability if the court is satisfied that after the director first knew (or ought to have known) that there was no reasonable prospect that the company would avoid going into insolvent liquidation, they took every step reasonably open to them to minimise the loss to the company's creditors. This provision does not apply to a person who exercises, or is entitled to exercise, or who controls, or is entitled to control, the exercise of powers which, apart from the memorandum or articles, would fall to be exercised by the board.

Misfeasance. Misfeasance is governed by statute and the common law. The Insolvency Act provides a summary remedy against directors, officers and other persons concerned in the promotion of the company, for example, if such a person:

- Misapplies or is accountable for any money or other property of the company.
- Is guilty for misfeasance or breach of any fiduciary or other duty in relation to the company.

(Section 254, Insolvency Act.)

In these circumstances, the court can, on the application of a liquidator, make an order that the defendant either:

- Repays the money or assets (with interest).
- Contributes a sum of money to the company's assets by way of compensation.

Fraudulent trading. If at any time before the commencement of the liquidation of the company any of its business had been carried on with the intent to defraud creditors of the company or any person, or for fraudulent purposes, any person who was knowingly a party to such fraud can be ordered by the court to make a contribution to the company's assets in respect of the fraudulent trading.

Guarantees. If a director provides a guarantee for the obligations of a company to a third party, the director may be required to pay the amount of the guarantee in accordance with its terms (and any additional collateral provided by the director on behalf of the company).

Partner

The main legal acts regulating the formation and operation of BVI partnerships are the:

- *Partnership Act 1996* (Partnership Act).
- *Limited Partnership Act 2017* (Limited Partnership Act).

For partnerships that continue to fall under the Partnership Act, every partner in a partnership is jointly liable with the other partners for all debts and obligations of the partnership incurred while he/she is a partner (except in the case of a limited partner of a limited partnership (see below)).

If a partner commits any wrongful act or omission in the ordinary course of business of the partnership, or with the authority of the other partners, which causes a loss or injury to a person who is not a partner, the partnership is liable to the same extent as the partner who committed/omitted the act.

For limited partnerships formed under Part VI of the Partnership Act or the Limited Partnership Act 2017 (that is, where there are one or more general partners and one or more limited partners), a limited partner is not liable for the obligations of the limited partnership unless it is also a general partner.

Subject to the limited partnership agreement, a limited partner is normally not liable for the debts and liabilities of the partnership beyond the amount of the limited partner's contribution to the partnership. The position of a limited partner in a limited partnership is therefore comparable to that of a shareholder of a company.

Parent Entity (Domestic or Foreign)

Unless a parent entity has provided a guarantee for the obligations of a company to a third party, it is unlikely that the parent entity or shareholder of the company will be held liable for the debts of an insolvent company.

A shareholder of a limited company has no liability, as a shareholder, for the liabilities of the company (section 80(1), Companies Act). A shareholder's liability to the company is limited to the amount unpaid on the shares of the company held by them. However, there may be limited circumstances in which the court will be prepared to "pierce the corporate veil" if a company's separate legal personality has been abused (typically only when fraud has occurred). Furthermore, shareholders may in certain circumstances be liable to repay distributions paid to them if, after immediately after the distribution, the company was not solvent.

Other Party

On the application of a liquidator, the court can make an order against an officer, liquidator, administrator, administrative receiver, supervisor, interim supervisor or any person who has been concerned with the promotion, formation, management, liquidation or dissolution of a company, if that person has either:

- Misapplied, retained or become accountable for any money or other assets of the company.

- Been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

(Section 254, Insolvency Act.)

A third party can also be liable if it has provided a guarantee or any third-party security in respect of the obligations of a company to a lender.

Setting Aside Transactions

10.Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

The main voidable transactions in the BVI are:

- Unfair preferences.
- Transactions at undervalue.
- Voidable floating charges.
- Extortionate credit transactions.

Unfair Preference

An unfair preference arises if all of the following are applicable:

- The company takes a step which has the effect of putting a creditor into a position which, if the company goes into insolvent liquidation, will be a better position than the creditor would have been in if that step had not been taken.
- The company is insolvent, or becomes insolvent as a result of the transaction, (such that it is an "insolvency transaction").
- The transaction was entered into within the "vulnerability period" (that is, six months before the onset of insolvency if the person is unconnected to the company and two years if the person is a connected person).

(Section 245, Insolvency Act.)

Other than in the case of a transaction with a connected person, a transaction is not an unfair preference if the transaction took place in the ordinary course of business. The step will also not be considered an unfair preference if it was made outside the vulnerability period. Where a transaction is entered into with a connected person, it is presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business.

Transaction at an Undervalue

A company will enter into a transaction at an undervalue with a person if all the following are applicable:

- The company disposes of an asset for either:
    - no consideration; or
    - consideration significantly less than the value of the asset.
- The transaction is an insolvency transaction.
- The transaction was entered into within the vulnerability period.

(Section 246, Insolvency Act.)

However, a transaction will not be considered a transaction at undervalue where the transaction was entered into with an unconnected party and section 246(2) of the Insolvency Act applies. For this to apply:

- The transaction must have been entered into in good faith and for the purposes of its business.
- At the time of the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

If a transaction is entered into with a connected person, it is presumed that the transaction was an insolvency transaction and that the defence available under section 246(2) of the Insolvency Act will not apply.

Voidable Floating Charge

A floating charge created by a company is voidable if it is an insolvency transaction and entered into within the vulnerability period, unless the floating charge secures any of the following:

- Money advanced or a liability discharged at the time of, or after, the creation of the charge.
- The amount of any liability of the company discharged at the same time as, or after, the creation of the charge.
- The value of the assets or services sold or supplied to the company at the same time as, or after, the creation of the charge.
- The interest, if any, payable on the above.

Extortionate Credit Transaction

A transaction entered into within five years from the onset of insolvency involving the provision of credit to the company will be an extortionate credit transaction if, with regard to the risk accepted by the person providing the credit, either the:

- Terms of the transaction required grossly exorbitant payments to be made in respect of the credit.

- Transaction otherwise grossly contravenes ordinary principles of fair trading.

Carrying on Business During Insolvency

11.In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

Arrangements

If the debtor is subject to an arrangement (that is, a scheme of arrangement, plan of arrangement or a company creditors' arrangement), the company can continue to trade when the relevant arrangement is in place subject to the terms of that arrangement. The directors will carry on the debtor's business.

Liquidation

If a liquidator is appointed to a solvent company under the BC Act, the liquidator can continue to trade on behalf of the company provided he is authorised to do so according to the terms of the liquidation plan. However, the liquidator cannot do so for more than two years without the prior approval of the court.

A liquidator appointed to an insolvent company can be permitted to continue to trade on behalf of the company subject to the powers afforded to the liquidator by the court.

In case of a provisional liquidation, the provisional liquidator generally acts to "hold the ring" until the appointment of a liquidator, although the court may grant a provisional liquidator additional powers if it considers it just and convenient to do so. Where the court appoints a "light touch" provisional liquidator, the directors will usually be permitted to carry on running the company's business but with certain restrictions on their powers and under the high-level supervision of the provisional liquidator.

Additional Finance

12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

Arrangements

Under the terms of the relevant arrangement (that is, a scheme of arrangement, plan of arrangement or a company creditors' arrangement), a company can obtain additional finance.

Liquidation

If the debtor is subject to a liquidation (whether solvent or insolvent), the liquidator has the power to obtain additional finance if the liquidator deems it necessary for the purpose of the liquidation.

If the liquidator of an insolvent company obtains additional finance to assist with the costs and expenses of the liquidation, this finance will be paid out first when payment is made for the costs and expenses of the liquidation (section 199, Insolvency Rules). The BVI court has recently confirmed its approval of commercial third-party funding of liquidators.

Multinational Cases where there are no Applicable EU or International Frameworks

13. What are the rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What is the process for applying for local recognition where there are no applicable EU or international frameworks? What are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Part XIX of the Insolvency Act provides a framework under which the BVI court can provide assistance to "foreign representatives" (that is, foreign insolvency office holders from specified countries).

Under the provisions, representatives from the following prescribed jurisdictions can apply to the BVI court for a broad range of orders to assist with foreign proceedings: Australia, Bahamas, Barbados, Belize, Bermuda, Canada, the Cayman Islands, Finland, Guernsey, Guyana, Hong Kong SAR, Ireland, the Isle of Man, Jamaica, Japan, Jersey, New Zealand, member states and territories within the *Organisation of Eastern Caribbean States* (OECS), Nigeria, Singapore, Trinidad and Tobago, Turks and Caicos Islands, the UK and the US.

These orders include (but are not limited to):

- Restraining the commencement or continuation of any proceedings, execution or other legal process against a debtor or in relation to any of the debtor's property.
- Restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property.

- Requiring a person to deliver up any property of the debtor or the proceeds of this property to the foreign representative.
- Making any order or grant any relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a BVI insolvency proceeding co-ordinating with a foreign proceeding.
- Appointing an interim receiver of any the debtor's property for any term and subject to any conditions as it considers appropriate.
- Authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding in respect of a debtor.
- Staying or terminating BVI insolvency proceedings.

When considering such an application, the BVI court will do what is best to ensure the economic and expeditious administration of the foreign proceedings in line with certain guiding principles.

The Insolvency Act provides that any order made by the BVI court in exercise of the powers under Part XIX does not affect the rights of secured creditors of a BVI company.

The provisions under Part XIX do not extend to permitting the court to assist foreign representatives from non-prescribed foreign jurisdictions. The BVI's UNCITRAL Model Law provisions contained in PART XVIII of the Insolvency Act have not been brought into force, and there is no intention to do so.

In addition to the statutory assistance regime, the BVI courts will exercise a limited jurisdiction of common law recognition of foreign insolvency office holders from non-prescribed jurisdictions, but it has recently been held that the common law does not extend to granting assistance to such persons.

Concurrent Proceedings

If a BVI company is subject to insolvency proceedings in another jurisdiction on account of either the company holding assets or it having its centre of main interest in another jurisdiction as a matter of the laws of that jurisdiction (both common occurrences for BVI companies), the liquidator can nevertheless be appointed in the BVI.

The BVI courts have adopted the *Judicial Insolvency Network guidelines* (Guidelines) on cross-border insolvency to enhance communication between the courts, insolvency representatives and other parties in a global context. The Guidelines reflect the view of the judiciary on the importance of co-ordination and co-operation in cross-border insolvency proceedings.

International Treaties

Legislation based on the *UNCITRAL Model Law on Cross-Border Insolvency 1997 (*UNCITRAL Model Insolvency Law) has been incorporated into the Insolvency Act. The stated purpose of those provisions is to promote co-operation between the courts and insolvency administrators of the Virgin Islands and other designated foreign countries' provisions. However, the provisions are not currently in force.

Procedures for Foreign Creditors

There are no special procedures which foreign creditors must comply with when submitting claims in BVI insolvency proceedings.

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