INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5B Guidance Text

British Virgin Islands

2022 / 2023

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CONTENTS

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN THE BRITISH VIRGIN ISLANDS (BVI)

Welcome to **Module 5B**, dealing with the insolvency system of the **British Virgin Islands (BVI)**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of BVI's insolvency laws;
- a relatively detailed overview of the BVI insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the BVI context.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the web pages for the Foundation Certificate in International Insolvency Law for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law on the INSOL International website.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module, you should have a good understanding of the following aspects of BVI insolvency law:

- the background and historical development of BVI insolvency law;
- the various pieces of primary and secondary legislation governing BVI insolvency law;
- the operation of the Insolvency Act, Business Companies Act and other legislation in regard to bankruptcy, liquidation and corporate rescue;
- the rules of international insolvency law as they apply in the BVI;
- the rules relating to the recognition of foreign judgments in the BVI.

After having completed this module, you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of BVI insolvency law; and
- be able to answer questions based on a set of facts relating to BVI insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through the text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO THE BRITISH VIRGIN ISLANDS (BVI)

The British Virgin Islands (BVI) is a British Overseas Territory (BOT) in the Eastern Caribbean, comprising of approximately 54 islands, many of which are uninhabited. The financial services centre is situated in Road Town on the largest island of Tortola. The population of the BVI is approximately 32,000.[1] From a lifestyle perspective, the BVI is very quiet, sparsely populated and the infrastructure basic, save for Road Town. The BVI is under the jurisdiction and sovereignty of the United Kingdom and the British Government is primarily responsible for the BVI's foreign affairs and defence. Executive authority is vested in the British monarch and exercised on King Charles III's behalf by the Governor, resident in the BVI. However, the BVI has been self-governed since 1967. The current Governor of the BVI is Mr John Rankin CMG (who most recently served as the Governor to Bermuda). Mr Rankin was sworn into office on 29 January 2021.

Whilst the BVI is a BOT, it also operates as a parliamentary democracy. The Virgin Islands Constitution Order 2007 (subsequently amended in 2015) brought into force a new constitution and the BVI is now led by the Premier, elected in a general election. The Cabinet is the executive arm of the Government and includes five ministers and the Attorney General (non-voting) and is chaired by the Governor. The power to pass new legislation vests in the House of Assembly, which comprises of thirteen elected members and two non-voting members (the Speaker of the House and the Attorney General). New legislation is subject to approval by the Governor. The current Premier is Natalio Wheatley replaced the former premier Andrew Fahie on 5 May 2022, and is the leader of the ruling Virgin Islands Party.

The official currency of the BVI is the United States dollar (USD). There are no exchange controls and no restrictions on the free movement of currency.

From the 1960s onwards, the BVI incrementally evolved from an agriculture-based economy towards tourism (for boat charters and cruise ships, given the popular beach resorts) and

[1] The last census was undertaken in 2010 and there were approximate 28,054 people residing in the BVI, which has risen slowly. However, the negative impact on population caused by Hurricanes Irma and Maria and potentially Covid-19, has yet to be reflected in figures released by the government. In this regard, see http://www.bvi.gov.vg/statistics.

financial services. Company incorporations are a fundamental part of the BVI's economy. The BVI is now a leading offshore financial centre. Over one million companies have been incorporated in the BVI and it is the second-largest domicile in the world for the formation of offshore investment funds.

In 2017, the BVI was ranked as the world's third most important offshore jurisdiction. This was despite challenges from the Channel Islands and the Cayman Islands. Since then, the BVI has retained its status as a major player in the international service sector. During 2020, the BVI has continued to be one of the most significant offshore jurisdictions, particularly so in the insolvency and restructuring sphere. According to the BVI Financial Services Commission's (FSC) latest annual report, there were 402,907 active companies in the BVI. The Covid-19 pandemic has posed problems to the global economy and the BVI financial services community has illustrated its resilience and innovation. For example, the BVI previously experienced significant challenges following Hurricanes Irma and Maria in 2017. During the pandemic, using the expertise and innovation developed previously, the BVI Court quickly switched to remote hearings and electronic filings.

Despite being at the forefront of regulatory disclosure and governance, on 1 May 2018 the United Kingdom government enacted the Sanctions and Anti-Money Laundering Act 2018, which requires territories and crown dependencies to establish a publicly accessible register of the beneficial ownership of companies registered in its jurisdiction. The BVI government previously objected to this legislation, not least because it represents interference with the BVI's constitutional autonomy and places the territory at a competitive disadvantage compared to other jurisdictions that do not meet the stringent regulatory and disclosure standards in the BVI.

On 30 June 2017, the Beneficial Ownership Secure Search System Act, 2017 (BOSS Act) came into force. This BOSS Act requires registered agents (entities that are required for the incorporation and administration of companies), in the BVI to create a database of beneficial ownership information for certain entities which they service. The most fundamental amendments to the BOSS Act came into force on 1 October 2019, as a result of section 16 of the BVI Economic Substance (Companies and Limited Partnerships) Act, 2018; and on 31 October 2019, to reflect the Rules on Economic Substance in the Virgin Islands issued by the BVI International Tax Authority. In September 2020, Premier Andrew Fahie made the following statement: "Your government commits to working in collaboration with Her Majesty's Government towards a publicly accessible register of beneficial ownership for companies, in line with international standards and best practices as they develop globally and, at least, as implemented by EU Member States by 2023 in furtherance of the EU Fifth Anti-Money Laundering Directive (AMLD5)". This is a significant development in relation to public registers, bringing the BVI in line with all other BOTs.

On 1 January 2023 a number of significant amendments to the BVI Business Companies Act 2004 will come into force via the BVI Business Companies (Amendment) Act 2022 and the BVI Business Companies (Amendment) Regulations 2022. The key amendments for BVI companies are a streamlined process for dissolution and restoration, and making available the names of directors (although only to users of the VIRRGIN platform and changes to the accounting and record keeping requirements).

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Please note from the outset, the BVI Government authorities rarely consolidate legislation and so all separate amendments to each statute must be reviewed. In addition, there are currently no law reports in the BVI. Cases are referred to only by their case number provided by the High Court Registry on filing - there is no citation aside from this. Judgments are published by the Eastern Caribbean Supreme Court, from its head office in St Lucia.

The legal system of the BVI is based on English common law. Common law and equity were extended to the BVI by way of the Common Law (Declaration of Application Act) 1705 and the Eastern Caribbean States Supreme Court (Virgin Islands) Act 1969. With regard to legal precedent, decisions of the BVI courts are treated as precedent as they would be in other jurisdictions (such as England and Wales). English judgments are treated as highly persuasive, whilst taking into account local laws and BVI Court precedents. For example, there may be some BVI statues that do not follow the comparable English statue to a fundamental degree. In addition, decisions from other Eastern Caribbean jurisdictions can also be persuasive (although not actually binding upon the BVI court) dependent of the development of the applicable law in that country. Case law from other Commonwealth jurisdictions may also be considered, for example from Hong Kong, Australia and the Cayman Islands.

With regard to statute, all domestic matters are legislated locally, by the House of Assembly (as noted above). This includes taxation, company laws, banking, insurance and commercial regulations. It is important to note that BVI statues do not often come into force on the date that they are passed by the House of Assembly. It is common for, a statute to come into force on the date it is published in the Virgin Islands Official Gazette.[2]

The statutory framework for restructuring, reorganisations and insolvency in the BVI is principally codified in the Insolvency Act, 2003[3] (the Insolvency Act) the Insolvency Rules, 2005 (the IR) – which are largely creditor-friendly – and the BVI Business Companies Act, 2004 (the BCA). The Insolvency Act sets out the procedures for insolvent liquidations and the appointment of liquidators, receivers and administrative receivers and trustees in bankruptcy. The Insolvency Act was predominantly modelled on the United Kingdom's Insolvency Act 1986, with a number of fundamental differences. The BCA sets out the governing principles for company restructuring and reorganisation as well as the voluntary liquidation regime.

Prior to the BCA the International Business Companies Act, 1984 (IBA) governed company law and there are transitional provisions provided for in the BCA. The majority of BVI companies incorporated under the IBA were "automatically re-registered" as BCA companies under the relevant BCA transitional provisions on 1 January 2007.

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2 https://eservices.gov.vg/gazette/.

3 The Insolvency Act came into force on 1 January 2004.

Before commencement of the Insolvency Act in January 2004, BVI insolvency law was taken from a combination of sections of the Companies Act (first brought into force 1884 and originally modelled on the late 19th century English Companies Act), the Bankruptcy Act (first brought into force in 1890) and common law. Whilst there are still two main statutes providing the legal framework, since the commencement of the Insolvency Act, insolvency law in the BVI is more unified and detailed, particularly in relation to corporate and cross-border insolvency.

The fundamental principle underlying BVI insolvency law, which closely follows English law, is the *pari passu* treatment of creditors. Accordingly, subject to contractual arrangements to the contrary, and to a small class of preferential creditors, unsecured creditors share equally in the assets of an insolvent company (which are available for distribution). In addition, the Insolvency Act specifically recognises and protects the rights of secured creditors to enforce their security.

4.2 Institutional framework

4.2.1 BVI court system

The Eastern Caribbean Supreme Court (ECSC) is the superior court of record for the BVI, as well as for Anguilla, Montserrat, Antigua and Barbuda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Grenada and Dominica. The ECSC is headquartered in Saint Lucia, although each Member State has its own High Court Registry and its own High Court Judiciary. In May 2009, the ECSC established a dedicated Commercial Division, located in the BVI. The minimum value for a claim to be brought in the Commercial Court is USD 500,000, although the majority of cases are considerably larger.

Appeals from the High Court are to the ECSC Court of Appeal, which sits in the BVI approximately three times a year. Appeals from the Court of Appeal are to the Judicial Committee of the Privy Council in London. The BVI also has a Magistrate's Court, which has both a criminal and a civil jurisdiction and from which appeals lie directly to the ECSC Court of Appeal. The Court of Appeal is an itinerant court, which can hear BVI appeals in other jurisdictions, where required on an urgent basis.

The ECSC Civil Procedure Rules 2000 (CPR) govern practice and procedure in the BVI courts, as supplemented by practice directions. The CPR were significantly amended in 2011, in particular in respect of the practice and procedure relating to service out of the jurisdiction (Part 7) and appeals to the Court of Appeal (Part 62). Whilst English case law continues to be persuasive in the jurisdiction, where the CPR provides for a different approach to that of England and Wales, the English Civil Procedure Rules are not persuasive. However, where no specific or special provision exists under BVI law (for example, if there is a complete *lacuna* in the CPR), section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act, provides that the BVI Court will exercise its jurisdiction in near conformity with the law and practice in force in the High Court of Justice in England.

Parts 69A and 69B of the CPR provide for a separate approach to Commercial Court cases, heard in the BVI Commercial Court. A case is suitable for determination in the Commercial Court when it falls into certain categories of cases arising out of the transaction of trade or commerce

and generally has a monetary value of over USD 500,000. In addition, practice and procedure in respect of certain Insolvency Act proceedings are governed by the IR. The CPR may still apply if there is a *lacuna*, provided that the Insolvency Act or the IR are not contradicted.

The BVI court system and, in particular, the Commercial Division, is regarded as highly efficient in the context of the enforcement of creditor rights. It is very common for high-value insolvency proceedings to be brought in the BVI Commercial Division. The court exercises a supervisory position in insolvency proceedings in the BVI, for example orders appointing insolvency practitioners, such as liquidators, often require the office holder to seek the Court's sanction before exercising certain powers. The Court hears matters urgently (on application with a certificate of urgency), for example, where there is a risk that assets are being dissipated.

4.2.2 The Financial Services Commission

The enactment of the Financial Services Commission Act, 2001 (as amended) (the FSC Act), established the BVI FSC, an independent supervisory authority. Prior to the coming into force of the FSC Act, financial services were regulated by the Ministry of Finance of the BVI Government and the Governor.

The functions of the Commission are set out in section 4 of the FSC Act and, in particular, include responsibility for the regulation, supervision and inspection of all financial services in and from within the BVI.[4] Regulated activities that are considered "financial services" include insolvency services, investment businesses and the registration of companies and limited partnerships. In addition, the FSC is the licensing authority for insolvency practitioners.

The FSC comprises of a number of different divisions, reflecting its statutory functions:

(1) the Registry of Corporate Affairs (the Registry);

(2) Investment Businesses;

(3) Banking, Insolvency and Fiduciary Services;

(4) Insurance;

(5) Research and Statistics; and

(6) Legal and Enforcement.

The FSC also comprises an Enforcement Committee to consider, determine and exercise the FSC's powers on enforcement conferred on it under Part V of the FSC Act.[5] For example, investigation and enforcement would be required where a regulated person, such as a licenced

4 Financial Services Commission Act, s 3.
5 *Idem*, s 16A.

insolvency practitioner acting as a liquidator, has provided false inaccurate or misleading information.

The FSC Act also established a "Board of Commissioners", which is the governing body of the FSC and is responsible, *inter alia*, for: (i) establishing policy for the FSC and monitoring and overseeing its implementation; and (ii) monitoring and overseeing the management of the FSC with the objective of ensuring that the resources of the FSC are utilised economically and efficiently. The Board of Commissioners is comprised of the Managing Director, as an *ex officio* member, in addition to at least four other members (up to six).

With regard to international affairs, sections 33C and 33D of the FSC Act provides for the FSC's duty to cooperate with foreign regulatory authorities or persons outside of the BVI that have functions in relation to the prevention or detection of financial crime. Cooperation includes the sharing of documents and information and making requests for assistance to foreign regulatory authorities.

4.2.3 BVI company law

The Registry predominantly administers the BCA and is a division of the FSC. It is also responsible for ensuring that entities undertaking business in the BVI are registered and that the Register of Companies (Register) is properly maintained. The Registrar of Corporate Affairs (the Registrar) administers the Register.

Every company incorporated in this jurisdiction is required at all times to have a registered agent,[6] unless it is in liquidation.[7] The first registered agent must be named in the company's memorandum of association.[8] If at any time a company does not have a registered agent, it is required to immediately, by resolution of members or directors, appoint a registered agent.[9] Under section 91(3) of the BCA, an entity may not act as a registered agent, or hold itself out as the same, unless it holds a licence. The FSC maintains a register of approved registered agents, which is published on the FSC's website.[10]

A company that does not have a registered agent commits an offence and is liable on summary conviction to a fine of USD 10,000. The Registrar has the power to strike a company off the Register in the event the company does not have a registered agent.[11] The Registrar will not restore the company to the register unless the Registrar is satisfied that a licenced person has agreed to act as registered agent.[12]

If a company is struck-off by the Registrar for non-payment of fees or for not having a registered agent, it will stay in a hiatus state on the Register for a period of seven years or 10 years,

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6 Business Companies Act, s 91(1).
7 *Idem*, s 91(5); the applicable definition of "liquidation" is under s 160 of the BVI Insolvency Act, 2003.
8 Business Companies Act, s 9(1)(d).
9 *Idem*, s 91A(1).
10 *Idem*, s 95.
11 *Idem*, s 213(1).
12 *Idem*, s 217(2).

depending on the incorporation date, prior to be being dissolved. However, from 1 January 2023 the BVI Business Companies (Amendment) Act 2022 and BVI Business Companies (Amendment) regulations 2022 will amend section 216 of the BCA to state that where a company is struck-off under section 213(4) of the BCA, the company is dissolved on the date that the Registrar publishes a notice of striking-off in the Virgin Islands Official Gazette under subsection (5).

In addition to a registered agent, a company is at all times required to have a registered office in the jurisdiction.[13] Under the BCA, a registered office of a company is:

(a) the place specified as the company's first registered office in the company's memorandum;[14] or

(b) if one or more notices of change of registered office have been filed under section 92 BCA, the place specified in the last such notice to be registered with the Registrar of Companies.

The registered office of a BVI company must be a physical address in the BVI and if the registered office of the company is the office of its registered agent, this must be stated in the description of the address in the company's memorandum or in the notice of change of address. A company is required to maintain, at its registered office, the following: its memorandum and articles of association, the register of members (or a copy), a register of directors (or a copy), register of charges (where relevant) and copies of all notices and other documents filed by the company in the previous 10 years.[15] This company information is not public, however from 1 January 2023 the names of the directors will be available to those users of the FSC's VIRRGIN platform.

Pursuant to section 232(1) of the BCA, (except as otherwise provided), any document that is either required to be filed or permitted to be filed under the BCA, may only filed by the registered agent or a liquidator, where applicable.

4.2.4 Enforcement of creditor rights (inside and outside of insolvency)

In light of the BVI's position as an international financial centre, the role of creditors (predominantly based in foreign jurisdictions), has played an important role in the development and policy of BVI insolvency law. For example, Part XVIII of the Insolvency Act introduced provisions for cross border insolvencies and under section 446 it was to provide that foreign creditors with a right of direct access and such creditors have the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as creditors from within the jurisdiction. However, Part XVIII of the Insolvency Act is not yet in force.

In a corporate insolvency, the Insolvency Act provides for a range of transactional avoidance provisions, which are enforced by application to the BVI Court. These are designed to give effect to the *pari passu* principle, including the avoidance of preferential payments to creditors and

[13] *Idem*, s 90(1).
[14] *Idem*, s 9(1)(c).
[15] *Idem*, s 96.

transactions at an undervalue, collectively known as voidable transactions. The Insolvency Act also provides remedies for, *inter alia*, fraudulent and insolvent trading.

Whilst there are debt and company restructuring procedures available, pursuant to schemes of arrangement, plans of arrangement and creditor arrangements, there is currently no specific procedure available that is similar to Chapter 11 in the United States or administration in England and Wales. There is an administration process set out in the Insolvency Act, but it has never been brought into force.

Other than modifications under the Insolvency Act for insurance companies, regulated entities and certain financial contracts, there are no special regimes applicable to different types of BVI companies.

Self-Assessment Exercise 1

Study the basic aspects dealt with in the previous section.

Briefly set out the insolvency framework applicable in the BVI and how this is supervised and regulated by the BVI's institutional framework.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

Section 161(1) of the BCA provides each BVI company with the ability (subject to its memorandum and articles of association) to create a charge over its property by an instrument in writing. A charge is defined as any form of security interest over property, wherever situated (other than an interest arising by operation of law).[16]

The BCA also allows the governing law of that charge to be agreed as between the parties (section 161(2) of the BCA). In addition, under the BCA: (i) there are no formalities, such as a requirement for the document to be notarised; and (ii) no stamp duty is payable in the BVI. 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.

There are two ways in which a charge is registered / recorded in the BVI:

(1) Section 162 is mandatory and requires a company to keep at the company's registered office or at the office of its registered agent, a register of all relevant charges created by the company. The information in the company's register must include: (i) the date of creation of

[16] *Idem*, s 160(1).

the charge; (ii) a short description of the liability secured by the charge; (iii) a short description of the property charged; (iv) name and address of the trustee for the security or the name of the address of the charge (if no trustee); (v) the name and address of the holder of the charge and (vi) details of any prohibition or restriction (if any) contained in the instrument creating the charge on the power of the company to create any future charge ranking in priority to or equally with the charge. This register is not available for public inspection; however, failure to maintain the register can result in a fine of up to USD 5,000 for the company. In the event a charge was not entered on this register, the charge would still be valid and enforceable in accordance with its terms.

(2) Section 163 is not mandatory but sets out the rules for the public registration of charges. In order to do so, an application must be made to the Registrar to register the charge. This application may be made by (i) the company or a legal practitioner in the BVI authorised to act on its behalf; or ii) the chargee, or a person authorised to act on the chargee's behalf. The Registrar is required to keep a Register of Registered Charges with respect to each company.[17] In the event the Registrar is satisfied with any application made, the Registrar will enter the details in the particular register, including the date and time on which the charge was registered, in addition to providing a certificate of registration for such charge.

Secured creditors are not strictly speaking classed as creditors or considered as participating in the insolvency process.[18] Their claims are directly against the assets of the company, which are subject to the security, so they fall outside the liquidation. There are, therefore, no timelines for enforcing a secured claim. It is up to the secured creditor to determine when to take control of the security interest and when to sell it for the best return.

Common forms of security interest in the BVI granted over immovable property are as follows:

Legal mortgages

A legal mortgage is created by a contract which provides the lender with a legal interest in the asset, subject to the right to have the assets re-conveyed once the obligations have been complied with (the equity of redemption). In order to prefect a legal mortgage the title to the relevant assets must be conveyed to the security taker. In practice, a mortgage is usually created by the mortgagor entering into a charge by way of legal mortgage, which provides to the lender a legal interest in the relevant asset. The holder of a legal mortgage over assets has three primary remedies in the event of default under the mortgage or charge: (i) foreclose on the shares, (ii) sell the shares, or (iii) appoint a receiver over the shares. There may also be additional terms included under the mortgage.

[17] *Idem*, s 163(3).
[18] Insolvency Act, s 175(2).

Equitable charge

The terms of an equitable charge provide the lender with the power to obtain and sell assets subject to the charge. It prevents the chargor from disposing, in whole or in part, the asset subject to the charge without the chargee releasing the charge, in whole or in part.

A fixed charge will generally arise where: (i) the asset is, or is capable of being, determined; and (ii) the charge gives the lender control of such 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).

Mortgages and charges over shares in a BVI Company

There is a distinct section in the BCA which relates to mortgages over shares in BVI companies. Under section 66 of the BCA, there is no prescribed form for a mortgage or charge of shares of a BVI company. However, it must: (i) be in writing and signed by (or with authority of) the holder of the shares to which the mortgage or charge relates,[19] (ii) clearly indicates the intention to create a mortgage or charge,[20] and (ii) clearly indicate the amount secured by the mortgage or charge or how the amount is to be calculated.[21]

The governing law of a mortgage or charge of shares of a BVI company may be the law of the BVI or the law of another jurisdiction.[22] The holder of a legal mortgage over shares general has three remedies in the event of default under the mortgage or charge: (i) foreclose on the shares, (ii) sell the shares, or (iii) appoint a receiver over the shares. There may also be additional terms included under the mortgage or charge. Please note that, unlike in some jurisdictions, in the BVI, a mere deposit of share certificates will not give rise to an equitable mortgage.[23]

Common forms of security interest in the BVI granted over movable property:

Equitable charge

See above in relation to immovable property.

Pledge

This is a form of security in which a lender takes possession of an asset. A pledge provides the lender with a common law power of sale over physical assets, in the event of a default. A pledge

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19 *Idem*, s 66(1).
20 *Idem*, s 66(3)(a).
21 *Ibid*.
22 *Idem*, s 66(4).
23 See Business Companies Act, s 66(1) (mortgage over shares).

cannot be granted over BVI company shares. A pledge does not confer a right to appoint a receiver or foreclose.

Self-Assessment Exercise 2

Study the basic aspects dealt with in the previous section.

Question 1

Describe the mandatory procedure for registering a charge.

Question 2

Why is it preferable for a chargee to undertake public registration of a charge despite it not being mandatory?

Question 3

What are the remedies available to the holder of a legal charge over shares in a BVI company?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

As stated above, the statutory framework for restructuring, reorganisations and insolvency in the BVI is principally codified in the Insolvency Act and the Insolvency Rules. The role played by the Court is a significant one, in particular in giving directions to insolvency practitioners, providing sanction where required, approving the liquidator's remuneration, fees and expenses and generally controlling the process. Fundamentally, all insolvency practitioners, such as liquidators, supervisors, interim supervisors and receivers, are officers of the Court. It is noted that the BVI Commercial Court has significant experience in dealing with multi-jurisdictional work and, in particular, major corporate insolvencies on a daily basis. For example, a number of the most notorious Madoff feeder funds were incorporated in the BVI and consequently there has been much litigation and Court supervision conducted in the BVI.

In a BVI insolvent liquidation, it is the creditors of the company who are the key stakeholders – the BVI is a creditor-friendly jurisdiction and much of the legislation is biased heavily towards creditors. For example, in insolvent liquidation the creditors can form a creditors' committee, which works with the liquidator in relation to the liquidation and creditors can use their influence in this regard.

6.2 Insolvency practitioners

6.2.1 Licencing and regulation

Part XX of the Insolvency Act contains the provisions that relate to the licensing of insolvency practitioners in the BVI. There are also detailed requirements contained in the Insolvency Practitioner Regulations, 2004 (made by the Executive Council of the FSC) and in a Code of Practice issued by the FSC. The Code of Practice includes guidelines on the qualifications and experience that a licenced insolvency practitioner should have.

A person is not able to act as an insolvency practitioner unless they have such a licence,[24] otherwise they commit an offence. An insolvency practitioner includes: an administrative receiver, liquidator or provisional liquidator, an interim supervisor, a supervisor or a bankruptcy trustee.[25] The requirement to be licenced in the BVI does not apply to an overseas insolvency practitioner acting jointly with a licensee or the Official Receiver.

Licences are issued by the FSC,[26] on application from individuals only[27] and are published in the Virgin Islands Official Gazette.[28] The FSC's website also contains a list of current licenced insolvency practitioners in the BVI.[29] The FSC will only issue a licence if:[30] (i) the individual is resident in the BVI and fit, proper and qualified to act, (ii) the individual will be in compliance with the Insolvency Act and the IP Regulations, (iii) the individual is not disqualified from holding a licence,[31] and (iv) the issuing of a licence is not against the public interest. Pursuant to section 478 of the Insolvency Act, the FSC is provided with powers to control licensees and enforce against them. The consequences of a licenced insolvency practitioner not complying with the relevant legislation include suspension and / or revocation of their licence.[32]

6.2.2 Eligible insolvency practitioner

Under the Insolvency Act,[33] a person is an "eligible insolvency practitioner", able to be appointed over an insolvent BVI company, foreign company or an individual's estate as a trustee in bankruptcy if: (a) he is a licenced insolvency practitioner, (b) he has given his written consent to act in the prescribed form, (c) he is not disqualified from holding a licence under section 477, (d) he is not disqualified from acting,[34] and (e) there is in force such security for the proper performance of his functions.[35]

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24 Insolvency Act, s 474(2).
25 *Idem*, s 474(1)(a)-(e).
26 *Idem*, s 476.
27 *Idem*, ss 475(1) and 475(2). A company or a partnership cannot be a licensed insolvency practitioner.
28 https://eservices.gov.vg/gazette/.
29 http://www.bvifsc.vg/insolvency-practitioners.
30 Insolvency Act, s 476.
31 *Idem*, s 482(2).
32 *Idem*, s 479.
33 *Idem*, ss 482(1)(a)-(e).
34 See Insolvency Act, s 482(2).
35 That is, there is a retainer.

6.2.3 Overseas insolvency practitioners

Under section 483 of the Insolvency Act, an individual resident outside of the BVI can be appointed to act as an insolvency practitioner and sets out detailed requirements in this regard.[36]

It is common for BVI companies' assets (or a substantial part thereof) to be situated outside of the BVI. Accordingly, it is often helpful to appoint an insolvency practitioner from a jurisdiction in which such assets are held. From a practical standpoint, whilst there is another insolvency practitioner appointed (which has associated costs), it significantly reduces costs of travel and further costs relating to local expertise. This is particularly important in long-running liquidations which involve multiple disputes in different jurisdictions.

However, the overseas insolvency practitioner must be appointed jointly with a BVI licenced insolvency practitioner or the Official Receiver. In order to be so appointed, prior written notice of such intended appointment must be provided to the FSC.[37] In circumstances where it is proposed that an overseas insolvency practitioner be appointed, the FSC has the power to appear and be heard at the court hearing to appoint (where applicable) and object to the appointment.[38] In practice, the foreign insolvency practitioner usually writes a letter to the FSC, providing required details (such as expertise and qualifications) and awaits confirmation that the FSC approves the appointment of the overseas insolvency practitioner (subject to Court approval, where relevant).

6.2.4 The Official Receiver[39]

The FSC has the power to appoint the Official Receiver under section 488(1) of the Insolvency Act and he is an employee of the FSC. The FSC can also appoint a Deputy Official Receiver and other staff members. The requirement to be licenced under section 474(2) of the Insolvency Act does not apply to the Official Receiver. Similarly, to licenced insolvency practitioners, the Official Receiver is an officer of the Court and may apply to the Court for directions and is required to comply with any directions provided by the Court.[40] The functions of the Official Receiver derive from the Insolvency Act and the IR (where applicable) and any other relevant enactment. Subject to provisions to the contrary, any reference under the Insolvency Act or IR to a liquidator, supervisor, interim supervisor, receiver or bankruptcy trustee includes the Official Receiver acting in such capacity. The Official Receiver and Deputy Official Receiver have an automatic right of audience before the BVI Court,[41] unlike other licenced insolvency practitioners who instruct insolvency lawyers for such purposes.

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36 Insolvency Act, s 483.
37 *Ibid*. In addition, there are a number of conditions set out specifically in relation to a Court appointment under the Insolvency Act, s 483 (a)(i)-(v).
38 *Idem*, s 484.
39 *Idem*, Pt XXI.
40 *Idem*, s 490.
41 *Idem*, s 492.

6.3 Personal bankruptcy

The BVI is an international offshore finance centre, focusing on holding companies for investment structures. Given its small population, applications for personal bankruptcy are relatively rare and are very unlikely to involve an international element. The framework is, however, set out below in detail.

The Insolvency Act provides certain provisions which are equally applicable as between an insolvency company and a bankrupt. These provisions are set out in Part V of the Insolvency Act and include: (i) insolvency set-off, (ii) agreements to subordinate debt, and (iii) statutory demands. In addition, the provisions relating to creditors' committees also mirror those in the corporate insolvency regime. These provisions are dealt with in the corporate insolvency section below.

6.3.1 Individual creditors' arrangement

An individual creditors' arrangement is available pursuant to Division 3 of the Insolvency Act, whereby an individual can make a "proposal" to his creditors and nominate an insolvency practitioner as interim supervisor. The individual is required to provide the nominated insolvency practitioner with the proposal and a recent statement of his assets and liabilities.[42] Once accepted, the insolvency practitioner must notify the Official Receiver of his appointment and, among other things, prepare a report to the Court and monitor the affairs of the debtor.[43]

An individual who intends to make a proposal may apply to the Court for a moratorium, but only in circumstances where: (i) he is entitled to apply for a bankruptcy order, (ii) an eligible insolvency practitioner has accepted such appointment as an interim supervisor, (iii) no previous applications have been made, and (iv) the individual is not a regulated person.[44]

The Court will grant a moratorium order if it considers it would be appropriate to do so for the purpose of facilitating the consideration of the individual's proposal.[45] The effect of a moratorium order includes the following:[46] (i) no application for an order for bankruptcy can be proceeded with, (ii) no order for bankruptcy can be made, (iii) no steps can be taken to enforce security, and (iv) no legal proceedings may be commenced against the individual or in respect of his assets. With regard to contracts such as hire purchase, leave of the Court is required in order to repossess assets.

However, during the period that a moratorium order is in force, the interim supervisor owes a duty to report to the Court in circumstances where he forms the view that the proposed arrangement no longer has a reasonable prospect of success and where the individual is not complying with his duties under such proposal.[47]

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42 *Idem*, s 47.
43 *Idem*, ss 48 and 49.
44 Insolvency Act, s 51.
45 *Idem*, s 53.
46 *Idem*, s 55.
47 *Idem*, s 54.

The next steps in the procedure are as follows:[48] (i) the interim supervisor files a report with the Court on the proposal, (ii) the Court may make an order for the extension of a moratorium (where relevant), and (iii) a creditors' meeting is called. The chairman of such creditors' meeting is then required to provide a report to the Court of the creditors' committee's decisions on the proposal. Where a proposal is rejected, the moratorium falls away. The effect of an approved proposal is that the arrangement takes effect from the date of the meeting and is binding on the individual and on each creditor.[49] The implementation of the arrangement includes that the supervisor is given possession of all assets subject to such arrangement.[50]

6.3.2 Order for bankruptcy

The provisions governing bankruptcy in the BVI are found under Part XII of the Insolvency Act, supplemented (where applicable) by the Insolvency Rules. Interpretation is predominantly set out in section 290 (save for the definition of "insolvent" in section 8), in particular, bankrupt means "the individual against whom the bankruptcy order is made" and debtor means "the individual to whom an application for a bankruptcy order relates".

A bankruptcy order is made by the Court and it vests the assets of such individual in a bankruptcy trustee appointed by the Court, for the purposes of the division amongst the creditors.[51] The bankruptcy commences at the time at which the order is made by the Court and continues until it is terminated by the discharge of the bankrupt under section 376 or section 379 of the Insolvency Act.[52]

The conditions of which the Court needs to be satisfied in order to consider making a bankruptcy order, are as follows:

(a) that on the date the application was filed, the debtor: (i) was ordinarily resident in the BVI; (ii) was personally present in the BVI; (iii) was carrying on business in the BVI by means of a partner or partners or of an agent or manager; or (iv) had a place of residence or place of business in the BVI;

(b) that the debtor has or appears to have assets in the BVI; or

(c) that there is a reasonable prospect that the making of a bankruptcy order will benefit the creditors of the debtor.

A debtor or partnership is deemed to be carrying on business in the BVI if liabilities incurred in the course of a business formerly carried on in the BVI, remain unpaid.[53] In light if the conditions of which the Court must be satisfied and the population of the BVI, it is not difficult to understand why bankruptcy is not often encountered.

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48 *Idem*, ss 56 to 58.
49 *Idem*, s 62.
50 *Idem*, s 63.
51 *Idem*, s 292(1).
52 *Idem*, s 292(2).
53 *Ibid*.

Pursuant to section 294 of the Insolvency Act, an application to the Court for a bankruptcy order can be made: (a) by the debtor, (b) by a creditor, or (c) by the supervisor of an arrangement or by a creditor under section 301 of the Insolvency Act. An application for a bankruptcy order must be determined within three months after it is filed[54] or it is deemed to have been dismissed.[55] This time period can be extended for a period of up to three months if the Court considers fit and if it is satisfied that (a) special circumstances justify the existence, and (b) the order extending is made before the expiry of that period.[56] Applicants may also be able to withdraw the application, but only with leave of the Court.[57]

6.3.3 Application by a debtor

Where the debtor makes an application for a bankruptcy order, pursuant to section 295(1), he must satisfy the Court that: (a) the debtor is unable to pay his debts as they fall due, (b) that the unsecured liabilities of the debtor exceed the prescribed minimum, and (c) that if a bankruptcy order is made, the value of the debtor's assets available for distribution to his unsecured creditors will exceed the prescribed minimum.

The debtor must also include a verified statement of his assets and liabilities.[58] Section 290 defines the "prescribed minimum" as the minimum amount of the debt for which a statutory demand may be issued under section 155. Pursuant to rule 149(1) of the IR, the minimum sum for which a statutory demand may be issued is USD 2,000.

6.3.4 Application by a creditor

Pursuant to section 296(1) of the Insolvency Act, a creditor's application must be made in respect of a liability or liabilities where, at the time of the application: (a) the amount of the liability or the aggregate amount of the liabilities, exceeds USD 2,000, and (b) the liability or each of the liabilities is for a liquidated sum payable to the applicant creditor immediately. Such application may not be made in respect of a liability incurred outside of the BVI, unless the liability is payable by virtue of a judgment or award by execution in the BVI.

6.3.5 Application by a secured creditor

A secured creditor must state in his application the full amount of the liability and in addition: (a) state that he is willing, in the event of a bankruptcy order being made, to give up his security interest for the benefit of other creditors of the bankrupt, or (b) give an estimate of the value of his security interest and make the application in respect of the full amount of the liability of the debtor to him less the estimated value of the security interest.[59]

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54 *Idem*, s 306(1).
55 *Idem*, s 306(3).
56 *Idem*, s 306(2).
57 *Idem*, s 303.
58 *Idem*, s 295(2).
59 *Idem*, s 298(1).

Where any amount is unsecured, the secured creditor is treated as an unsecured creditor.[60] In the event a secured creditor fails to disclose his security interest and a bankruptcy order is made, that secured creditor is deemed to have given up his security for the benefit of the other creditors.[61] However, in such circumstances the secured creditor can make an application for relief pursuant to section 299(2) in the event it was an inadvertent failure or due to an honest mistake.

When making a decision on an application by a creditor of a bankruptcy order, the Court must first be satisfied that the debtor is "insolvent" within the meaning of section 8(2) of the Insolvency Act. Section 8(2) states that an individual is insolvent if: (a) he fails to comply with the requirements of a statutory demand that has not been set aside under section 157, or (b) execution or other process issued in a judgment, decree or order if a BVI court in favour of a creditor of the individual is returned wholly or partly unsatisfied. In relation to (a) or (b) the statutory demand or the judgment etc must be made by / in favour of the creditor making the application.[62] Furthermore, there are a number of other matters that the Court must be satisfied of, which are set out in section 300(2) of the Insolvency Act.

On hearing an application, the Court has the power to make a bankruptcy order, dismiss the application, adjourn the hearing (conditionally or unconditionally) or make any interim order it considers fit.[63] Upon making the bankruptcy order, the Court will appoint either the Official Receiver or an eligible insolvency practitioner to be the bankruptcy trustee of the bankrupt.[64]

6.3.6 Interim relief

Where an application has been filed, but not yet determined by the Court or withdrawn, the Court may make an order for interim relief if it considers that it is necessary for the protection of the assets.[65] An application for interim relief may be made by: (a) the applicant, (b) the debtor, or (c) any creditor of the debtor.[66] The Court may make an order, *inter alia*, directing an eligible insolvency practitioner (or the Official Receiver) to take control of the debtor's assets (or any part of them) and any relevant books and documents. Such interim order will remain in effect until the earlier of the discharge of the order by the Court or the applicant or the determination or withdrawal of the application for a bankruptcy order.

6.3.7 Effect of interim relief

Unless leave of the Court is obtained, the following actions cannot be taken: (a) no steps may be taken to enforce any security interest over the debtor's assets, (b) no steps may be taken to repossess assets that are being used or occupied by or are in the possession of the debtor, and

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60 *Idem*, s 298(2).
61 *Idem*, s 299(1).
62 *Idem*, s 300(1)(a)-(b).
63 *Idem*, s 304.
64 *Idem*, s 305.
65 *Idem*, s 307(1).
66 *Idem*, s 307(2).

(c) no proceedings, execution or other legal process may be commenced or continued or distress levied against the debtor or his assets.

6.3.8 Effect of bankruptcy order

On the making of a bankruptcy order, the assets comprised in the bankrupt's estate:

- vest in his trustee without any conveyance, assignment or transfer; and
- become divisible among his creditors in accordance with the Insolvency Act.[67]

Every bankruptcy is under the general control of the Court and (subject to anything contrary in the Insolvency Act) the Court has full power to decide all questions of priorities and all other questions, whether of law of fact, arising in any bankruptcy.

6.3.9 The bankrupt's estate

Section 313 of the Insolvency Act sets out the assets contained in the bankrupt's estate: (a) all assets belonging to or vested in the bankrupt at the date of bankruptcy, (b) assets claimed by the trustee under section 318 or 319, and (c) capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of assets as might have been exercised by the bankrupt for his own benefit.

Items not included in the bankrupt's estate: (a) assets held by the bankrupt on trust for any other person, (b) tools, books, vehicles and other equipment as are necessary for the bankrupt to use personally by him in his business, (c) clothing, bedding, furniture, household equipment and other items necessary for basic domestic needs, and (d) any asset which is excluded from his estate under any other enactment. Assets comprised in the bankrupt's estate are subject to the right of any person, whether as a secured creditor or otherwise, unless such rights have been given up under provisions in the Insolvency Act.

6.3.10 General duties of trustee

In performing his functions and undertaking his duties under the Insolvency Act, a bankruptcy trustee acts as an officer of the Court.[68] The principal duties of a trustee in bankruptcy are: (a) to take possession of, protect and realise the bankrupt's estate, and (b) distribute the bankrupt's estate in accordance with the Insolvency Act. In addition, if the trustee is not the Official Receiver, he has a duty to provide such information and documentation as is reasonably required by the Official Receiver for the purpose of enabling him to carry out his functions.[69] The trustee is also required to prepare a preliminary report within 60 days of the bankruptcy order and provide this to the Official Receiver.

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[67] *Idem*, s 311(1).
[68] *Idem*, s 323.
[69] *Idem*, s 324(2).

6.3.11 Powers of trustee

Part 1 of Schedule 4 of the Insolvency Act contains the powers that the trustee is able to exercise with permission of the Court or the creditor's committee. Part 2 sets out the powers that the trustee can utilise without the permission of the Court or creditors committee. In addition, the trustee is able to inspect goods of the bankrupt that are the subject to a pledge or other security.[70] A security holder is not entitled to realise his security until the trustee has had an opportunity to inspect.

6.3.12 Administration by the trustee

Among other things, the trustee may at any time call a meeting of the creditors of the bankrupt.[71] The trustee can also require the bankrupt to attend any such meeting and the bankrupt may be committing an offence if he then does not attend.

6.3.13 Duties of the bankrupt[72]

Once an order is made, the bankrupt is required to provide to the trustee all assets comprised in his estate that are in his possession and control. In addition, he must deliver to the trustee all documents that relate to his assets or affairs. This includes any documentation that would be subject to privilege in litigation. Where the bankrupt cannot deliver up assets, he must do everything as reasonably required by the trustee in order to protect those assets. In addition, should there be an increase in the bankrupt's estate at any time after the bankruptcy order, the bankrupt must give notice of this to the trustee.

6.3.14 Claims by unsecured creditors

Such creditors must make a written claim, which is submitted to the trustee.[73] The unsecured creditor may be required to provide further information and evidence in affidavit form or otherwise. The trustee is then required to either admit or reject the claim, in whole or in part as soon as reasonably practicable. The trustee must provide the creditor with a notice containing reasons for any rejection. However, the trustee is not required to admit or reject claims when it appears to him that there are insufficient assets in the bankrupt's estate to enable a distribution to unsecured creditors.

6.3.15 Claims by secured creditors

Whilst secured creditors are not obliged to make a claim in the bankruptcy, they are able to do so under section 338 of the Insolvency Act. In order to make a claim the creditor must value the assets subject to the security and claim as an unsecured creditor for the remainder of the debt as an unsecured creditor. In the alternative the creditor can surrender their security interest to the trustee for the benefit of all creditors and claim as an unsecured creditor for the whole debt.

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70 *Idem*, s 315.
71 *Idem*, s 333.
72 *Idem*, s 316.
73 *Idem*, s 336.

6.3.16 Contracts[74]

Where a contract has been made with a person who subsequently becomes bankrupt, the Court may, on the application of any other party to the contract, make an order discharging obligation under the contract on such terms as to payment by the applicant or the bankrupt of damages for non-performance or otherwise as appear to the Court to be equitable. Any damages payable by the bankrupt by virtue of an order of the Court are provable as a bankruptcy debt. Where an undischarged bankrupt is a contractor in respect of any contract jointly with any person, that person may sue or be sued in respect of the contract without the joinder of the bankrupt. In addition, the trustee can disclaim onerous property, which can include an unprofitable contract.[75]

6.3.17 Distribution of the estate

The bankrupt's estate is applied in the following priority:[76]

(a) in paying, in priority to all other claims, the costs and expenses properly incurred in the bankruptcy in accordance with the prescribed priority;

(b) in paying the preferential claims admitted by the trustee;

(c) in paying all other claims admitted by the trustee; and

(d) in paying any applicable interest payable.[77]

In addition, any claims in relation to credit provided by the bankrupt's spouse at the time of the bankruptcy order (whether or not that person was the spouse at the time of providing such credit), rank in priority after the payment of interest.[78]

6.3.18 General control of trustee by the Court

A person aggrieved by an act, omission or decision of a trustee may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the trustee. A trustee may apply to the Court for directions in relation to any particular matter arising under the bankruptcy.

6.3.19 Voidable transactions

6.3.19.1 General

Part XIV of the Insolvency Act provides for a number of applications that may be made by the trustee to set aside certain transactions. Pursuant to the definitions set out in section 400(1) of

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[74] *Idem*, s 350.
[75] *Idem*, s 359.
[76] *Idem*, s 344.
[77] *Idem*, s 342.
[78] *Idem*, s 335.

the Insolvency Act, there are four types of voidable transactions (which are not necessarily mutually exclusive):

(a) an unfair preference;

(b) an undervalue transaction;

(c) a voidable general assignment of book debts; and

(d) an extortionate credit transaction.

There are a number of definitions which are applicable to more than one type of voidable transaction. In order to be subject to challenge, a voidable transaction must have been entered into during the "vulnerability period". For these purposes, the "onset of insolvency" is defined as the date on which the application for a bankruptcy order was filed.

In relation to an unfair preference, an undervalue transaction and a voidable general assignment of book debts, the vulnerability period means:

(a) in the case of a transaction entered into with, or a preference given to, a connected person, the period commencing two years prior to the onset of insolvency and ending on the date of the bankruptcy order; and

(b) in the case of a transaction entered into with, or a preference given to, any other person, the period commencing six months prior to the onset of insolvency and ending on date of the bankruptcy order.

For the purposes of an extortionate credit transaction, the vulnerability period is the period commencing five years prior to the onset of insolvency and ending on the date of the bankruptcy order.

The definition of a "connected person" is also relevant in relation to all voidable transactions. Section 5(1) of the Insolvency Act defines connected person as any one or more of the following:

(a) a promoter of the company;

(b) a director or member of the company or of a related company;

(c) a beneficiary under a trust of which the company is or has been a trustee;

(d) a related company;

(e) another company, one of whose directors is also a director of the company;

(f) a nominee, relative, spouse or relative of a spouse of a person referred to in paragraphs (a) to (c);

(g) a person in partnership with a person referred to in paragraphs (a) to (c); and

(h) a trustee of a trust having as a beneficiary a person who is, apart from this paragraph, a connected person.

When making an application to challenge unfair preferences, an undervalue transaction and / or a voidable general assignment, the trustee must satisfy the Court that the transaction is an "insolvency transaction", that is, that at the time the particular contract was entered into, the individual was bankrupt or became so as a result of that transaction.

6.3.19.2 Unfair preference

An unfair preference is an insolvency transaction entered into by an individual during the vulnerability period, which has the effect of putting the creditor into a position which, in the event of a bankruptcy, the creditor would be in a better position than he would have been in if the transaction had not been entered into.[79] There is a carve-out (exception) for transactions entered into in the ordinary course of business. Where the transaction was entered into with a connected person, it is automatically presumed to be an unfair preference and that it did not take place in the ordinary course of business, unless the contrary can be proved.[80] A transaction may still be deemed an unfair preference notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the BVI.

6.3.19.3 Undervalue transactions[81]

If the individual: (a) makes a gift to a person or otherwise enters into a transaction with that person on terms that provide for him to receive no consideration, or (b) he enters into a transaction with a person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by him, provided that such transactions are an insolvency transactions and were entered into during the vulnerability period, the trustee will be able to challenge it as an undervalue transaction.

However, the individual is not deemed to have entered into an undervalue transaction if: (a) the individual enters into the transaction in good faith and for the purposes of his business, and (b) at the time he enters into the transaction, there were reasonable grounds for believing that the transaction would benefit him. Again, a transaction may be an undervalue transaction notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the BVI.

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79 *Idem*, s 401.
80 *Idem*, s 401(4).
81 *Idem*, s 402.

6.3.19.4 Voidable general assignment of book debts[82]

This applies where an individual engaged in a business makes a general assignment to another of his existing or future book debts and a bankruptcy order is subsequently made against him. The assignment is voidable as regards book debts which were not paid before the filing of the bankruptcy application, unless the assignment has been registered under BVI law.[83] For these purposes, an assignment includes an assignment by way of security or charge on book debts. It does not include those assignments due under contract or in the transfer of business made in good faith.

6.3.19.5 Extortionate credit transaction[84]

A transaction entered into during the vulnerability period for, or involving the provision of, credit to him is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit: (a) the terms of the transaction require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit, or (b) the transaction otherwise grossly contravenes ordinary principles of fair trading.

Where the trustee satisfies the Court that a voidable transaction was entered into the Court may:[85]

(a) make an order setting aside the transaction in whole or in part;

(b) in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the individual had not entered into that transaction; and

(c) in respect of an extortionate credit transaction, may by order provide for any one or more of the following:

(i) the variation of the terms of the transaction or the terms on which any security interest for the purposes of the transaction is held;

(ii) the payment by any person who is or was a party to the transaction to the trustee of any sums paid by the individual to that person by virtue of the transaction;

(iii) the surrender by any person to the trustee of any asset held by him as security for the purposes of the transaction; and

(iv) the taking of accounts between any persons.

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82 *Idem*, s 403.
83 Under the Bill of Sale Act.
84 Insolvency Act, s 404.
85 *Idem*, s 405(1).

Section 405(2) sets out a number of requirements that an order of the Court may contain. In addition, section 406 of the Insolvency Act lists the limitations on orders made by the Court. Any money paid to, assets recovered, or other benefit received by the trustee as a result of an order made in relation to voidable transactions are deemed to be assets of the company available to pay unsecured creditors of the company.[86]

6.3.20 Bankruptcy offences

Such offences are subject to the defence of "innocent intention" set out under section 388 of the Insolvency Act. In brief, offences include non-disclosure, concealment of assets, concealment of books and papers, including falsification, false statements, fraudulent disposal of assets, absconding, fraudulent dealing with asset obtained on credit, obtaining credit and engaging in business and gambling.

6.3.21 Discharge[87]

Under the Insolvency Act there are provisions dealing with whether a bankruptcy can be automatically discharged or not. An automatic discharge will occur at the end of three years commencing on the date of the bankruptcy order, unless the bankrupt is ineligible for automatic discharge or the bankrupt has been previously discharged by the Court.[88]

A bankrupt is ineligible for automatic discharge where he has been an undischarged bankrupt at any time in ten years prior to the date of the bankruptcy order, or he has been convicted of a bankruptcy offence.[89] A bankrupt may also apply to the Court for a discharge of his bankruptcy where he is ineligible for automatic discharge, or at any time six months from the date of the bankruptcy order (so before the end of the three year period).[90]

The discharge releases the bankrupt from all debts claimable in the bankruptcy, but has no effect on the functions of the trustee or on the operation of the provision of the Insolvency Act. A discharge does not affect the right of any creditor to claim in the bankruptcy for any debt form which the bankrupt is released or of any secured creditor to enforce his security interest.

There are a number of liabilities that the bankrupt is not released from, such as liabilities incurred as a result of fraud and fines imposed for offences.[91] In addition, a discharged bankrupt is required to give such assistance as his trustee reasonably requires in the realisation and distribution of such of his assets as are vested in his trustee.[92] If the bankrupt refuses to do so, he will be committing an offence under the Insolvency Act.

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86 *Idem*, s 407.
87 *Idem*, s 376.
88 Under the Insolvency Act, s 379(1)(b) and (c).
89 Insolvency Act, s 375.
90 *Idem*, s 378.
91 *Idem*, s 380.
92 *Idem*, s 381.

6.3.22 Annulment[93]

The Court may annul a bankruptcy order if at any time it appears to the court that:

(a) on any grounds existing at the time the order was made, the order ought not to have been made; or

(b) to the extent required by this Act and the Rules, the claims made in the bankruptcy and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the Court.

The Court may annul a bankruptcy order whether or not the bankrupt has been discharged.

Self-Assessment Exercise 3

Study the basic aspects dealt with under the Personal Bankruptcy section.

Question 1

What assets are included in the estate of a bankrupt individual?

Question 2

Explain the effect on the bankrupt's estate when an order for bankruptcy is made by the BVI Court.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.4 Corporate liquidation

6.4.1 General

Given the position of the BVI as an international offshore finance centre and the number of companies incorporated in the jurisdiction, corporate insolvencies are very common. In addition, a large proportion of BVI companies are holding companies and consequently nearly all liquidations have a multi-jurisdictional element. In light of the small size of the BVI and the relatively small amount of local businesses, it is less common to see an entirely domestic liquidation.

Corporate liquidations in the BVI are often long-running and can involve the liquidator tracing assets and making claims in several different jurisdictions. In most, teams of lawyers in those

[93] *Idem*, s 382.

jurisdictions are involved, as well as the Insolvency Act allowing for the appointment of overseas insolvency practitioners as joint liquidators. The BVI Court plays a large role in corporate liquidations. A good example of this is where the liquidator makes an application to the Court for sanction to pursue proceedings in another jurisdiction or requests assistance from the Court in relation to recognition in foreign jurisdictions (such as by way of a letter of request to a foreign court).

First, it is first important to be aware of the terminology utilised in the BVI legislation as it can become confused in multijurisdictional insolvency matters. In the BVI, a liquidator is appointed in:

(a) voluntary liquidation (solvent) under the BCA;

(b) insolvent liquidation (voluntarily) under the Insolvency Act by members resolution; and

(c) insolvent liquidation by court application under the Insolvency Act.

The appointment of a liquidator over an insolvent company can be achieved by way of an application to the BVI Court or by way of a qualifying resolution of the members. A qualifying resolution of the members of a company appointing a liquidator should not be confused with or referred to as a "voluntary liquidation", which is an entirely different procedure.

A brief summary of (solvent) voluntary liquidation is set out below, for the reason that an insolvent liquidation can potentially arise upon investigations undertaken by a liquidator in a voluntary liquidation. There is a separate procedure set out in the BCA which provides for such circumstances. However, as explained below, this is not a form of corporate rescue, as the ultimate goal is usually to dissolve the company as it has come to the end of the use for which it was incorporated.

It will usually be a creditor (often domiciled in another jurisdiction) that commences formal insolvency proceedings. However, a company is obliged to commence formal insolvency proceedings when its director or directors become aware that the company is insolvent and there is no prospect of the company trading its way out of difficulties. There is no specific time period for placing the company into liquidation but steps should be taken to do so at the point that the director or directors become aware that the company is insolvent and there is no prospect of recovering the business. Failure to do so may lead to the directors becoming liable to the creditors and shareholders of the company under the insolvent trading provisions of the Insolvency Act.

6.4.2 Voluntary liquidation

Insolvency is not required to place a company into voluntary liquidation under the provisions of the BCA. Indeed, voluntary liquidation under the BCA is not available to insolvent companies. A voluntary liquidation is commonly utilised where a company is no longer required by a business and it is to be dissolved; that is, in the BVI it is not normally viewed as a form of

"corporate rescue".[94] The predominant purpose of a voluntary liquidation is, therefore, to deal with the company's assets (if any), pay any liabilities (if any) in order to dissolve the (solvent) company.

The procedure for voluntary liquidations is contained in Part XII of the BCA.[95] However, it is noted that the BCA does refer to the Insolvency Act for certain definitions, such as "creditor" and "liability", as set out in section 196A of the BCA. Pursuant to section 197(1) of the BCA, a company can only be liquidated under Part XII if: (a) it has no liabilities, or (b) if it is able to pay its debts as they fall due and the value of the assets is equal or exceeds its liabilities. A company may be put into voluntary liquidation notwithstanding that a security interest is registered with the BVI Registrar of Companies. The liquidator is, however, bound to give effect to the rights of priority of the claim of a secured creditor.[96]

In brief, where it is proposed to appoint a voluntary liquidator, the directors of the company are required to make a declaration of solvency and approve a liquidation plan.[97] Under section 199(1) BCA, a voluntary liquidator or two or more joint voluntary liquidators may be appointed: (a) by resolution of the directors, or (b) by a resolution of the members.[98] The requirements for such resolutions are set out in section 199(2)-(4) of the BCA. There are a number of circumstances in which a voluntary liquidator may not be appointed, which include where a liquidator of the company has already been appointed under the Insolvency Act.

It is important to note that section 198(4) of the BCA states that a director who makes a declaration of solvency without having reasonable grounds for believing that the company is, and will continue to be, able to discharge, pay or provide for its debts in full as they fall due, is committing an offence and is liable on summary conviction for a fine in the sum of USD 10,000. A liquidation plan has no effect unless it is approved by the directors no more than six weeks prior to the date of the resolution to appoint a liquidator.[99]

Unlike in an insolvent liquidation, a voluntary liquidator need not be a licenced insolvency practitioner unless the company is regulated, but must be an "eligible individual". Any individual who is not disqualified from being appointed or acting as a voluntary liquidator may be appointed. Regulation 19(2) of the BCA Regulations sets out a list of individuals who are disqualified from being appointed or acting as a voluntary liquidator of a company.

However, from 1 January 2023 section 199 of the BVI Business Companies (Amendment) Act 2022 and Regulation 6 the BVI Business Companies (Amendment) Regulations 2022 will introduce new requirements in respect of non-Insolvency Act liquidators. Regulation 6(a)1A states that an individual is qualified to be appointed and act as a voluntary liquidator of a company if he:

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94 Although a voluntary liquidator can cause the company to enter into a scheme of arrangement.
95 Please note that further steps must be taken in order to place an entity regulated by the FSC.
96 Business Companies Act, s 197(2).
97 *Idem*, s 198.
98 This is subject to the Business Companies Act, s 200, where the company is regulated by the FSC.
99 Business Companies Act, s 198(3).

(a) has liquidation experience of not less than two years;

(b) has professional competence to liquidate the specific company concerned;

(c) is able to demonstrate that he:

(i) holds an insolvency practitioner's licence; and

(ii) has as appropriate professional qualification (such as in law or accountancy) and experience of providing legal and financial advice or support to companies in the financial services sector; and

(d) is fully conversant with relevant financial services legislation connected to the business of the company to be liquidated, including the Financial Services Commission Act and BVI Business Companies Act.

Once appointed, the voluntary liquidator has 14 days to file the following with the Registrar: notice of his or her appointment in the approved form; the declaration of solvency made by the directors; and a copy of the liquidation plan.[100] The voluntary liquidation commences on the date that the voluntary liquidator files a notice of appointment with the Registrar. The voluntary liquidator must also advertise his or her appointment within 30 days of the commencement of the voluntary liquidation.[101]

A voluntary liquidator's principal duties are to:

(a) take possession of, protect and realise the assets of the company;

(b) identify all creditors of and claims against the company;

(c) pay or provide for the payment of, or to discharge, all claims, debts, liabilities and obligations of the company;

(d) distribute the surplus assets of the company to its members. This must be in accordance with the terms of the memorandum and articles of association of the company;

(e) prepare a statement of account in respect of the actions and transactions of the liquidator; and

(f) send a copy of the statement of account to all members, if so required by the liquidation plan.

Once the voluntary liquidation of a company commences: (i) the voluntary liquidator has custody and control of the company's assets, and (ii) although they remain in office, the directors cease to have any powers, functions or duties (although there are some exceptions). In most

[100] *Idem*, s 204.
[101] *Ibid*.

cases, a voluntary liquidation can be completed within 60 days of the date on which each voluntary liquidator is appointed.

The powers of a voluntary liquidator include to:[102]

(a) take custody of the assets of the company and register any property of the company in the name of the voluntary liquidator or a nominee;

(b) sell any assets of the company at public auction or by private sale without any notice;

(c) collect debts and assets due to the company;

(d) borrow money from any person for any purpose to facilitate the liquidation and dissolution of the company and to pledge or mortgage any property of the company as security;

(e) to negotiate, compromise and settle any claim, debt, liability or obligation;

(f) to prosecute and defend, in the name of the company or in the name of the liquidator any action or other legal proceedings; and

(g) to make any distribution in money or in other property.

Pursuant to section 209, Division 2 of the BCA, should a voluntary liquidator discover, during the course of their investigations, that (a) the value of the company's liabilities exceeds or will exceed those of its assets; or (b) the company is or will be unable to pay its debts as they fall due, the voluntary liquidator is required to immediately send a written notice to the Official Receiver.[103] The voluntary liquidator must then call a meeting of the creditors within 21 days of the date of the notice.[104] The meeting is treated as the first meeting of creditors of the company, called under section 179 of the Insolvency Act, by a liquidator appointed by the members of a company (see paragraph 6.4.4.1).

In the event that the voluntary liquidator is not a licenced insolvency practitioner, the Official Receiver may apply to the Court for the appointment of himself or another licenced insolvency practitioner as liquidator. From the time that the voluntary liquidator becomes aware that the company is or will be insolvent, the Insolvency Act will apply. The Court will appoint a liquidator if it is satisfied that the company is insolvent.[105]

6.4.3 Definition of insolvency

Corporate insolvency is governed by Part VIII of the Insolvency Act, with procedural requirements provided for under the IR. In addition, some important definitions are provided in section 8 of the Insolvency Act.

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[102] *Idem*, s 207.
[103] A notice must also be sent to the FSC in the event the company is regulated by the same.
[104] Business Companies Act, s 210(1).
[105] *Idem*, s 211A.

Set out below are the circumstances in which a company will be considered insolvent in the BVI. Whilst such statutory tests exist, on a Court appointment the Court retains residual discretion as to whether it should find that a company is insolvent and appoint a liquidator.

- It is proved to the satisfaction of the Court that a company is unable pay its debts as they fall due (a question of fact).[106] The well-known English case of *Cornhill Insurance Plc v Improvement Services Limited*[107] sets out that an inability to pay a debt that is due and not disputed, is sufficient evidence of insolvency.

- It is proved to the satisfaction of the Court that the value of the company's liabilities exceeds the value of its assets, or "balance sheet insolvency".[108] Section 10(1) of the Insolvency Act provides a wide definition of liability – under an enactment, in contract, tort or bailment, a breach of trust and arising out of an obligation to make restitution. Liability for these purposes includes a debt. In addition, section 10(2) of the Insolvency Act states that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. Notably, the BVI Court of Appeal in *Trade and Commerce Bank v Island Point Properties*[109] confirmed that a company may not be considered balance sheet insolvent in circumstances where the value of a company's assets became lower than those of its assets for only a short period.

- A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.

- If a company fails to comply with the terms of a statutory demand and it is not successfully set aside under sections 156 and 157 of the Insolvency Act. A statutory demand is a written demand for payment of a debt that is due and payable, made by a creditor in the format required under section 156 of the Insolvency Act.

The statutory demand must be (among other things) in writing, dated and signed by the creditor. It must require the company to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the service of the statutory demand. The most common reason that a company would apply to set aside a statutory demand is that a debt is disputed.

Where a company wishes to set aside a statutory demand, it must make an application to the Court. The 14 days within which such application must be made, is a strict one. However, it is noted that even where a statutory demand has not been complied with or set aside, the Court may still hear opposition to the appointment of a liquidator. In the BVI, the test as to whether the dispute of a debt is genuine is set out in *Sparkasse Bregenz Bank v Associated Capital Corporation*.[110] The decision has also been applied where there is a disputed debt in relation to an application to appoint a liquidator.

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[106] Insolvency Act, s 8(1)(c)(ii).
[107] [1986] 1 WLR 114.
[108] Insolvency Act, s 8 (1)(c)(i).
[109] SA BVICA 2009/0012.
[110] Civil Appeal No 10 of 2002.

6.4.4 Appointment of a liquidator

There are two procedures for the appointment of a liquidator set out in Part VI of the Insolvency Act:

(a) the Court may appoint the Official Receiver or a liquidator over a BVI company[111] pursuant to an application made under 162 of the Insolvency Act,[112] or over a foreign company on an application made under 163 of the Insolvency Act;[113] and

(b) appointment of an "eligible insolvency practitioner" by the members of a BVI company (as opposed to a foreign company) by way of a qualifying resolution.[114]

The liquidation of the company commences at the time at which the liquidator is actually appointed, for example the date the qualifying resolution is passed or the date of the Court order appointing the liquidator.[115] The liquidation does not end until it is terminated pursuant to the provisions contained in section 232 of the Insolvency Act. Once a liquidator is appointed the company is referred to as being "in liquidation".

6.4.4.1 Members' qualifying resolution

Pursuant to section 159(3) of the Insolvency Act, a resolution is a "qualifying resolution" if it is "passed at a properly constituted meeting of the company by a majority of 75 per cent" or a higher majority is required by the memorandum and articles of the company. There are restrictions and further procedural requirements if the company is regulated by the FSC[116]. Members are not able to appoint the Official Receiver as liquidator. Section 161(2) requires the company to provide notice to the liquidator of his appointment, as soon as practicable.

Once the liquidator is appointed via this route, it is important to note that there is a restriction on the liquidator's powers under section 182 of the Insolvency Act. During the period before the first creditors' meeting (called under section 179 of the Insolvency Act), the liquidator's powers are limited to: (a) taking into custody and control all the assets to which the company is or appears to be entitled; (b) disposing of perishable goods and other assets the value of which is likely to diminish if they are not immediately disposed of; (c) doing all such things as may be necessary to protect the company's assets; and (d) exercising such other of the powers conferred on a liquidator by section 186 as the Court may, on his application, sanction.

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[111] Insolvency Act, s 159(1).
[112] *Idem*, s 159(1)(a).
[113] *Idem*, s 159(1)(b).
[114] *Idem*, s 159(2).
[115] *Idem*, s 160.
[116] See Insolvency Act, s 159(5).

6.4.4.2 Appointment by the Court

Section 162 of the Insolvency Act sets out the primary provisions relating to the appointment of a liquidator by the Court, supplemented by the IR as regards the procedure. Such application may be made by one (or more) of:

(a) the company;

(b) a creditor;

(c) a member;

(d) the supervisor of a creditor's arrangement;

(e) the FSC; and

(f) the Attorney General.

Pursuant to section 168(1), an application for the appointment of a liquidator must be determined within six months after it is filed, unless the Court extends this timeframe. The Court will only extend the timeframe if it is satisfied that there are special circumstances that justify the extension and the order extending the period is made before the expiry or the relevant period.[117] The Court's power to extend the timeframe is limited to three months.

The Court may only appoint a liquidator under section 159(1), if:

(a) the company is insolvent;

(b) the Court is of the opinion that it is "just and equitable"; or

(c) it is in the "public interest".

Just and equitable

The jurisdiction to appoint a liquidator over a BVI company on the "just and equitable" ground, is statutory. This has been given a wide range of meanings under case law. Examples of a just and equitable reason are as follows: (i) no justification for the company's continued existence, (ii) deadlock in the management of the company, such that the company can no longer operate, (iii) loss of confidence in the company's management, (iv) evidence of fraud in the running of the company, and (v) where there is a quasi-partnership and there has been a breakdown of trust and confidence.

[117] Insolvency Act, s 168 (2)(a)-(c).

An application by a member may only be made with leave of the Court and leave will only be granted if the member has a *prima facie* case that the company is insolvent.[118]

On 12 October 2020, the Privy Council in *Chu v Lau*[119] set out a detailed analysis on what circumstances might constitute deadlock and a quasi-partnership, for the purposes of an application for the appointment of a liquidator on the ground that it would be just and equitable to do so.

Public interest

Only the Attorney General and the FSC can apply for the appointment of a liquidator under this ground. Public interest is given a wide interpretation, for example, where the protection of a large number of members or investors is required.

6.4.5 Interim relief

Under section 170 of the Insolvency Act, if an application for the appointment of a liquidator has been filed but not yet determined by the Court or withdrawn, the Court may appoint the Official Receiver or an eligible insolvency practitioner as a provisional liquidator. This provision is utilised where there is an urgent need to preserve the company's assets or its business, for example where there is a risk of dissipation of the assets or that the company's business will not be properly maintained, between the filing of the application and its determination.

An application for the appointment of a provisional liquidator can be made by:[120]

(a) the original applicant of the appointment;

(b) the company;

(c) a creditor;

(d) a member;[121]

(e) the FSC; and

(f) any person who, under any other enactment, is entitled to apply for the appointment of a liquidator of the company.

Pursuant to section 170(4) of the Insolvency Act, the Court will only appoint a provisional liquidator if:

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[118] *Idem*, s 162(3).
[119] [2020] UKPC 24.
[120] Insolvency Act, s 170(2)(a)-(f).
[121] However, the Insolvency Act, s 170(3) provides that an application made by a member may only be made with leave of the Court.

(a) the company consents; or

(b) the Court is satisfied that the appointment of a provisional liquidator is:

(i) necessary for the purpose of maintaining the value of assets owned or managed by the company; and

(ii) is in the public interest.

In order to make a successful application to appoint a provisional liquidator, the application will need to demonstrate to the Court that:

(a) there is an application before the court for the appointment of a liquidator;

(b) there is a good arguable case that a ground for the appointment of a provisional liquidator exists;

(c) there is a good arguable case that the applicant has standing to make the application; and

(d) the Court should exercise its discretion to maintain the status quo in relation to the company's assets.[122]

A provisional liquidator has the rights and powers of a liquidator, but only to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was appointed. The Court retains the discretion to limit the powers of a provisional liquidator as it considers fit.[123]

The appointment of a provisional liquidator ends when the Court makes an order appointing a liquidator[124] or terminating the provisional liquidation.

For the first time in February 2019, the BVI court appointed "soft touch" provisional liquidators with permission to assist restructuring. This allows for the appointment of court-appointed provisional liquidators whilst giving approval for incumbent directors to remain in place. This seeks to minimise disruption to the day-to-day business and provides the company with time to restructure as it invokes a statutory moratorium on claims. It is anticipated that this decision will result in an upturn in corporate restructurings in the BVI.[125]

6.4.6 Effect of liquidation

Section 175(1) sets out in detail the effect of the appointment of a liquidator over a company. From the commencement of the liquidation, the liquidator has custody and control of the assets of the company and the power to sell any such assets. The company is no longer the beneficial

[122] *Akai Holdings Limited v Brinlow Investments Limited* BVIHCV 134 of 2006.
[123] Insolvency Act, s 171.
[124] *Idem*, s 17392).
[125] *In the Matters of Constellation Overseas Ltd and Others* BVIHC (Com) 2018/0206.

owner of its assets and such assets are held on statutory trust for the benefit of the creditors. The assets do not automatically vest in the liquidator and a liquidator has to apply for such order from the Court. Any steps taken in contravention of section 175(1) are void and are of no effect. The liquidator is subject to the supervision of the Court (as an officer of the Court) and may also be subject to the supervision of a creditors' committee (where applicable). The appointment of a liquidator does not affect the right of a secured creditor to take possession or realise or otherwise deal with the assets over which the creditor has security.[126]

The directors and officers do remain in office, but cease to have any powers, functions or duties other than those authorised or permitted by the liquidator.[127] Members are not permitted to exercise any power under the memorandum or articles of association or otherwise, except for the purposes of the Insolvency Act.[128]

Unless the Court orders otherwise, no party is permitted to commence any action or proceedings against the company or in relation to its assets or commence / continue to exercise or enforce any right or remedy over or against the assets of the company.[129]

Shares in the company cannot be transferred unless a Court order is obtained to that effect and no alteration is permitted in the status or rights or liabilities of members.[130] No amendment may be made to the company's memorandum or articles of association.[131]

In addition, a creditor is not entitled to retain the benefit of any execution process, distress or attachment over or against the assets of a company in liquidation unless the execution, process or attachment is completed before the first occurring of the commencement of the liquidation and, (a) where the liquidator was appointed by the members, the date upon which the creditor had notice of the meeting at which the resolution was proposed, or (b) where the liquidator was appointed by Court, the date on which the application was filed.[132] However, a person who, in good faith and for value purchases assets of a company from an officer charged with an execution process, acquires a good title as against the liquidator of the company.

6.4.7 Duties of a liquidator

The liquidator owes duties to the company in liquidation and to the stakeholders, principally the unsecured creditors.
The principal statutory duties of a liquidator are set out in section 185(1) of the Insolvency Act and in summary are:

(a) to take possession of, protect and realise the assets of the company;

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[126] *Idem*, s 175(2).
[127] *Idem*, s 175(1)(b).
[128] *Idem*, s 175(1)(f).
[129] *Idem*, s 175(1)(c).
[130] *Idem*, s 175(1)(d)-(e).
[131] *Idem*, s 175(1)(g).
[132] *Idem*, s 176.

(b) to distribute the assets or the proceeds of realisation of the assets in accordance with the Insolvency Act; and

(c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with the Insolvency Act.

The Insolvency Act allows the liquidator to use his own discretion when undertaking his duties[133] and, on an application to the Court, it will generally give greater weight to the liquidator's views than those of the stakeholders (dependent on the circumstances).[134]

The liquidator also has statutory administrative duties in relation to his appointment. Within 14 days of his appointment the liquidator must:

(a) advertise his appointment;

(b) file the notice of appointment with the Registrar; and

(c) service notice of his appointment on the company.[135]

In terms of section 179 of the Insolvency Act, the liquidator must also call a first meeting of creditors within 21 days of the date of his appointment. However, for liquidator appointments by the Court only, the liquidator may dispense with the first creditors' meeting.[136] The liquidator must also settle a list of members as soon as practicable after his appointment.[137]

The liquidator is a fiduciary and accordingly has common law fiduciary duties in addition to his statutory duties. Such fiduciary duties will include:

(a) avoiding conflicts of interest and making a profit on his own account;

(b) to act with skill and care in the performance of his duties;

(c) to exercise his powers for the purpose for which he was appointed; and

(d) to act impartially.

In addition, if it appears to the liquidator that the conduct of a director or former director of the company makes him unfit to be concerned in the management of companies, he is required (as soon as practicable) to prepare a written report and send it to the Official Receiver.[138]

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[133] *Idem*, s 185(2).
[134] *Re Edenote Limited* [1997] BCLC 89.
[135] The notice must also be sent to the FSC if the company is a regulated entity.
[136] Insolvency Act, s 183.
[137] *Idem*, s 193.
[138] *Idem*, s 271.

6.4.8 Powers of a liquidator

The liquidator is an agent of the company in liquidation and an officer of the Court.[139] Under section 186 of the Insolvency Act, the liquidator has all the powers necessary to undertake his applicable duties and functions. The liquidator's powers are set out in detail in Schedule 2 of the Insolvency Act. However, the Court has discretion in ordering that certain powers may only be exercised with the sanction of the Court (whether the liquidator is appointed by the Court or by the members).[140] The acts of a liquidator are valid notwithstanding any defect in his nomination, appointment or qualifications.[141]

The liquidator (howsoever appointed) also has the power to make an application to the Court for directions at any time in relation to a particular matter arising in the liquidation.[142] The liquidator has a number of investigatory powers, including powers to require a person (by written notice) to provide information and to undertake an examination of a person.[143]

A liquidator also has the power to enter into a creditors' company arrangement.[144] More information on such an arrangement is set out in the corporate rescue section below.

6.4.9 Claims

The BVI insolvency legislation does not use the term "proof of debt" and instead uses "claims". "Admissible claims" are defined in section 11 of the Insolvency Act as:

(a) liabilities of the company, foreign company or individual at the relevant time;

(b) liabilities of the company, foreign company or individual arising after the relevant time by virtue of any obligation incurred before the relevant time; and

(c) any interest that may be claimed in accordance with the Insolvency Act or the IR.

An unsecured creditor may make a claim against a company in liquidation by submitting to the liquidator a written claim, signed by him or on his behalf.[145] Pursuant to the Insolvency Act, the liquidator is able to require a creditor to:

(a) to verify his claim by affidavit;

(b) to provide further particulars of his claim; or

(c) to provide the liquidator with documentary or other evidence to substantiate the claim.

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[139] *Idem*, s 184.
[140] *Idem*, s 186(3).
[141] *Idem*, s 186(6).
[142] *Idem*, s 186(5).
[143] *Idem*, ss 282 and 283.
[144] *Idem*, s 22.
[145] Insolvency Rules, r 184 sets out details of what a claim should include.

A claim made by an unsecured creditor can be amended or withdrawn: (a) by the creditor at any time before it is admitted by the liquidator, and (b) by agreement between the creditor and the liquidator at any time after it has been admitted.[146] The Court, on the application of the liquidator or a creditor (only where the liquidator declines to make application under this subsection), may expunge or amend an admitted claim if it is satisfied that the claim should not have been admitted or should be reduced.

Unless there are insufficient assets for a distribution to unsecured creditors,[147] the liquidator must, as soon as reasonably practicable after receiving a claim, either admit or reject the claim in whole or in part. If the liquidator rejects the claim (in whole or in part) he is required to provide to the relevant creditor a notice of rejection in which the reasons for the rejection of the claim shall be specified.

Pursuant to section 211 of the Insolvency Act, a secured creditor is able to (a) value the assets subject to the security interest and claim in the liquidation of a company as an unsecured creditor for the balance of his debt, or (b) surrender the security interest to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole of his debt. However, the Insolvency Act does not impose either option on a secured creditor and they can remain outside the liquidation process.

The assets of a company in liquidation are applied in the following priority:

(a) in paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;

(b) after payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;

(c) after payment of the preferential claims, in paying all other claims admitted by the liquidator; and

(d) after paying all admitted claims, in paying any interest payable.

Within each class of claim, those claims will rank *pari passu*.[148]

Preferential claims are paid ahead of unsecured creditors and are listed in Schedule 2 to the IR. It is also worth noting that preferential creditors will rank ahead of a creditor with a floating charge. Preferential creditors are as follows:

(a) amount due to a past or present employee up to USD 10,000;

(b) amounts due to the BVI Social Security Board (no limit);

[146] Insolvency Act, s 210.
[147] *Idem*, s 209(6A).
[148] *Idem*, s 207(2).

(c) amounts due in relation to pensions contributions or medical insurance (accrued within a certain timeframe), up to USD 5,000 per employee; and

(d) sums due to the Government of the BVI in relation to tax, duty, licence fees or permits, with a limit of USD 50,0000 and sums due to the FSC in relation to any fee or penalty, up to USD 20,000.

In the event a creditor's claim is rejected, that creditor may consider making an application under section 273 of the Insolvency Act. A creditor, being "a person aggrieved by an act, omission or decision of an office holder" may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the liquidator. Please note that a member may also make an application under this section. However, the commercial decisions made by a liquidator are afforded great weight and, as such, a creditor faces a high bar in bringing an application under this section. Generally, a Court will only interfere with the decision of a liquidator if "he has done something so utterly unreasonable and absurd that no reasonable man would have done it".[149]

6.4.10 Creditors' committee

The creditors of a company in liquidation can establish a creditors' committee at any time after the appointment of a liquidator by passing a resolution to that effect at a creditors' meeting.[150] A person is not eligible to be a member of the creditors' committee where their claim has been rejected.[151] The functions of a creditors' committee include: (a) consulting with the liquidator about matters relating to liquidation, (b) considering reports from the liquidator, and (c) assisting the liquidator in discharging his functions.[152]

A creditors' committee's powers include the ability to:

(a) call a meeting of creditors;

(b) require the liquidator to provide the committee with reports and information concerning the liquidation (as it reasonably requires); and

(c) require the liquidator to attend the committee to provide it with such information and explanations concerning the insolvency proceeding as it reasonably requires.

The committee also has the power to approve the liquidators' remuneration. Given the powers afforded to the creditors' committee, it is a useful tool should a creditor wish to take a more active role in the liquidation process.

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[149] *Re Edennote Ltd* [1996] 2 BCLC 389.
[150] Insolvency Act, s 421.
[151] *Idem*, s 423(2).
[152] *Idem*, s 422.

6.4.11 Set-off and netting agreements

In the event that, before the commencement of the company's liquidation,[153] there have been mutual credits, mutual debts or other mutual dealings between the company and a creditor claiming, or intending to claim, in the liquidation:[154]

(a) an account is to be taken of what is due from each party to the other in respect of those mutual credits, mutual debts or other mutual dealings, as at the start of the company's liquidation;

(b) the sum due from one party is to be set-off against the sum due from the other party; and

(c) only the balance of the account may be claimed in the company's liquidation or is payable to the company (as the case may be).[155]

The set-off provisions do not apply to a claim where a creditor has actual notice that the company was insolvent at the time it: (a) gave credit to, or received credit from, the company, or (b) acquired a claim against the company or any part of or interest in the claim.[156] Insolvency set-off under the Insolvency Act only applies where the creditor is claiming, or intending to claim, in the company's liquidation. In many other common law jurisdictions, insolvency set-off is automatic and mandatory. For the purposes of these provisions, the Insolvency Act states that insolvency means cash flow insolvency or technical insolvency only and that the balance sheet test does not apply.[157]

Some mutual debts may arise pursuant to a "netting agreement". A netting agreement is defined in section 434 of the Insolvency Act as:

> "an agreement between two parties only, in relation to present or future financial contracts between them the provisions of which include the termination of those contracts for the time being in existence, the determination of the termination values of those contracts and the set off of the termination values so determined so as to arrive at a net amount due".

In short, netting is a method of reducing risks in a financial contract by combining obligations in order to attain a reduced net obligation.

The Insolvency Act defines "collateral" as:

(a) cash in any currency;

(b) securities of any kind;

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[153] The date of the appointment of the liquidator, ie the date of the order or members' qualifying resolution.
[154] Such claims must be admissible claims.
[155] Insolvency Act, s 150.
[156] *Idem*, s 150(2).
[157] *Idem*, s 150(3).

(c) guarantees, letters of credit and obligations to reimburse; and

(d) any asset commonly used as collateral.

"Collateral arrangement" means any margin, collateral or security arrangement or other credit enhancement related to a netting agreement or one or more financial contracts, including:

(a) a pledge;

(b) a security arrangement based on the transfer of title to collateral; and

(c) any guarantee, letter of credit or reimbursement obligation by or to a party to one or more financial contracts, in respect of those financial contracts.

"Financial contract" is defined as a contract under which payment or delivery obligations that have a market or an exchange price are due to be performed at a certain time or within a certain period of time. Finally, "netting" means the termination of financial contracts, the determination of the termination values of those contracts and the set off of the termination values so determined so as to arrive at a net amount due, if any, by one party to the other where each such determination and set off is effected in accordance with the terms of a netting agreement between those parties.

The IR sets out a non-exclusive list of contracts that constitute a financial contract, including various categories of swap agreement, various categories of derivatives (including equity and credit derivatives), currency and interest rate futures or options, repurchase agreements, agreements to buy, sell, borrow or lend securities and title transfer collateral arrangements.

The Insolvency Act has incorporated a previous version of the ISDA[158] Model Netting Act into the law of the British Virgin Islands.[159] As such, any contractual netting provisions relating to financial contracts will prevail over the statutory insolvency set-off provisions.[160] This is set out in section 435 of the Insolvency Act, which relates to the enforcement of netting agreements.

6.4.12 Contracts generally

The liquidator has the power to carry on the business of the company so far as this is necessary to facilitate the liquidation, which is likely to include the maintenance of certain contracts (to the extent required).

However, whilst the commencement of liquidation does not *prima facie* affect existing contracts, the liquidator does have the power to disclaim an unprofitable contract into which the company has entered. In order to do so, the liquidator must file a notice of disclaimer with the court under section 217 of the Insolvency Act. The disclaimer takes effect when the notice of the disclaimer

[158] International Swaps and Derivatives Association. In this regard, see https://www.isda.org/2018/10/16/isda-publishes-updated-model-netting-act/.
[159] This is also confirmed by ISDA. In this regard, see https://www.isda.org/2018/06/12/status-of-netting-legislation/.
[160] Insolvency Act, s 435.

is filed at Court. A disclaimer operates to determine the rights, interests and liabilities of the company (only) in relation to the contract disclaimed. A person suffering loss or damage as a result of a disclaimer of onerous property under section 217 of the Insolvency Act may claim in the liquidation of the company as a creditor for the amount of the loss or damage.[161]

In addition, on the application of a person who is, as against the liquidator of a company, entitled to the benefit or subject to the burden of a contract made with the company, the Court may make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court considers just.[162] Damages payable to a person under such an order made may be claimed by him as a debt in the liquidation of the company. However, no contractual counterparty may commence or proceed with any proceedings against the company without permission of the BVI court (as the court which has jurisdiction over the insolvency).

It is noted that the Insolvency Act specifically states that nothing in the legislation: "invalidates any provision contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted or whereby the funds of the company are alone made liable in respect of the policy or contract".[163]

6.4.13 Voidable transactions

6.4.13.1 General

Part VIII of the Insolvency Act provides for a number of applications that may be made by the liquidator to set aside certain transactions. Pursuant to the definitions set out in section 244(1) of the Insolvency Act, there are four types of voidable transactions (which are not necessarily mutually exclusive):

(a) an unfair preference;

(b) an undervalue transaction;

(c) a floating charge that is voidable under section 247 of the Insolvency Act; and

(d) an extortionate credit transaction.

There are a number of definitions which are applicable to more than one type of voidable transaction. In order to be subject to challenge, a voidable transaction must have been entered into during the "vulnerability period". Here, the distinction between the way in which the liquidator was appointed is relevant. The "onset of insolvency" is defined as: (a) the date on which the application for the appointment of the liquidator was filed, where a company is in liquidation and the liquidator was appointed by the Court, or (b) the date of the appointment of

[161] *Idem*, s 229(2).
[162] *Idem*, s 229(1).
[163] *Idem*, s 203.

the liquidator, where a company is in liquidation and the liquidator was appointed by the members.

For the purposes of an unfair preference, an undervalue transaction and a floating charge, the vulnerability period means: (a) in the case of a transaction entered into with, or a preference given to, a connected person, the period commencing two years prior to the onset of insolvency and ending on the appointment of the liquidator, and (b) in the case of a transaction entered into with, or a preference given to, any other person, the period commencing six months prior to the onset of insolvency and ending on the appointment of the administrator or, if the company is in liquidation, the liquidator.

For the purposes of an extortionate credit transaction, the vulnerability period is the period commencing five years prior to the onset of insolvency and ending on the appointment of the liquidator.

The definition of a "connected person" is also relevant in relation to all voidable transactions. Section 5(1) of the Insolvency Act defines connected person as any one or more of the following:

(a) a promoter of the company;

(b) a director or member of the company or of a related company;

(c) a beneficiary under a trust of which the company is or has been a trustee;

(d) a related company;

(e) another company one of whose directors is also a director of the company;

(f) a nominee, relative, spouse or relative of a spouse of a person referred to in paragraphs (a) to (c);

(g) a person in partnership with a person referred to in paragraphs (a) to (c); and

(h) a trustee of a trust having as a beneficiary a person who is, apart from this paragraph, a connected person.

In addition, the Insolvency Act provides for the definition of a "related company":[164]

(a) it is a subsidiary or holding company of that other company;

(b) the same person has control of both companies; and

(c) the company and that other company are both subsidiaries of the same holding company.

[164] *Idem*, s 5(2).

When making an application to challenge unfair preferences, an undervalue transaction and / or a floating charge, the liquidator must satisfy the Court that the transaction is an "insolvency transaction", that is, that at the time the particular contract was entered into, the company was insolvent or became insolvent (as a result of that transaction). It is notable that there is still very little BVI case law in relation to circumstances where a purported insolvency transaction caused a company to become insolvent.

6.4.13.2 Unfair preference[165]

An unfair preference is an insolvency transaction entered into by the company during the vulnerability period, which has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, it would be in a better position than he would have been in if the transaction had not been entered into. This is drafted widely; however, there is a carve-out (exception) for transactions entered into in the ordinary course of business.[166]

For example, this carve-out would theoretically include trade creditors and financing entered into at arm's length. Where the transaction was entered into with a connected person, it is automatically presumed to be an unfair preference and that it did not take place in the ordinary course of business, unless the contrary can be proved.[167] A transaction may still be deemed an unfair preference notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the BVI.[168] Under BVI law it is, therefore, not necessary to demonstrate an "intention to prefer" to challenge such a transaction.

6.4.13.3 Undervalue transactions[169]

If the company: (a) makes a gift to a person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or (b) it enters into a transaction with a person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company, provided that such transactions are an insolvency transactions and were entered into during the vulnerability period, the liquidator will be able to challenge it as an undervalue transaction.

The principle test to be applied is what a "reasonably informed" buyer would pay for a particular transaction at arm's length.[170] However, a company is not deemed to have entered into an undervalue transaction if: (a) the company enters into the transaction in good faith and for the purposes of its business, and (b) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.[171] Again, a

[165] *Idem*, s 245.
[166] *Idem*, s 245(2).
[167] *Idem*, s 245(4).
[168] *Idem*, s 245(3).
[169] *Idem*, s 246.
[170] *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143.
[171] Insolvency Act, s 246(2).

transaction may be an undervalue transaction notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the Virgin Islands.[172]

6.4.13.4 Voidable floating charge[173]

A floating charge created by a company is voidable if it is created within the vulnerability period it is an insolvency transaction. However, a floating charge is not voidable to the extent that it secures the following:

(a) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;

(b) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;

(c) the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and

(d) the interest, if any, payable on the amount referred to in paragraphs (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

In the event that a company creates a floating charge in favour of a connected person within the vulnerability period, it is presumed that the charge was an insolvency transaction (unless the contrary is proved).

6.4.13.5 Extortionate credit transaction

A transaction entered into by a company during the vulnerability period for, or involving the provision of, credit to the company is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit: (a) the terms of the transaction require(d) grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit, or (b) the transaction otherwise grossly contravenes ordinary principles of fair trading.
Where the liquidator satisfies the Court that a voidable transaction was entered into the court may:

(a) make an order setting aside the transaction in whole or in part;

(b) in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; and

[172] *Idem*, s 246(3).
[173] *Idem*, s 247.

(c) in respect of an extortionate credit transaction, may by order provide for any one or more of the following:

(i) the variation of the terms of the transaction or the terms on which any security interest for the purposes of the transaction is held;

(ii) the payment by any person who is or was a party to the transaction to the office holder of any sums paid by the company to that person by virtue of the transaction;

(iii) the surrender by any person to the office holder of any asset held by him as security for the purposes of the transaction; and

(iv) the taking of accounts between any persons.

Section 249(2) sets out a number of requirements that an order of the Court may contain (subject to the generality of section 249(1)).

In addition, section 250 of the Insolvency Act lists the limitations on orders made by the Court where it has found that there is an unfair preference or an undervalue transaction.

Such orders must not:

(a) prejudice any interest in assets that were acquired in good faith and for value from a person other than the company, or prejudice any interest deriving from such an interest; or

(b) require a person who received a benefit from the transaction in good faith[174] and for value to pay a sum to the office holder, except where that person was a party to the transaction or, in respect of an unfair preference, the preference was given to that person when he was a creditor of the company.

Any money paid to, assets recovered or other benefit received by the liquidator as a result of an order made in relation to voidable transactions, are deemed to be assets of the company available to pay unsecured creditors of the company.[175]

6.4.14 Liability of the directors

A liquidator can make a number of applications against directors or former directors (including shadow or *de facto* directors).

6.4.14.1 Misfeasance

On the application of a liquidator, the Court may make an order where it is satisfied that a director (former or current):[176]

[174] There are further provisions in the Insolvency Act, s 250(4)-(5) in relation to "good faith".
[175] Insolvency Act, s 251.
[176] *Idem*, s 254(2).

(a) has misapplied or retained, or become accountable for any money or other assets of the company; or

(b) has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.[177]

The Court may make one or more of the following orders against the director:[178]

(a) that he repays, restores or accounts for the money or other assets, or any part of it;

(b) that he pays to the company as compensation for the misfeasance or breach of duty such sum as the Court considers just; and
(c) that he pays interest to the company at such rate as the Court considers just.

6.4.14.2 Fraudulent trading

On the application of the liquidator, the Court may make an order where it is satisfied that, at any time before the commencement of the liquidation of the company, any of its business has been carried on:[179]

(a) with intent to defraud creditors of the company or creditors of any other person; or

(b) for any fraudulent purpose.

The Court may declare that any person who was knowingly a party to the carrying on of the business in such manner is liable to make such contribution, if any, to the company's assets as the Court considers proper.[180]

6.4.14.3 Insolvent trading

On the application of the liquidator, the Court may make an order against a person who is or has been a director of the company if it is satisfied that:[181]

(a) 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 would avoid going into insolvent liquidation; and

(b) he was a director of the company at that time.

[177] *Idem*, s 254(1).
[178] *Idem*, s 254(3).
[179] *Idem*, s 255(1).
[180] *Idem*, s 255(2).
[181] *Idem*, s 256(1).

The Court may order that the person concerned makes such contribution, if any, to the company's assets as the Court considers proper.[182] However, the Court will not make such an order if it is satisfied that after the director first knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation, the director took every step reasonably open to him to minimise the loss to the company's creditors.[183] Any money paid to, assets recovered or other benefit received by the liquidator as a result of an order made under section 255 or section 256, are deemed to be assets of the company available to pay the unsecured creditors of the company.[184]

6.4.14.4 Disqualification orders

Applications to Court for such orders under the Insolvency Act are rare in the BVI, as only the Official Receiver can make them. A disqualification order is an order that a director shall not, for the period specified in the order, engage in any directorships (or other applicable order) without the leave of the Court. An application for a disqualification order may not be made more than six years after the date on which the company concerned became insolvent.

6.4.14.5 Fraudulent conduct[185]

Where a liquidator is appointed by the Court, a person who is or has been an officer of the company is deemed to have committed an offence if, at any time whilst an officer or during the period of 12 months preceding the commencement of the liquidation, he has:

(a) made or caused to be made any gift or transfer of, or charge on, or has caused, permitted or acquiesced in the levying of any execution against the company's assets; or

(b) has concealed or removed any of the company's assets since, or within, sixty days of the date of any unsatisfied judgment or order for the payment of money obtained against the company.

A person is not guilty of an offence under this section:

(a) by reason of conduct constituting an offence (in relation to a gift, etc) which occurred more than five years before the commencement of the liquidation; or

(b) if he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors.[186]

[182] *Idem*, s 256(2).
[183] *Idem*, s 256(3).
[184] *Idem*, s 257.
[185] *Idem*, s 289(1).
[186] *Idem*, s 289(2).

6.4.15 Liability of the liquidator

There are enforcement provisions in relation to a liquidator's duties under the Insolvency Act under section 221. An application may not be made for an order under section 221 as against a liquidator or an administrator who has been released, except with the leave of the Court.

Pursuant to section 187 of the Insolvency Act, the liquidator can be removed from office if he:

(a) is not eligible to act; and

(b) breaches a duty or obligation, fails to comply with a direction of the Court, or the Court is satisfied that:

(i) the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator; or

(ii) the liquidator has interests in conflict with his role.

An application to remove the liquidator can be made by the creditors' committee, a creditor or member of the company, or the Official Receiver. In addition, there are provisions under section 231 for the enforcement of a liquidator's administrative duties.

6.4.16 Termination, completion and dissolution

The liquidation of a company terminates on the date of one of the following, whichever is first:[187]

(a) the Court makes an order terminating the liquidation (see below);

(b) the liquidator filed a certificate of compliance, as he is required to do under section 234(2) of the Insolvency Act; or

(c) the Court makes an order exempting the liquidator from having to file a certificate of compliance.

On the application of a liquidator creditor, director, member of the Official Receiver, the Court may make an order for the termination of the liquidation at any time, if it is just and equitable to do so.[188]

With regard to the completion of a liquidation, the liquidator is required under section 234(2) to prepare his final report as soon as practicable after completing his duties. Such report must be sent to every admitted creditor and every member of the company. A copy of the final report must also be filed with the Registrar. Section 234(3) sets out the requirements for certain statements to be included in the final report. The liquidator is also empowered to make an

[187] *Idem*, s 232.
[188] *Idem*, s 233(1).

application to the Court to exempt the liquidator from compliance with the requirement to send his final report to all known creditors or modify the entire provision with regard to a final report.[189]

In addition, pursuant to section 235 of the Insolvency Act, the liquidator or provisional liquidator can apply for their release when their appointment ends. The effect of a release is that the liquidator is discharged from all liability in respect of any act or default in relation to his administration of the company.[190] The Court can still make an order under section 254 of the Insolvency Act against a liquidator, notwithstanding his release under section 235.

On termination and completion of liquidation, section 236 of the Insolvency Act states that the IR will provide for the dissolution of a company. However, there is a *lacuna* in the IR in this respect, as no such procedure has been legislated for.

Moreover, termination of a liquidation may not necessarily mean that the company should be dissolved. For example, there may be (although rare) a situation where a company liquidation is terminated because the debt has been paid to the appointing creditor (for example, through an injection of capital by a person interested in the company) and then an application is made to the court that the liquidation be terminated so that it can continue in business. In practice, where a liquidation is completed and terminated once the liquidator has filed his final report and been released, the liquidator will write to the Registrar / FSC to request that the company be dissolved.

Self-Assessment Exercise 4

Question 1

In what circumstances will a company be considered insolvent in the BVI (that is, under the definition of insolvency under the Insolvency Act)?

Question 2

Describe, in brief, the two procedures available under BVI law for the appointment of a liquidator.

Question 3

Explain whether an overseas insolvency practitioner can be appointed over the liquidation of a BVI company and any procedural requirements.

[189] *Idem*, s 234(4).
[190] *Idem*, s 235(3).

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.5 Receivership

Receiverships are becoming increasingly popular in the BVI, in particular as a way to prevent the dissipation of assets when undertaking asset tracing investigations and so this section may have more relevance than in other jurisdictions. The Insolvency Act and the IR again regulate receiverships and administrative receiverships, in addition to the BCA and the Conveyancing and Law of Property Act 1961.

Receivers are appointed either: (a) by the Court on an application, or (b) under a debenture. Under section 116(1) of the Insolvency Act there is an extensive list of persons who are not eligible to be appointed as receiver. In practice, when appointing via the Court, a receiver is usually a registered insolvency practitioner in the BVI. Pursuant to section 117(1), there is the availability to appoint joint receivers. Once a receiver is appointed there are a number of administrative steps that must be taken, which are set out in section 118. In addition, section 119 sets out the administrative steps that a company must take. With regard to a receiver appointed out of Court, section 139 sets out further provisions in relation to the receiver's appointment.

A receiver appointed out of Court under a debenture (other than an administrative receiver) is deemed to be the agent of the company unless the charge or instrument under which the receiver was appointed expressly states to the contrary.[191] However, if a liquidator is appointed in relation to a company in receivership, the agency of the receiver is terminated with immediate effect (only the agency, not the receivership).[192] A receiver appointed by the Court is an agent of the Court, not of the company.

The powers of a receiver are those expressly or impliedly set out in the charge or other instrument in terms of which the receiver was appointed.[193] In the case of a receiver appointed by the Court, the receiver's powers are those which are granted under the order appointing the receiver. Accordingly, the initial drafting of the appointing document or the order are very important in relation to the breadth of the powers of a receiver. Section 127(2) of the Insolvency Act also sets out the statutory powers granted to a receiver in the event that the charge of other instrument does not expressly provide for these.

The primary duty of a receiver is to exercise his powers in:

(a) good faith; and

(b) a manner he believes, on reasonable grounds, to be in the best interests of the person in whose interests he was appointed.[194]

[191] *Idem*, s 126(1).
[192] *Idem*, s 126(3).
[193] *Idem*, s 127(1)(a).
[194] *Idem*, s 128(1).

To the extent consistent with this, the receiver must also have reasonable regard to the interests of:

(a) the creditors of the company;

(b) sureties who may be called upon to fulfil obligations of the company;

(c) persons claiming, through the company, an interest in assets in respect of which he was appointed; and

(d) the company.[195]

Where a receiver exercises a power of sale, that receiver owes a duty to obtain the best price reasonably obtainable at the time of sale. Such duty is owed to:

(a) creditors of the company;

(b) sureties who may be called upon to fulfil obligations of the company;

(c) persons claiming, through the company, an interest in assets in respect of which the receiver was appointed; and

(d) the company.[196]

The Insolvency Act also regulates administrative receiverships. Under BVI law it is possible to appoint an administrative receiver pursuant to a floating charge over all or substantially all of a company's assets and undertaking.[197] In addition, an administrative receiver can be appointed by the Court. Where the Court appoints a receiver who would, had he been appointed out of Court, be an administrative receiver, the Court may, in the order under which the receiver is appointed, specify that the receiver is an administrative receiver.[198] However, the Court cannot appoint a receiver as an administrative receiver if there is an administrative receiver already acting in relation to the company.

In light of the wide powers often provided to an administrative receiver, the Insolvency Act imposes a number of requirements and duties on the administrative receiver. As with a receivership, an administrative receivership can exist while the company is in insolvency. Notwithstanding any provision in the memorandum or articles, an administrative receiver may, unless the debenture or other instrument by which he was appointed provides otherwise: (a) execute all documents necessary or incidental to the exercise of his powers in the name of and on behalf of the company in receivership, and (b) use the company's seal.[199] Unless and to the extent that the debenture or other instrument by which an administrative receiver is appointed

[195] *Idem*, s 128(2).
[196] *Idem*, s 129(1).
[197] *Idem*, s 142.
[198] *Idem*, s 143.
[199] *Idem*, s 144.

provides otherwise, the powers conferred on an administrative receiver of a company by the debenture or other instrument by which he was appointed, include the powers specified in Schedule 1 of the Insolvency Act.

In addition, an administrative receivership may also be used in relation to foreign companies - there is nothing in the Insolvency Act that restricts such procedures to BVI companies. However, in order to use such provisions in relation to a foreign company:

(a) the creditor would need to be the holder of a floating charge; and

(b) a BVI licenced insolvency practitioner would need to be appointed.

6.6 Corporate rescue

Please note that the provisions in relation to administrations in the BVI are not in force and there is, therefore, no availability for an administrator to be appointed in relation to a corporate entity.

Pursuant to BVI law there are three main ways in which a BVI company can restructure or reorganise: A plan of arrangement and a scheme of arrangement (both under the BCA) and a creditors' arrangement (governed by the Insolvency Act, given that is a debt-related procedure). Generally speaking, the "arrangements" focus on restructuring equity, whereas the creditors' arrangement is available for the restructuring of debt.

These provisions are not frequently utilised and are not particularly workable or valuable in achieving a positive outcome for the company. In 2018, there were a total of 37 applications to the BVI court to appoint a liquidator, of which 32 resulted in a liquidator being appointed and the companies commencing a winding-up process. In addition, there were 19 voluntary appointments of a liquidator in 2018 following a members' resolution. However, the appointment for the first time of "soft touch" provisional liquidators is anticipated to result in an increase of corporate restructuring in the BVI. Please refer to paragraph 6.4.5. for further information.

6.6.1 Plan of arrangement

This is governed by the BCA and is initiated by the directors of a company or, if the company is in voluntary liquidation, by a voluntary liquidator. There is no requirement for a company to be insolvent before a Plan of Arrangement can be considered. "Arrangement" is defined in section 177(1) of the BCA and includes a reorganisation or restructuring of a company.

The directors of a company must decide whether a Plan of Arrangement is in the best interests of the company, its creditors or shareholders.[200] The Plan of Arrangement may permit a company to:

(a) amend its memorandum and articles of association;

[200] Business Companies Act, s 177(2).

(b) reorganise, merge or consolidate, or separate its businesses;

(c) dispose of any assets, business, shares, debt or other securities;

(d) approve the dissolution of the company; or

(e) put in place any combination of the above.

Once the directors have approved the Plan of Arrangement, the company must apply to the BVI Court to approve the proposed arrangement.[201] The Court has the power to approve, amend or reject the proposed Plan of Arrangement.[202] The Court will determine to whom notice of the proposed plan should be given and whether the approval of any individual is required.[203]

The BVI Court will also determine whether any holder of shares, debt obligations or securities in the company can dissent to the proposed Plan of Arrangement. In that case, any dissenting party may receive payment of fair value in respect of its shares, debt obligations or other securities.[204]

Provided the Court approves the plan, the directors must give notice to and (if so ordered) seek approval from the relevant persons.[205] Once the Plan of Arrangement is approved by those persons, the directors will execute (on behalf of the company) the articles of arrangement. These include:

(a) the Plan of Arrangement;

(b) a copy of the Court order approving the plan; and

(c) details of how the plan was approved.[206]

The articles of arrangement are then required to be filed with the Registry and once registered the company will be issued with a certificate.

A plan of arrangement is effective on the date that the articles of arrangement are registered by the Registrar or on such date subsequent thereto, not exceeding thirty days, as is stated in the articles of arrangement.[207]

A voluntary liquidator of a company may approve a plan of arrangement under section 177, in which case that section applies as if "voluntary liquidator" was substituted for "directors" and subject to such other modifications as are appropriate.

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[201] *Idem*, s 177(3).
[202] *Idem*, s 177(4)(e).
[203] *Idem*, s 177(4)(a) and (b).
[204] *Idem*, s 179.
[205] *Idem*, s 177(6).
[206] *Idem*, s 177(7).
[207] *Idem*, s 177(11).

Notably, section 179 of the BCA provides for the right of dissenters, unlike the provisions for schemes of arrangement. A member of a company is entitled to payment of the fair value of his shares upon dissenting from an arrangement (if permitted by the Court). In order to exercise such entitlement, the member is required to provide to the company prior to the meeting (or at the meeting prior to the vote) its written objections to the action.

6.6.2 Schemes of arrangement

Also governed by the BCA, a scheme of arrangement is a statutory mechanism that permits a company to enter into a compromise or arrangement between the company and its creditors, or between the company and its shareholders. In certain circumstances, it allows a company to restructure and avoid entering into a formal insolvency process.

A scheme of arrangement is initiated by the company, a creditor, a shareholder or a liquidator (voluntary or appointed under the Insolvency Act) by applying to the BVI Court for a meeting of creditors or shareholders.[208] As with the plan of arrangement, there is no requirement for the company to be insolvent when the application to the court is made.

A meeting will then be called and the scheme will be put to a vote. The scheme will be approved if 75% in value of the creditors or class of creditors or shareholders or class of shareholders present and voting at the meeting agree to the scheme.[209] If the scheme of arrangement is approved by the requisite proportion of shareholders or creditors, the applicants must return to the Court for approval of the scheme.

The scheme will be only be binding on all creditors, shareholders and the company once the order approved by the Court sanctioning the scheme is filed with Registrar.[210] A copy of the order of Court is required to be attached to every copy of the company's memorandum issued after the order is made. Should the company contravene this section, it is an offence and is liable on summary conviction to a fine of USD 5,000.

In relation to schemes of arrangement in the BVI, it is important to note that:

(a) there is no provision for the rights of dissenters (as there is with a plan of arrangement);

(b) there is no requirement for supervision of such scheme once it is the court order is granted; and

(c) there is no express protection for the rights of secured or preferential creditors.

6.6.3 Company creditors' arrangements (CCA)

CCAs are governed by the Insolvency Act and the Rules. The rules for putting a CCA in place are largely based on the applicable United Kingdom rules, with relevant modifications. A CCA

[208] *Idem*, s 179A(1)-(2).
[209] *Idem*, s 179A(3).
[210] *Idem*, s 179A(5).

is a compromise between a company and its creditors that allows the parties to vary the rights of the creditors and cancel the liability of a debtor in whole or in part.[211]

The legislative framework for a CCA is set out in Part II of the Insolvency Act but, to date, these arrangements have not proved popular in the BVI. It may well be that the presence of a supervisor discourages companies from considering this option, preferring instead a scheme of arrangement under the BCA. In addition, it is very common for aggrieved creditors to serve a statutory demand and apply for the appointment of a liquidator, given the procedural simplicity provided for under the Insolvency Act and the fact that it is heavily creditor-friendly. Notably, the appointment of an interim supervisor under a company creditors arrangement is also available where the company is in liquidation.

The process is usually initiated by the directors of the company by proposing an arrangement and nominating an interim supervisor to act. The board can take this step if they believe that the company is insolvent or is likely to become so.[212] A written proposal can then be approved. In circumstances where a company is already in liquidation, the liquidator can make the proposal.

The directors must pass a resolution:

(a) stating that the company is insolvent or is likely to become insolvent;

(b) approving a written proposal setting out how the creditors' rights will be varied or cancelled; and

(c) nominating an eligible insolvency practitioner to be appointed interim supervisor.[213]

It is worth noting that, unless the secured creditors agree in writing to the contrary, a CCA does not affect the right of a secured creditor to enforce its security interest or vary the liability secured by the security interest. The position is the same when it comes to preferred creditors. Unless agreed in writing, a preferred creditor will not receive less than it would have received in a liquidation of the company had the company liquidation commenced on the same date as the CCA.[214]

One of the primary functions of an interim supervisor is to prepare a report on the proposal to be presented to the creditors. Where the interim supervisor is appointed by the board he may also monitor the affairs of the company, including its conduct.

The proposal must be approved by 75% of the creditors. The percentage is calculated by reference to the value of the debt rather than on a poll vote basis. Provided the proposal is approved by 75% of the creditors in value, the supervisor will be appointed and the CCA will be

[211] Insolvency Act, s 15(1).
[212] *Idem*, s 20(1)(a).
[213] *Idem*, s 20(1)(b)(i)-(iii).
[214] *Idem*, s 15(4).

binding on the company, each creditor and shareholder.[215] The supervisor will immediately takes possession of the assets of the company. However, the directors (or the liquidator) will remain in control of the company.

The predominant function of the supervisor is to ensure that the terms of the CCA are implemented. After the approval of an arrangement the board or, where appropriate the liquidator, are required to take all necessary steps to put the supervisor into possession of the assets included in the arrangement.[216]

There is no statutory time period within which a CCA must be completed. It is usual, however, for a CCA to include provisions that state when the CCA is anticipated to conclude. Notably, there are no provisions allowing for an application to be made for a moratorium prior to the creditors' meeting, unlike in individual creditors' arrangements.

Self-Assessment Exercise 5

Study the basic aspects dealt with in the previous section.

Question 1

Set out the procedure for entering into a creditors' company arrangement.

Question 2

What is the effect of a CCA?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

7.1 General

Given the position of the BVI as a major offshore financial centre and the consequential nature of BVI incorporated entities (that is, often holding companies), BVI insolvencies frequently involve cross-border or multi-jurisdictional elements. In addition, in 2017 the BVI adopted the Judicial Insolvency Network (JIN) guidelines on cross-border insolvency, which was another positive step for the jurisdiction. The Judicial Insolvency Network guidelines – drafted in 2016 by ten insolvency judges from international jurisdictions, including a BVI Commercial Court Judge – aim to create co-operation and communication between courts on cross-jurisdiction proceedings and to minimise the time and expense involved in litigation.

[215] *Idem*, s 34.
[216] *Idem*, s 35(1).

The BVI appears to have adopted a hybrid approach to cross-border insolvency, in that it exercises its own domestic insolvency law but cooperates with other jurisdictions. It does not have a universalist approach as it has not adopted any treaties and has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

7.2 Statute

The Insolvency Act contains two sections that address cross-border insolvency. Part XVIII sets out the provisions based on the UNCITRAL Model Law on Cross-Border Insolvency. However, this has not been brought into force and so will not be addressed further in this guidance text. There is no indication as to when or whether this part of the Insolvency Act will ever be brought into force.

Part XIX of the Insolvency Act provides the primary framework for the powers provided to the BVI Court to make orders in aid of "foreign proceedings". The BVI Court can recognise certain foreign insolvency proceedings and provide assistance to "foreign representatives". The power to make such orders extends to designated countries, which include Australia, Canada, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States. When making an order in aid of foreign proceedings, the BVI Court is able to apply the applicable BVI laws or the law of the applicable country.[217]

A foreign proceeding is defined as a collective judicial or administrative proceeding, (including an interim proceeding), pursuant to insolvency law, in which the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy.[218] A foreign representative is a person or body (including one appointed on an interim basis), authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs, or to act as a representative of the foreign proceeding. For example, such definitions would include liquidators or the equivalent representative in the relevant jurisdiction.

The BVI Court is provided with wide powers in relation to the orders that can be made, which include:[219]

(a) restraining the commencement or continuation of any proceedings, against a debtor or debtor's property;

(b) restraining the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

(c) requiring any person to deliver up any property of the debtor or the proceeds of such property;

[217] *Idem*, s 467(5).
[218] *Idem*, s 466(1).
[219] *Idem*, s 467(3).

(d) ordering or granting relief to facilitate, approve or implement arrangements that will result in a co-ordination of BVI insolvency proceeding with a foreign proceeding;

(e) appointing an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorising the examination by the foreign representative of the debtor or of any person who could be examined in a BVI insolvency proceeding; or

(g) staying or terminating or making any other order it considers appropriate in relation a BVI insolvency proceeding.

Section 468 of the Insolvency Act sets out certain matters which the Court is required to consider when making an order. In particular, the Court must be guided by what will best ensure the economic and expeditious administration of the foreign proceeding, to the extent that this is consistent with:

(a) the just treatment of all persons claiming in the foreign proceeding;

(b) the protection of persons in the BVI who have claims, from prejudice and inconvenience in the processing of claims in the foreign proceeding;

(c) the prevention of preferential or fraudulent dispositions of property;

(d) the need for distributions to claimants in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency; and

(e) comity.

Orders made by the Court under section 476 of the Insolvency Act do not affect the rights of any secured creditors to deal with the property over which they have a security interest.[220] Moreover, unless consent is so provided, such order does not:[221]

(a) affect the right of any creditor to benefit from set-off;[222] or

(b) result in a preferential creditor receiving less than he would receive in a BVI insolvency proceeding.

In addition, on 7 January 2021, the BVI government enacted an amendment to the Eastern Caribbean Supreme Court (Virgin Islands) Act, which provides that the Court now has jurisdiction to grant free-standing interim relief in aid of existing or anticipated foreign proceedings (in any civil or commercial matter). Such interim relief includes injunctive relief, the appointment of receivers and third-party disclosure orders.

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[220] *Idem*, s 467(4).
[221] *Idem*, s 468(2).
[222] As provided for in the Insolvency Act, s 150.

7.3 Common law

With regard to common law, in *Picard v Bernard L Madoff Investment Securities LLC*[223] (BLMIS), the trustee for the liquidation of BLMIS (Mr Irving Picard) sought the following orders:

(a) recognition as a foreign representative under Part XIX of the Insolvency Act;

(b) an entitlement to apply to the BVI Court for order in aid of such foreign proceedings; and

(c) an entitlement to require any person to deliver up to the trustee any relevant property.

The BVI Commercial Court did not grant the application for the predominant reason that it was not possible for a foreign representative to obtain a form of global recognition in the BVI. The Court would only grant orders under Part XIX on a case-by-case basis – it only provides the foreign representative with an express right to make applications for assistance. However, the Court did make it clear that Mr Picard was a foreign representative within the meaning of Part XIX.

In the matter of C (a bankrupt)[224] was a Commercial Court case, pursuant to an application made by a trustee in bankruptcy, this time appointed pursuant to the law of Hong Kong. Such application meant that the Court had to reconsider its decision in *Picard* on the application of Hong Kong trustees in bankruptcy (Hong Kong being a relevant foreign country). The trustees applied for recognition at common law of the bankruptcy proceedings and their standing as trustees. The application, *inter alia*, requested that the trustees be granted the powers that they would have had if they had been appointed as bankruptcy trustees under the Insolvency Act.

The Court held that:

(a) the jurisdiction of section 470 of the Insolvency Act was limited to making order for the purpose of preserving foreign insolvency proceedings;

(b) the premise that once a foreign insolvency is recognised they should thereby be treated as having all of an equivalent insolvency practitioner in the BVI was rejected; and

(c) section 470 of the Insolvency Act did not confer jurisdiction on the Court to assist foreign representatives from jurisdictions other than those designated by the FSC under Part XIX.

In the case of *Re FuturesOne Diversified SPC Ltd*,[225] an application was made by the United States Commodities Futures Trading Commission in relation to a receiver appointed by the United States District Court. The BVI Court did not grant the orders sought, on the basis that a receivership did not come within the meaning of a foreign insolvency proceeding. A foreign insolvency proceeding was limited to proceedings for the purpose of reorganisation, liquidation and bankruptcy. The Court decided that on the evidence before them, the receivership was in

[223] BVIHCV 0140 of 2010.
[224] BVIHC (COM) 80 of 2013.
[225] BVIHCM (COM) 0113 of 2013.

place to protect investors and therefore did not come within this meaning. Accordingly, the US Court appointed receiver did not have standing to make applications under Part XIX.

In May 2019, the Judicial Committee of the Privy Council handed down judgment in the case of *UBS AG New York and others v Fairfield Sentry Ltd (In Liquidation) and others.*[226] The central question on appeal was whether section 249 of the Insolvency Act either expressly or by necessary implication confers an exclusive jurisdiction on the BVI High Court so as to preclude foreign courts, which assist in a BVI liquidation, from exercising such powers. Section 249 sets out the order available to a court where the court finds that a voidable transaction has occurred. The Privy Council found that section 249 of the Insolvency Act does not preclude a foreign court from exercising such powers.

As referred to in paragraph 6.4.5, in *In the Matters of Constellation Overseas Ltd & others,*[227] "soft touch" provisional liquidators were appointed over a group of companies to aid restructuring in both Brazil and the United States. This development in BVI common law illustrates the flexibility of the BVI courts when faced with complex cross-border restructurings.

In March 2021, the Court of Appeal provided further confirmation that common law recognition of foreign insolvency proceedings continue to exist. In *Net International Property Ltd v Adv Eitan Erez*,[228] the Court of Appeal found that:

(a) Recognition was part of the common law of the BVI before the passing of the Insolvency Act in 2003 and continues to be. A local court in the BVI has power under the common law to recognise a foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. Recognition is usually accompanied by assistance which gives the foreign officeholder powers to deal with the local estate. However, recognition does not necessarily include assistance.

(b) An established common law right may be abrogated by necessary implication where statute provides a comprehensive scheme that replaces the common law right. While Part XVIII of the Insolvency Act 2003 provides a comprehensive scheme for the recognition of foreign officeholders that maybe sufficient to abolish the common law of recognition, Part XVIII is not yet effective. Therefore, the common law right of recognition survives.

(c) Part XIX of the Act does provide a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. However, if the country has not been designated as a relevant foreign country then the officeholder is not entitled to apply for assistance under Part XIX of the Act. Assistance is no longer available at common law to foreign office holders from non-designated countries.

[226] [2019] UKPC 20.
[227] BVIHC (Com) 2018/0206.
[228] BVIHCMAP2020/0010.

7.4 BVI liquidator

The Court is also empowered to authorise a BVI insolvency practitioner to act in a foreign country on behalf of a BVI insolvency proceeding, as permitted by the applicable foreign law. For example, a liquidator might apply for an order from the BVI Court that he can make certain applications in another jurisdiction and apply for a letter of request from the BVI Court, to be sent to the applicable foreign court, requesting the relevant assistance.

7.5 Concurrent proceedings[229]

Notwithstanding that a BVI incorporated company is in liquidation in a foreign country, a liquidator can be appointed over the company in the BVI, by using either of the two routes of appointment. Generally, the liquidation of the company in the place of incorporation will be considered the primary liquidation.

7.6 Liquidation of foreign companies in the BVI

Foreign companies not registered or incorporated in the BVI can also enter into liquidation in the jurisdiction, by way of a Court appointment of a liquidator. In order to enter liquidation in the BVI the foreign company must have sufficient presence of assets in the jurisdiction.

7.7 Foreign creditors

As referred to above, section 446 of the Insolvency Act provides foreign creditors with a right of direct access. Creditors have the same rights regarding the commencement of, and participation in, a BVI insolvency proceeding as creditors in the BVI. However, such right of direct access does not affect the priority of claims in a BVI insolvency proceeding or the exclusion of foreign penal, revenue and social security claims from such a proceeding.

Self-Assessment Exercise 6

Describe the circumstances and procedure in which a foreign representative can obtain an order in aid of foreign proceedings under the Insolvency Act, 2003.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

The British Virgin Islands are not a party to any conventions or treaties in relation to the enforcement of local or foreign judgments. However, it is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

[229] Insolvency Act, s 461.

Therefore, an individual who has the benefit of an arbitral award granted by a state that is a party to the New York Convention, can seek to enforce that award in the BVI.

The recognition of foreign judgments in the BVI is principally governed by the Reciprocal Enforcement of Judgments Act (Cap 65) 1922 (1922 Act) and common law. There is also the Foreign Judgments (Reciprocal Enforcement) Act 1964 (Cap 27) (1964 Act), however there is doubt as to whether the 1964 Act is properly designated (although this has yet to be argued in Court) and as such, it will not be referred to further in this guidance text.

From a practical standpoint, the enforcement of a foreign judgment in the BVI is only effective to the extent that the judgment debtor / defendant has assets in the BVI, against which to enforce. Consequently, prior to making an application for registration or otherwise, it is important to identify any assets, such as shares, held in the territory.

Under the 1922 Act, "judgment" is defined as any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of the Act, whereby any sum of money is made payable.[230] Accordingly, only judgments for final and conclusive monetary sums can be enforced and any other judgment, whether declaratory, injunctive or otherwise, cannot be enforced.

The 1922 Act extends only to judgments given in the High Court of England Wales and Northern Ireland and the Court of Session in Scotland.[231] It also extends to judgments given in the courts of the Bahamas, Barbados, Belize, Trinidad & Tobago, Guyana, St Lucia, Grenada, Jamaica and New South Wales (Australia).[232] Judgments from countries that are not included under the Reciprocal Enforcement of Judgments Act 1922, cannot be registered.

Once a foreign judgment is duly registered under the 1922 Act by the BVI Court, it is treated from the date of registration as being of the same force and effect as if that judgment had been made in the BVI.[233] Accordingly, all the remedies usually available under the CPR will be available. Pursuant to CPR 45.2, these include: (i) a charging order, (ii) a garnishee order, (iii) a judgment summons, (iv) an order for seizure and sale of goods, and (V) the appointment of a receiver.

The foreign judgment is registrable within 12 months of the date of judgment, unless the BVI court grants a longer period on the basis that it is just and convenient to do so.[234] In order to register a judgment, a judgment creditor must apply to court under CPR Part 72. The application must contain certain prescribed information and must exhibit a duly authenticated copy of the judgment and details of any interest that has become due under the law of the country in which judgment has been entered. This may also include a certified / authenticated translation of the judgment into English (if necessary). The application can be made without notice to the

[230] Reciprocal Enforcement of Judgments Act, s 2(1).
[231] *Idem*, s 3(1).
[232] *Idem*, s 6(1).
[233] *Idem*, s 3(3)(a).
[234] *Idem*, s 3(1).

judgment debtor. The court can order the judgment creditor to give security for costs in relation to any proceedings that can be brought to set aside the registration.

Pursuant to section 3(2) of the 1922 Act, the Court will not order a judgment to be registered in the event that:

(a) the original court acted without jurisdiction;

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction or the court;

(c) the judgment debtor was not duly served with the process of the original court and did not appear, notwithstanding that he is ordinarily resident or carrying on a business within the jurisdiction of that court of agreed to submit to the jurisdiction of the court;

(d) the judgment was obtained by fraud;

(e) the judgment debtor satisfies the court that an appeal is pending or that he is entitled to and intends to appeal; or

(f) the judgment related to a cause of action which for reasons of public policy (or similar) could not have been entertained by the Court.

At common law, the courts treat any final and conclusive monetary judgment as a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction where the judgment was obtained. The judgment creditor must prove the judgment and show that it is a final and conclusive monetary judgment for a specified sum. If those matters are established, a retrial of the issues in the action is not necessary. The creditor can instead apply for summary judgment.[235]

The position is more complex for foreign judgments that are not for a specified sum of money. In those circumstances, the common law doctrine will not strictly engage, but the creditor can seek to avoid a re-trial of the issues by relying on the equitable principles of estoppel. Basically, the applicant must argue that it would be an abuse of process to re-litigate matters previously decided before a court of competent jurisdiction.

Again, from a practical standpoint, a judgment creditor does not necessarily need to apply for registration of a foreign judgment (or follow any of the other procedures) in order to enforce their debt. Such debtors are not precluded from using the procedures under the Insolvency Act, as set out throughout this Guidance Text.

[235] Civil Procedure Rules, r 50.

Self-Assessment Exercise 7

Study the basic aspects dealt with in the previous section.

A creditor had a judgment handed down 11 months ago in the Courts of England and Wales for a debt owed to it under a loan agreement. Can such judgment be registered in the BVI? If the judgment can be so registered, set out the relevant procedure and any other considerations you would need to be aware of.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

9. INSOLVENCY LAW REFORM

From 1 January 2023 the BVI Business Companies (Amendment) Act 2022 and the BVI Business Companies (Amendment) Regulations 2022 will introduce new requirements in respect of non-Insolvency Act liquidators, dissolution and restoration procedures.

There is no rescue procedure as such in the BVI. The provisions in the Insolvency Act for the appointment of administrators have not been brought into force and there is no indication as to when, or if, administrations will become available in the BVI.

With regard to the UNCITRAL Model Law on Cross-Border Insolvency, it is currently considered unlikely, by both insolvency practitioners and the legal profession, that this will be brought into force in the BVI in the near future, if at all.

The BVI Courts have shown their willingness to assist in corporate restructuring by approving "soft touch" provisional liquidations.

The above are some of the more significant developments in BVI insolvency law in recent years (as set out in detail throughout the Guidance Text). This brings the BVI in line with accepted restructuring practices already utilised in other Caribbean jurisdictions.

10. USEFUL INFORMATION

Court judgments:

- https://www.eccourts.org
- www.worldlii.org/

Financial Services Commission (including financial legislation):

- http://www.bvifsc.vg/

Civil Procedure Rules:

- https://www.eccourts.org/civil-procedure-rules/

Virgin Islands Official Gazette:

- https://eservices.gov.vg/gazette/

For liquidation advertisements and other legal notices:

- Virgin Islands Official Gazette (as above)
- BVI Beacon: http://bvibeacon.com/
- The Island Sun: https://www.islandsun.com/

BVI Government:

- http://www.bvi.gov.vg/

BVI House of Assembly:

- http://www.bvi.gov.vg/house-of-assembly

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Study the basic aspects dealt with in the previous section.

Briefly set out the insolvency framework applicable in the BVI and how this is supervised and regulated by the BVI's institutional framework.

Commentary and feedback on Self-assessment Exercise 1

You answer should refer to the Insolvency Act, 2003 Insolvency Rules, 2005 and the Business Companies Act, 2004. You should discuss the supervisory role of the BVI Court in insolvency proceedings. Examples would include: (i) sanctioning the exercise of certain powers of an office holder (such as a liquidator), and (ii) the availability of applications to the Court in the event of a voidable transaction (thus protecting and giving effect to the *pari passu* principle).

You should also include reference to the Financial Services Authority, including that: (i) insolvency services are an activity regulated by the FSC, (ii) insolvency practitioners are licensed by the FSC, and (iii) FSC's Enforcement Committee also has the power to take enforcement action against persons such as a licenced insolvency practitioners. Reference to the FSC's governing body, the Board of Commissioners should also be made.

Self-Assessment Exercise 2

Study the basic aspects dealt with in the previous section.

Question 1

Describe the mandatory procedure for registering a charge.

Question 2

Why is it preferable for a chargee to undertake public registration of a charge despite it not being mandatory?

Question 3

What are the remedies available to the holder of a legal charge over shares in a BVI company?

Commentary and feedback on Self-assessment Exercise 2

You answers should contain the following information:

Question 1

Section 162 of the BCA requires a company to keep, at the company's registered office or at the office of its registered agent, a register of all relevant charges created by the company. Your answer should set out the information that must be included in such registration, pursuant to the BCA.

Question 2

Section 163 of the BCA sets out the procedure for the public registration of charges, with the Registrar of Companies. Generally it is this public register which determines the priority of security under BVI law, so it is in the chargee's interest to register its charge with the Registrar.

Question 3

Answer as follows:
(i) foreclose on the shares;
(ii) sell the shares; or
(iii) appoint a receiver over the shares.

Self-Assessment Exercise 3

Study the basic aspects dealt with under the Personal Bankruptcy section.

Question 1

What assets are included in the estate of a bankrupt individual?

Question 2

Explain the effect on the bankrupt's estate when an order for bankruptcy is made by the BVI Court.

Commentary and feedback on Self-assessment Exercise 3

Question 1

Section 313 of the Insolvency Act sets out the assets contained in the bankrupt's estate and these should be listed, with an explanation, where relevant.

Question 2

The assets of the bankrupt vest in his trustee without any conveyance, assignment or transfer; and become divisible among his creditors in accordance with the Insolvency Act. Your answer should also explain that every bankruptcy is under the general control of the Court.

Self-Assessment Exercise 4

Question 1

In what circumstances will a company be considered insolvent in the BVI (that is, under the definition of insolvency under the Insolvency Act)?

Question 2

Describe, in brief, the two procedures available under BVI law for the appointment of a liquidator.

Question 3

Explain whether an overseas insolvency practitioner can be appointed over the liquidation of a BVI company and any procedural requirements.

Commentary and feedback on Self-assessment Exercise 4

Question 1

Your answer should include the following, making reference to the relevant sections of the Insolvency Act:
(i) A company cannot pay its debts as they fall due.
(ii) The value of the company's liabilities exceeds the value of its assets.
(ii) A company fails to satisfy (wholly or partly) execution or other process issued on a judgment, decree or order of the BVI Court in favour of a creditor of the company.
(iv) A company fails to comply with the terms of a statutory demand (and it is not successfully set aside under sections 156 and 157 of the Insolvency Act).

Question 2

Your answer should provide details of: (i) the appointment of a liquidator set out in Part VI of the Insolvency Act, and (ii) appointment of a liquidator by the members of a BVI company by way of a qualifying resolution.

Question 3

An overseas insolvency practitioner can be appointed as liquidator of a BVI company, but only as a joint appointment. Your answer must include the notification and eligibility requirement application under the Insolvency Act, for example, notification of such joint appointment to the FSC.

Self-Assessment Exercise 5

Study the basic aspects dealt with in the previous section.

Question 1

Set out the procedure for entering into a creditors' company arrangement.

Question 2

What is the effect of a CCA?

Commentary and feedback on Self-assessment Exercise 5

Your answers should include the following, making reference to the relevant sections of the Insolvency Act:

Question 1

(i) The process is usually initiated by the directors of the relevant company and your answer should set out the circumstances in which a CCA may be considered.
(ii) Your answer should then explain the procedure of the appointment of an interim supervisor, followed by the initiation of the meeting of creditors to vote on the relevant proposal.

Question 2

The CCA will be binding on the company, each creditor and shareholder. The supervisor immediately takes possession of the assets. However, the directors (or the liquidator) will remain in control of the company.

Self-Assessment Exercise 6

Question

Describe the circumstances and procedure in which a foreign representative can obtain an order in aid of foreign proceedings under the Insolvency Act, 2003.

Commentary and feedback on Self-assessment Exercise 6

Your answer should include a discussion of Part XIX of the Insolvency Act, including
(i) The definition of foreign proceedings.
(ii) The definition of foreign proceedings.
(iii) A brief overview of the procedure.

Self-Assessment Exercise 7

Study the basic aspects dealt with in the previous section.
A creditor had a judgment handed down 11 months ago in the Courts of England and Wales for a debt owed to it under a loan agreement. Can such judgment be registered in the BVI? If the judgment can be so registered, set out the relevant procedure and any other considerations you would need to be aware of.

Commentary and feedback on Self-assessment Exercise 7

A judgment for a debt owed to a creditor under a loan agreement is likely to be a money judgment, which can be registered. In addition, the judgment was handed down in England and Wales, a jurisdiction to which the 1922 Act extends.
However, your answer should also note that: (i) the judgment was handed down 11 months ago and so time is of the essence with respect to the application for registration, and (ii) that it is not clear in the facts whether section 3(2) of the 1922 Act is engaged and therefore more facts will need to be provided prior to confirmation of the availability of registration.

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