RESTRUCTURING & INSOLVENCY

British Virgin Islands

LEXOLOGY
Getting The Deal Through

Consulting editor
Freshfields Bruckhaus Deringer LLP

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Quick reference guide enabling side-by-side comparison of local insights, including a general overview; types of liquidation and reorganisation processes; insolvency tests and filing requirements; directors' and officers' regime; stays of proceedings and moratoria; doing business during reorganisations; asset sales; creditor remedies, involvement and proving claims; security; clawback and related-party transactions; treatment of groups of companies; international cases; and recent trends.

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GENERAL

Legislation

What main legislation is applicable to insolvencies and reorganisations?

The relevant legislation is the Insolvency Act 2003 (the Insolvency Act) and the Insolvency Rules 2005, and the British Virgin Islands' (BVI) Business Companies Act 2004 (the BCA). The Insolvency Act sets out the procedures for insolvent liquidations and the appointment of administrative receivers. The BCA sets out the statutory framework for company restructuring and reorganisation as well as the voluntary liquidation regime.

Law stated - 01 October 2022

Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

All companies incorporated in the BVI may be subject to insolvency or reorganisation proceedings. Further, in certain circumstances, companies with a sufficient link to the BVI may also be wound up, along with companies that were previously incorporated within the BVI but subsequently migrated to another jurisdiction.

In a liquidation, secured creditors' assets are excluded from the estate, and a secured creditor's right to enforce their security is not affected. Assets subject to proprietary claims may be excluded (if the proprietary claim is made out) in the sense that they are in fact owned by others and are therefore not assets of the company.

Law stated - 01 October 2022

Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There is no specific legislation in the BVI to deal with the financial difficulties of such enterprises. All private companies can be wound up in the usual way irrespective of whether they are government-owned or not. However, governmental or statutory bodies may require statutory intervention to dissolve them seeing as they are originally created by statute.

Law stated - 01 October 2022

Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

There is no specific legislation in the BVI to deal with this, although a regulated company may not appoint a liquidator under the Insolvency Act without first notifying the Financial Services Commission, such that there is a degree of regulatory oversight in the case of insolvent financial institutions. All institutions, big or small, are treated in the same way.

Law stated - 01 October 2022

Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The Commercial Court, a division of the BVI's High Court, has exclusive remit over corporate insolvency matters. The first appellate court from the Commercial Court is the Eastern Caribbean (EC) Court of Appeal, which is based in St Lucia but is itinerant, travelling between the various countries and territories of the Eastern Caribbean.

The Judicial Committee of the Privy Council is the final court of appeal for the BVI, hearing appeals from the EC Court of Appeal. The Privy Council sits in London and consists of justices of the UK Supreme Court.

An appeal only exists as of right against any final decision which, on the 'application test', would have been determinative of the action whichever way it was decided. Further, an appeal as of right lies in relation to a limited number of categories; in particular, injunctions and the appointment of receivers or provisional liquidators. Permission for leave to appeal is required for other appeals. On granting leave to appeal in relevant cases, the Court may impose conditions including payment into court on account of any award made at first instance and security for costs.

Law stated - 01 October 2022

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Under section 199 of the Business Companies Act 2004 (the BCA), a voluntary liquidator may be appointed by resolution of the directors pursuant to section 199(2) or by resolution of members pursuant to section 199(3) only if the company is solvent. As such, this procedure is not available for distressed or insolvent companies. In a voluntary solvent liquidation, a liquidator may only be appointed where the directors have made a declaration of solvency in accordance with section 198(1) of the BCA. The directors must also file a liquidation plan. The liquidator does not need to be a licensed insolvency practitioner.

Further, the members of a company may, by way of a qualifying resolution (usually at least 75 per cent of the members entitled to vote), appoint a licensed insolvency practitioner as liquidator under the Insolvency Act 2003 (the Insolvency Act) for the purposes of carrying out an insolvent winding up of the company.

Law stated - 01 October 2022

Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

The Insolvency Act provides for companies to enter into a creditor's arrangement, at the instigation of the company itself (or a liquidator), which is a creditor-approved arrangement, supervised by an insolvency practitioner, which can give effect to a debt restructuring plan or another form of reorganisation.

In addition, the BCA provides for companies to enter into court-sanctioned schemes of arrangement and plans of

arrangement, which can be used to effect voluntary reorganisations. Both schemes and plans of arrangement require the approval of creditors and members (or classes of creditor or members) and court sanction.

These arrangements provide mechanisms for BVI companies to deal with dissenting creditors or other stakeholders and result in an arrangement that binds the company and its members or creditors, or both (or a class of them). However, none of these procedures provides for an effective moratorium against claims brought by stakeholders who may not be bound by the arrangement, scheme or plan.

None of the above procedures requires the company in question to be insolvent, but they can all be used to ensure that a company is able to continue trading despite financial difficulties, or to give effect to other forms of restructuring, reorganisations, etc.

An insolvent restructuring may be facilitated using the provisional liquidation procedure in the Insolvency Act, which can be initiated by the company or one or more of its creditors. In such cases, the provisional liquidators are given limited or 'light touch' powers, with the management remaining in place and the provisional liquidators overseeing and assisting in the restructuring process. An order may be sought from the court to stay or restrain any action or proceedings pending against the company in provisional liquidation, to assist the provisional liquidation process, although that falls short of the full statutory moratorium on claims that applies when a company enters liquidation. It is potentially possible for a provisional liquidator to pursue a scheme or plan of arrangement, if appropriate.

Law stated - 01 October 2022

Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

A creditors' arrangement requires the approval of 75 per cent by value of the company's creditors at a creditors' meeting convened by an interim supervisor appointed by the company. Court approval is not required, but the court has certain supervisory powers once an arrangement has been put in place. Once approved, a creditors' arrangement is binding as between the company and its creditors (including dissenting creditors), but secured and preferential creditors will not be bound unless they consent in writing. Provision is made for prejudiced stakeholders to seek relief from the court

In a plan of arrangement, the directors (or liquidator) of the company (as applicable) must first approve the plan of arrangement and then submit it for approval by the court. The court will consider the proposed plan and amend it if it sees fit, and will rule on the persons who should be required to approve the plan and the requisite thresholds for such approval. The company must then seek approval from stakeholders, following which the court will hold a further hearing to approve the plan. Thereafter, the plan becomes effective once filed by the company.

In a scheme of arrangement, the proposing party (which can be the company, a creditor or a shareholder) must make a proposal for the scheme and apply to court for an order approving the scheme. If the court approves the scheme, the company must then convene a meeting of stakeholders. If a majority representing 75 per cent 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 scheme, it will then be binding as between the company and all creditors or class of creditors, with no right of dissent after approval. 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. Secured and preferential creditors will not be bound unless they consent in writing.

Classes of creditors are classified as persons whose rights are not so dissimilar to make it impossible for them to consult together with a view to their common interest. Non-debtor or third-party releases of liability are possible in a

scheme of arrangement subject to the governing law of the underlying obligation allowing for it.

While there is no specific provision in any of the procedures described above for the release of non-debtor parties, it is in theory possible for schemes to deal with a wide range of issues, and so in principle, it may be possible for stakeholders to agree to release non-debtor parties from liability, albeit that this would not amount to a wider statutory release providing full immunity from suit.

Law stated - 01 October 2022

Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor can appoint a liquidator of a debtor company (which will commence the company's insolvent liquidation) by court order, following an application to the court and a hearing.

An application to court can be made by:

- the company itself;
- creditor (including a judgment creditor);
- a shareholder;
- the supervisor of a company creditors' arrangement; and
- in limited circumstances, the Attorney General or the Financial Services Commission.

While there is no strict requirement for the prior service of a statutory demand, where an application is being made by a creditor, the creditor should first serve a statutory demand on the debtor company before issuing a liquidation application, unless there are good reasons for not doing so.

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

- the company is insolvent;
- in the court's opinion, it is just and equitable for a liquidator to be appointed; and
- in the court's opinion, it is in the public interest for a liquidator to be appointed.

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.

Once an insolvent liquidation is underway, there are no material differences to proceedings opened voluntarily or by court order. However, where a liquidator is appointed by a company's members under the Insolvency Act, the liquidator's powers are limited until after the first creditors' meeting has been held, and at the first creditors' meeting, unsecured creditors will have the opportunity to vote on the appointment of an alternative liquidator.

Law stated - 01 October 2022

Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

A plan of arrangement and a creditors' arrangement can only be initiated by the company itself, and so these cannot be initiated by a creditor acting unilaterally. However, it is possible for a scheme of arrangement to be initiated by a creditor, albeit this will be subject to approval by 75 per cent of creditors and, where applicable, shareholders after the court initially approves the scheme. The express written consent of any secured and preferential creditors is required if they are to be bound.

If a decision is made by the company or a creditor to initiate a provisional liquidation in support of a restructuring (whether on a stand-alone basis or together with a plan, arrangement or scheme), that will require a court application and, in most cases, the support of any secured creditors if the procedure is to be effective.

Law stated - 01 October 2022

Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

There is no BVI legislation dealing specifically with pre-packaged reorganisations. However, it would in theory be possible for any of the above procedures to be expedited so that a restructuring (or any asset sale required as part of the restructuring, or both) could be effected relatively quickly, where time is of the essence.

Law stated - 01 October 2022

Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A scheme or plan of arrangement requires court approval, and at that stage, the court may refuse to sanction the scheme or plan, for example, if stakeholders object and the court is persuaded that the scheme or plan is not in the best interests of the company or relevant stakeholders. Even after the scheme or plan receives initial court approval, the plan or scheme will be defeated if it is not approved by the required majorities of creditors or members, as the case may be. In the case of a creditors' arrangement, court approval is not required, but the arrangement proposed by the company must be approved by 75 per cent of creditors.

There is no automatic consequence if a scheme, plan or arrangement fails. However, if a debtor were to fail to perform a plan, it is likely that the company would become insolvent and likely face an application to appoint liquidators or other enforcement action by creditors.

Law stated - 01 October 2022

Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

At the end of a liquidation, a company will be dissolved. In the case of a solvent voluntary liquidation, for instance, the liquidator will file a statement with the Registrar to confirm the liquidation is complete. Upon receiving the completion statement, the Registrar will strike the company off the Register and issue a certificate of dissolution. The date of dissolution is the date the certificate is issued. Immediately upon issue of the certificate by the Registrar, the liquidator will arrange for a notice of strike-off and dissolution in respect of the company to be published in the BVI Gazette.

The Registrar may strike a company off the Register if the company fails to pay its annual Registry fee (or any late payment penalties), if it does not have a registered agent, or if it fails to file any return, notice or document required to be filed under the BVI Business Companies Act 2004. A company that has been administratively struck from the Register is automatically dissolved seven years from the date of strike off, unless it is restored to the Register in the meantime. Where a company has been struck off the Register but is not yet dissolved, the company or a creditor, member or liquidator can make an application to the Registrar to restore the company to the Register within seven years from the date of strike-off.

Any property owned by a company at the date of dissolution is transferred into the ownership of the Crown (bona vacantia).

Law stated - 01 October 2022

Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Upon conclusion of the liquidation, 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 court to be released from their appointment. The company is then dissolved and ceases to exist from that point.

In relation to schemes, plans or arrangements, the terms of the plan, scheme or arrangement will determine when the arrangement concludes and what is intended to happen to the company thereafter.

Law stated - 01 October 2022

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A company is deemed to be insolvent under the Insolvency Act 2003 if:

- it fails to satisfy a valid statutory demand;
- execution or other process issued on a judgment, decree or order of the BVI court in favour of a creditor is returned wholly or partly unsatisfied; or
- either:
  - the value of the company's liabilities exceeds its assets (balance sheet insolvency); or
  - the company is unable to pay its debts as they fall due (cashflow insolvency).

Law stated - 01 October 2022

Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

There is no formal mandatory requirement for companies to commence insolvency proceedings. However, directors of BVI companies owe common law duties to act in the best interests of the company as a whole, which requires them to take account of the interests of the company's creditors ahead of those of the company's members when the company is insolvent or on the verge of insolvency. Directors may also be found statutorily liable for trading while the company is insolvent. It follows, therefore, that to act in the best interests of the company a director may be required to recommend that the members put the company into liquidation or cause the company to apply for the appointment of a liquidator, or both.

Law stated - 01 October 2022

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

For claims under the BVI Insolvency Act 2003 (the Insolvency Act), a director includes:

- de jure directors;
- de facto directors;
- 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 that, apart from the memorandum or articles, would fall to be exercised by the board.

If a company goes into insolvent liquidation, a director can be personally liable if, 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 but continued to trade.

In these circumstances, the court can order a director to make such contribution to the assets of the company as it considers proper (subject to the availability of a defence that the director took every step reasonably open to him to minimise the loss to the company's creditors).

Law stated - 01 October 2022

Directors' liability – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Part IX of the Insolvency Act deals with the principal ways in which a director may be ordered to provide compensation or otherwise contribute assets to an insolvent company.

If a director or officer of a company in liquidation has misapplied or retained or become accountable for any money of

the company, or if the director is guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company, then the court can make orders that such director 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. A 'misfeasance' claim can be brought by the company 'pre-insolvency' or after the company has entered into liquidation, by a liquidator.

There are also a number of 'voidable transaction' claims that can be brought by a liquidator against directors in relation to their conduct and management of a company prior to the commencement of a liquidation. These include claims for unfair preferences, undervalue transactions, voidable floating charges and extortionate credit transactions.

Directors can also be liable if they cause a company to make distributions when the company is insolvent.

Law stated - 01 October 2022

Directors' liability – defences

What defences are available to directors and officers in the context of an insolvency or reorganisation?

A director is able to rely on a variety of defences to the aforementioned claims. The available defences depend on the claim advanced but commonly include a denial that the conduct complained of satisfies the relevant legal tests. For instance, a director would argue that they acted with the skill and diligence expected of a reasonable director, or that the actions complained of did not cause or contribute to the company's insolvency. In certain circumstances, a director may be able to defend a claim on the basis that they reasonably relied on information provided by the company's professional advisers.

Unlike in many other common law jurisdictions, the Business Companies Act 2004 permits a company to indemnify its directors for non-fraudulent breaches of duty. However, it is questionable whether such indemnities can be relied upon by a director if the company is insolvent.

Law stated - 01 October 2022

Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors of BVI companies owe common law duties to act in the best interests of the company as a whole, which requires them to take account of the interests of the company's creditors ahead of those of the company's members when the company is insolvent or on the verge of insolvency. English authority, which the BVI court is likely to follow, suggests that a creditors' interest duty arises when the directors know, or should have known, that the company was or was likely to become insolvent. In that context, 'likely' meant probable.

Law stated - 01 October 2022

Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

During an insolvent liquidation, the directors and other officers of the company remain in office, but they cease to have any powers, functions or duties other than those required or permitted under the Insolvency Act or otherwise

authorised by the liquidator. In practice, the directors would usually cease to exercise all of their powers in a liquidation, but directors and officers are obliged to assist the liquidators and may be compelled to provide information to them.

The powers a director may be able to exercise during a reorganisation will depend on the type of proceeding. In some considered above, the directors will retain the same powers albeit the reorganisation proceedings are subject to court oversight. In a creditors arrangement, a licensed insolvency practitioner must be appointed as supervisor of the arrangement to oversee its implementation.

Law stated - 01 October 2022

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Following the appointment of a liquidator, there is a statutory moratorium on the commencement or continuation of claims against the company or its assets without the leave of the court. Any claims against the company after it enters liquidation must be made through the proof of debt process in the liquidation. However, a secured creditor is still permitted to enforce its security against the company.

No statutory stay or moratorium is available in a scheme, plan or arrangement, but any person who is bound by the terms of the scheme, plan or arrangement would be prevented from initiating a process against the company in breach of the terms of the scheme, plan or arrangement.

Law stated - 01 October 2022

Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

If the debtor is subject to a reorganisation the company can continue to trade when the relevant arrangement is in place subject to the terms of that arrangement. In those circumstances the directors will carry on the debtor's business.

If a liquidator is appointed to a solvent company, the liquidator can continue to trade on behalf of the company provided he or she 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 continue to trade the company's business insofar as necessary for its beneficial liquidation (in other words, to effect a better realisation for creditors, but not with a view to trading out of insolvency). Any costs or expenses incurred by the liquidator in carrying on the business will rank as an expense in the liquidation, and so these will be paid out in priority to all other claims (other than secured claims).

Law stated - 01 October 2022

Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

None of the voluntary reorganisation procedures specifically contemplate post-commencement financing; however, if a scheme, plan or arrangement that provides that the company may incur new borrowing is approved, there is no reason in principle why such funding cannot be obtained.

A liquidator of a company has powers under Schedule 2 of the Insolvency Act to borrow money whether on the security of the company or otherwise. In terms of priority, such a liability will enjoy priority if secured, or if unsecured would be deemed an expense of the liquidation and would therefore be payable in priority to other unsecured claims.

Law stated - 01 October 2022

Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

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 (if one is appointed) of any sale to a person connected with the company.

The liquidator cannot give a purchaser better title to property than the company had. So, 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. Therefore, subject to any terms of the sale contract, and subject to any proprietary claims against the asset, a purchaser would acquire the assets from an insolvent company free and clear or all other claims such as the claims of unsecured creditors.

Law stated - 01 October 2022

Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There is no specific prohibition in the BVI on stalking horse bids in sale procedures. However, a liquidator is tasked with seeking to return the maximum return to creditors and has wide discretion in relation to negotiating the sale of assets (subject to court approval as appropriate).

Law stated - 01 October 2022

Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches

the contract after the insolvency case is opened?

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 Insolvency Act. In many cases, however, contracts will include express provisions in contemplation of either party's insolvency.

A contractual counterparty may apply to the court under section 229 of the Insolvency Act 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 the permission of the court (although such claims can be pursued through the proof of debt procedure).

The legislative provisions relating to reorganisation procedures do not make express provision in relation to disclaiming existing contracts, but the terms of the scheme, plan or arrangement may well make provision for the amendment, variation or termination of certain contracts (in particular loan agreements).

Law stated - 01 October 2022

Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

The legislation does not make specific provision in respect of intellectual property (IP) rights; however, if such rights of termination exist within the contracts governing the debtor's right to use the IP, then the IP licensor will be entitled to terminate in accordance with the terms of the contract.

Law stated - 01 October 2022

Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The Data Protection Act 2021 applies to persons who 'possess' or who have 'control over, or authorise, the processing of any personal data in respect of commercial transactions'. This would apply to data collected by a company in liquidation or reorganisation. The Act limits the ability of a data controller (including a company in liquidation or reorganisation) from processing personal or sensitive data without the data subject's express consent.

Law stated - 01 October 2022

Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There is a mandatory stay provision under section 18(1) of the Arbitration Act 2013 (which governs arbitration in the BVI) that ordinarily requires parties to a claim brought before the court to be referred to arbitration if the matter in dispute is subject to an arbitration agreement. It is established in the BVI that this provision does not apply to applications to appoint liquidators, on the basis that arbitration agreements are designed to resolve disputes between the contracting parties and do not cover collective remedies such as winding-up. However, if the debt that is the subject of the liquidation application is disputed on substantive grounds, and the relevant loan agreement contains an arbitration clause, the dispute might well be referrable to arbitration and that would need to be resolved prior to any liquidation application being determined.

Law stated - 01 October 2022

CREDITOR REMEDIES

Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Secured creditors may be able to seize assets without taking enforcement proceedings in court. For instance, a secured creditor will usually have the power to appoint a receiver over the assets of a debtor to exercise its:

- statutory rights (eg, where a mortgage has been granted over property or a mortgage or charge has been granted over shares); or
- contractual rights (eg, under a debenture or other security document).

It is important to note that the assets of a BVI company are often situated outside the jurisdiction, as BVI companies are often holding companies for assets located elsewhere in the world. In those circumstances, any processes to seize assets in other jurisdictions will usually involve consideration of relevant foreign laws and procedures.

Law stated - 01 October 2022

Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

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 a judgment for the debt. If the debtor fails to file an acknowledgement of service or defence, the creditor may be able to obtain a default judgment. Alternatively, where (as is relatively common in debt enforcement claims) 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, which can result in a judgment without a full trial. If the judgment cannot be achieved on a summary basis, then proceedings may take some time to reach judgment depending on how complex the matter is, although an expedited is occasionally possible in exceptional cases.

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
- obtain an attachment of debts order.

Pre-judgment attachments are not available in the BVI, although a pre-judgment freezing order can be obtained in advance of issuing a claim to prevent the dissipation of assets pending the outcome of the claim.

Law stated - 01 October 2022

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

When an application is made to appoint liquidators, the application must be advertised in the Official Gazette, a newspaper in the BVI, and usually in another jurisdiction to bring the application to the attention of creditors. Once the liquidator is appointed, they are obliged to advertise the appointment and notify any known creditors about the appointment.

The liquidator must convene a creditors' meeting within 21 days of their appointment, although this can be dispensed with if the liquidator considers it appropriate to do so and the creditors do not require them to convene a meeting.

The liquidator is required to file a report within 60 days of appointment and to send this to creditors. A final report must also be filed upon completion of the liquidation. While there are no strict requirements to do so, liquidators may well report periodically to creditors as the liquidation progresses, or to any creditors' committee that is established pursuant to a resolution of the creditors at the first meeting, or both. Typically, a report is also given to creditors or any creditors' committee, or both, when the liquidator seeks approval for their fees and expenses.

Law stated - 01 October 2022

Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

A creditors' committee may be established at the first meeting of creditors or, at any time, by creditors' resolution.

The creditors' committee must comprise between three and five creditors or their authorised representatives.

The functions of the creditors' committee are prescribed by the Insolvency Act as follows:

- to consult with the office holder about matters relating to the insolvency proceeding;
- to receive and consider reports of the insolvency holder;
- to assist the office holder in discharging his or her functions; and
- to discharge any other functions assigned to it under an Act or set of rules (which include the power to approve the liquidator's remuneration and expenses, and the power to call a creditors' meeting).

The creditors' committee can require the liquidator to provide information and reports, and can summon the liquidator

to appear before it, but generally speaking, it cannot give directions to the liquidator.

As such, the creditors' committee acts primarily as a consultative body, with limited powers to control the course of the liquidation.

Aside from limited provisions for the expenses of attending meetings, the creditors' committee's costs are not generally recoverable from the liquidation estate.

Law stated - 01 October 2022

Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

If the liquidator does not have assets to pursue a claim, it is possible to seek funding from the creditors and third parties, or assign or sell the claim to third parties (which might include one or more creditors).

Law stated - 01 October 2022

Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

The liquidator will give notice of the appointment to any known creditors and advertise such an appointment. Any creditor wishing to participate in the initial meeting of creditors, and to be considered for a seat on any creditors' committee, will be required to submit a claim in the liquidation.

The liquidator will be obliged to admit the claim, or reject it, on the same basis as the court would, so it does not matter if the claim was acquired by the creditor at a discount. This is the 'proof of debt' process. The liquidator has broad discretion when carrying out this adjudication of claims. If a creditor is dissatisfied with the decision of a liquidation, then they may make an application to court under section 273 of the Insolvency Act 2003 (the Insolvency Act) to challenge that decision.

Law stated - 01 October 2022

Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Any such right agreed between the company and the creditor before the commencement of the liquidation is generally binding on the company in liquidation (section 435 of the Insolvency Act) unless it is deemed to be an unlawful preference, for instance.

Law stated - 01 October 2022

Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

There are no specific provisions of the BVI law allowing the court to change the rank of a creditor's claim.

Law stated - 01 October 2022

Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

In a liquidation, secured claims would be payable in priority to all other claims, including expenses.

The expenses of the liquidation are paid in priority to all unsecured claims.

The following qualify as preferential debts and are paid in priority to all other unsecured debts:

- employees' wages, salaries and holiday pay;
- amounts due by the debtor to the BVI Social Security Board;
- amounts due by the debtor in respect of pension contributions and medical insurance;
- sums due to the government of the BVI regarding any tax, duty, including stamp duty, licence fee or permit; and
- sums due to the Financial Services Commission in respect of any fee or penalty.

Claims in each category rank equally among themselves, pari passu, and have to be paid in full or equally in the case of shortage of assets.

Law stated - 01 October 2022

Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Wages and salaries (including accrued holiday pay) due in the period of six months preceding the commencement of the liquidation qualify as preferential claims in the liquidation.

If there are several claims for wages, it is possible for one person to submit a proof of debt on behalf of all the creditors in the class.

Any wages payable to employees continuing to be employed after the commencement of a liquidation would qualify as liquidation expenses and would be paid as such. However, in reality, it is rare for BVI companies to have employees, as most are used as holding companies.

Law stated - 01 October 2022

Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Pension contributions payable during the 12 months preceding the commencement of the liquidation by the debtor in its capacity as an employer are regarded as preferential claims.

Law stated - 01 October 2022

Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There are no such environmental-specific provisions under the BVI law.

Law stated - 01 October 2022

Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

According to BVI law, creditor's rights survive a reorganisation (subject to the binding terms of the restructuring) and any secured debts will remain enforceable. In the event of default, the secured creditor can usually enforce unless it has validly waived its right to do so. Only those debts discharged pursuant to the terms of the arrangement will be compromised, other liabilities will survive the reorganisation.

Normally, liabilities of a company will not survive a liquidation, because the liquidation procedure concludes with the dissolution of the company.

Law stated - 01 October 2022

Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

The liquidator pays distributions from available assets among unsecured creditors whose claims are admitted on a pari passu basis. Before making a distribution, the liquidator issues a notice stating the intention to distribute. If a creditor does not submit a claim by the specified in the notice date, the liquidator will exclude this creditor from the distribution. Claims will be subject to final adjudication (eg, admittance in part or in whole, or rejection) by the liquidator only when there are available funds to distribute.

After the allowance for the costs of the liquidation is made, liquidators may make interim distributions as the liquidation progresses, with a final distribution prior to the completion of the liquidation.

Law stated - 01 October 2022

SECURITY

Secured lending and credit (immovables)

What principal types of security are taken on immovable (real) property?

The principal types of security taken on immovable property in the BVI are:

- a mortgage (either legal or equitable);
- an equitable fixed charge; and
- a floating charge.

The governing law of a charge created by a BVI company may be the law of such jurisdiction as agreed by the parties to the charge.

A BVI company must maintain a private register of charges at its registered office. A public register of charges may also be kept by a company at the BVI Registrar of Corporate Affairs.

Law stated - 01 October 2022

Secured lending and credit (movables)

What principal types of security are taken on movable (personal) property?

The principal types of security taken on movable property in the BVI are:

- a floating charge;
- an equitable mortgage or charge; and
- a pledge (which is a possessory form of security in which a lender takes possession of an asset that provides the pledgee with a common law power of sale).

The formal requirements as to governing law and registration as set out for immovable property, mentioned earlier, apply to charges taken on moveable property.

Law stated - 01 October 2022

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

The main 'voidable' transactions in the BVI that can be annulled or set aside are:

- unfair preferences;
- transactions at undervalue;
- voidable floating charges; and
- extortionate credit transactions.

These transactions can be clawed back upon a successful application by the liquidator only.

The relevant transaction must have been entered into in the 'vulnerability period' (that is, six months before the onset of insolvency if the person is unconnected to the company or two years if the transaction is with a connected person).

Law stated - 01 October 2022

Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

In practice, it is common for shareholders to advance funds to companies by way of loan, and where a shareholder loan meets the criteria of a regular debt (as opposed to an equity contribution), these would ordinarily be provable as debts in a liquidation in the ordinary way. One important distinction, however, is that a shareholder may not apply to appoint a liquidator of a company on grounds of insolvency without first seeking the leave of the court. A shareholder can, however, apply for the appointment of liquidators on just and equitable grounds without the leave of the court.

There are no particular rules as to the treatment of shareholder or related party loans in a reorganisation.

Law stated - 01 October 2022

Lender liability

Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

Almost certainly not, although the position might be complex and therefore uncertain in circumstances of an extortionate credit bargain or lender fraud.

Law stated - 01 October 2022

GROUPS OF COMPANIES

Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Companies are distinct legal entities and have a separate legal personality from their shareholders. A shareholder of a limited company has no liability for the debts of its subsidiary, unless it has validly guaranteed such debts. A shareholder's liability to the company on a winding up is statutorily limited to the amount unpaid on the shares of the company held by that shareholder. However, there may be limited circumstances in which the court would be prepared to 'pierce the corporate veil' if a company's separate legal personality is abused (ie, as a vehicle for fraud). There is a developing body of English case law (likely to be persuasive in the BVI) that has considered the potential for parent companies to be held liable for the actions of subsidiaries in limited circumstances, but these principles are yet to be considered by the BVI courts.

Law stated - 01 October 2022

Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

A liquidator may seek sanction for the estates of two or more companies to be pooled for the purposes of reporting, distributions, and the payment of fees and expenses.

An order for pooling may be appropriate in circumstances where it is in the best interests of the creditors to pool them, in particular, where:

- there is an overlap and intertwined ownership and control of the companies;
- funds have moved between them and there are likely to be intermingled funds or claims between the companies; and
- there is a commonality of creditors across each of the estates;

See: In the Matters of Durant International Corp (in Liquidation), Kildare Finance Ltd (in Liquidation), MacDoel Investment Limited (in Liquidation) BVIHC (COM) 2017/134, 2017/135, 2019/0020.

Law stated - 01 October 2022

INTERNATIONAL CASES

Recognition of foreign judgments

Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The BVI is not a party to any international conventions or agreements in relation to the enforcement of domestic or foreign court judgments.

Recognition of foreign judgments is principally governed by the Reciprocal Enforcement of Judgments Act 1922 and the common law. The Reciprocal Enforcement Act provides a process for the recognition of judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Guyana, Grenada, Jamaica, New South Wales (Australia), St Lucia and Trinidad and Tobago, certain courts in Nigeria. Judgments from other jurisdictions may be recognised and enforced at common law, which requires a judgment creditor to commence a claim based upon the judgment debt.

In either process, only money judgments that are 'final and conclusive' can be enforced. As long as this test is met, a foreign default judgment can be enforced, subject to considerations such as due service, fairness and public policy.

Once foreign judgments have been recognised as enforceable in the BVI, the same enforcement remedies are available as for domestic judgments. Thereafter, a judgment creditor may seek, for instance, a charging order, garnishee order, judgment summons, order for the seizure and sale of goods or the appointment of a receiver.

Law stated - 01 October 2022

UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Part XVIII of the Insolvency Act 2003 (the Insolvency Act) adopts the UNCITRAL Model Law on Cross-Border Insolvency for recognising foreign officeholders, 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 a foreign office holder may seek statutory recognition in the BVI courts and thereby be afforded the same powers as a locally appointed office holder.

However, Part XIX of the Insolvency Act provides a basic statutory framework for judicial 'assistance' to be provided to insolvency office holders from certain designated countries, currently limited to Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States.

The Court of Appeal recently confirmed that the common law assistance jurisdiction had been superseded by Part XIX of the Insolvency Act. The result of the ruling is to prevent foreign insolvency office holders from non-designated countries from seeking assistance from the BVI court, although the court also confirmed that foreign insolvency office holders from non-designated countries could still seek limited common law recognition in the BVI.

Law stated - 01 October 2022

Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

With the exception of preferential creditors (the majority of whom are likely to be resident in the BVI), foreign creditors are not treated any differently from domestic creditors, and there are no special procedures that foreign creditors must comply with when submitting claims in BVI insolvency proceedings.

Law stated - 01 October 2022

Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Part III (Administration) of the Insolvency Act has not been brought into force.

Law stated - 01 October 2022

COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The concept of centre of main interests of a debtor company or group of companies does not directly apply in the BVI.

Law stated - 01 October 2022

Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

As noted above, Part XIX of the Insolvency Act does provide a basic statutory framework for judicial assistance in insolvency proceedings relating to certain designated jurisdictions, but this is not equivalent to Model Law recognition, and only provides the ability to apply for assistance from the BVI court on an application-by-application basis. Accordingly, the most effective way to ensure full control across jurisdictions in a cross-border insolvency is for the foreign office holder to seek to be appointed, where possible, in the BVI, on a joint basis with a BVI insolvency practitioner.

In 2017, the BVI adopted the Judicial Insolvency Network's (JIN) cross-border cooperation guidelines that are designed to increase communication and cooperation between courts, insolvency practitioners and other parties in international insolvencies and restructurings. The JIN guidelines have also been adopted by Bermuda, Delaware, New York and Singapore.

Law stated - 01 October 2022

Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Joint court hearings are possible in theory pursuant to the JIN guidelines.

Law stated - 01 October 2022

Winding-up of foreign companies

What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

The BVI court has a power to wind up foreign companies but the court will only exercise this power if the company has a connection with the BVI by virtue of having assets in the BVI or carrying on (or has carried on) business in the BVI. Further, there must be a reasonable prospect that the appointment of a liquidator in the BVI would be to the benefit of the creditors.

Law stated - 01 October 2022

UPDATE AND TRENDS

Trends and reforms

Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

In a recent landmark decision, the BVI court considered the role of third-party funding in BVI insolvency (see In the Matter of Exential Investments Inc (In Liquidation) (BVIHC(COM) 81 of 2020) . Before this decision, there was some uncertainty about whether such funding is legal due to the old principals of champerty and maintenance. The judge found that the funding arrangement entered into by the company and the liquidators was lawful and not contrary to BVI public policy. Indeed, he expressly found that the contrary is the case and sanctioned the arrangement, concluding by finding that:

> *'Without the funding, the liquidators would be unable to obtain recoveries for the benefit of the creditors of the company. Approving the funding arrangement is in the current case essential to ensure access to justice.'*

The Insolvency Act 2003 (the Insolvency Act) is under general review by the government of the BVI. At present, the administration procedure under Part III of the Insolvency Act, which is based on the UK's pre-Enterprise Act administration regime, is not yet in force. A review is being undertaken as to whether the introduction of such provisions is appropriate in the jurisdiction. The prevailing consensus at the present time is that the UNCITRAL Model Law on Cross-Border Insolvency provisions (allowing for further international cooperation) are unlikely to be brought into force. However, some consultation has taken place over the potential expansion of the list of designated countries under Part XIX.

With effect from 1 January 2023, a number of changes to the Business Companies Act (BCA) will affect the striking off and dissolution of companies, and voluntary liquidations. The main changes of relevance are as follows:

- Newly struck-off companies will be dissolved immediately if they fail to cure the relevant breach (usually non-payment of fees) within a 90-day grace period. There will no longer be a period of strike-off pending dissolution. Any companies that are currently in the seven-year strike-off period may apply to be restored before the earlier of the end of that seven-year period and 1 July 2023.
- Dissolved companies may be restored within five years of dissolution (or, if struck off prior to 1 January 2023, by the earlier of seven years from dissolution or 1 July 2023):
  - by application to the registrar within five years of dissolution if, inter alia:
    - the company was operational on dissolution;
    - a registered agent will act;
    - fees are repaid; and
    - the registrar considers it just and reasonable; or
  - by court order:
    - if dissolved pursuant to a completed liquidation (voluntary or insolvent);
    - if not carrying on business or in operation on the dissolution date;
    - to commence or continue legal proceedings or to distribute assets vested in the Crown bona vacantia; or
    - where just and fair.
- It will no longer be possible for anyone to act as a voluntary liquidator. A voluntary liquidator must be licensed under the BVI Insolvency Act or resident in the BVI for 180 days prior to appointment. It will still be possible to

appoint joint voluntary liquidators outside of the jurisdiction. Any already-appointed voluntary liquidators not satisfying the new requirement are not required to resign and may conclude the existing liquidations.

- BVI companies wishing to continue out of the jurisdiction must now advertise their intention to do so and must give advance warning of at least 14 days to all members and creditors.

The BVI did not suspend any insolvency law provisions in light of the covid-19 pandemic, unlike some other jurisdictions. However, the BVI courts quickly adopted remote hearings by videoconference, ensuring that insolvency-related proceedings could continue throughout the pandemic, and Commercial Court and Court of Appeal hearings continue to be held remotely as at September 2022.

Law stated - 01 October 2022

Jurisdictions

Australia	Gilbert + Tobin
Austria	Freshfields Bruckhaus Deringer
Belgium	Freshfields Bruckhaus Deringer
Bermuda	Carey Olsen
British Virgin Islands	Carey Olsen
Canada	Thornton Grout Finnigan
Cayman Islands	Carey Olsen
China	Dentons
Croatia	Schoenherr
Dominican Republic	Guzmán Ariza
European Union	Freshfields Bruckhaus Deringer
Finland	Waselius & Wist
France	Freshfields Bruckhaus Deringer
Germany	Freshfields Bruckhaus Deringer
Ghana	B&P Associates
Greece	PotamitisVekris
Guernsey	Carey Olsen
Hong Kong	Freshfields Bruckhaus Deringer
Hungary	Nagy és Trócsányi
India	Chandhiok & Mahajan, Advocates and Solicitors
Indonesia	Oentoeng Suria & Partners
Ireland	Dillon Eustace LLP
Italy	Freshfields Bruckhaus Deringer
Japan	Anderson Mōri & Tomotsune
Jersey	Carey Olsen

Malta	Ganado Advocates
Mauritius	Benoit Chambers
Netherlands	Freshfields Bruckhaus Deringer
Romania	CITR SPRL
Singapore	Ashurst
Slovenia	Jadek & Pensa
South Africa	Fasken
Spain	Freshfields Bruckhaus Deringer
Switzerland	Walder Wyss Ltd
Taiwan	Lee and Li Attorneys at Law
Thailand	Weerawong, Chinnavat & Partners Ltd
Ukraine	Vasil Kisil & Partners
United Arab Emirates	Freshfields Bruckhaus Deringer
United Kingdom - England & Wales	Freshfields Bruckhaus Deringer
USA	Paul, Weiss, Rifkind, Wharton & Garrison LLP
Vietnam	Freshfields Bruckhaus Deringer