

British Virgin Islands - Restructuring and Insolvency

Insights - 17/03/2023

Corporate insolvency in BVI is governed by the Insolvency Act, 2003 (as amended) and the Insolvency Rules, 2005 (as amended). These laws are closely based on the English Insolvency Act 1986. There are a number of insolvency regimes available.

However the provisions for administration, which are similar to the provisions of the English Insolvency Act 1986 prior to its amendment by the Enterprise Act 2002, and which promote the rescue of companies in financial difficulty assisted by a statutory moratorium, are not yet in force. There are separate provisions for insurance companies.

The key current insolvency procedures are liquidation, creditor arrangements, receivership and administrative receivership.

Liquidation

A liquidator is appointed for the purpose of collecting in and realising the assets of a company and distributing the proceeds of realisation to creditors. Liquidation marks the end of a company's business and does not have a rescue function. If the liquidation is a solvent liquidation, it is governed by the provisions of the BVI Business Companies Act, 2004 (as amended). If the liquidation is an insolvent liquidation it is governed by the Insolvency Act, 2003 (as amended) and the liquidator must be either the Official Receiver in the BVI or a BVI licensed insolvency practitioner. An individual who is resident outside the BVI may be appointed to act as liquidator jointly with a BVI licensed insolvency practitioner or the Official Receiver. Liquidation may be commenced by the BVI court or by shareholders' resolution. The BVI court also has jurisdiction to appoint a liquidator over a foreign company which has a connection with the BVI. Connection is defined as the presence of assets or the carrying on of business in the BVI or if there is a reasonable prospect that the appointment would benefit creditors.

Liquidation by the BVI Court

Proceedings are brought in the Commercial Court of the BVI. An application may be made by a

creditor, the company, its shareholders, the International Tax Authority, the Attorney General or the Financial Services Commission.

The grounds for appointment are that the company is insolvent, it is just and equitable that the company be wound up or it is in the public interest to wind it up. Only the Attorney General, the International Tax Authority or the Financial Services Commission may apply in the public interest.

The most common ground is insolvency. Insolvency may be established by showing any of the following: a failure to comply within 21 days with a statutory demand for an undisputed debt exceeding US\$2,000; execution issued on a judgment being returned unsatisfied; balance sheet insolvency; or an inability to pay debts as they fall due.

The court may, on application, appoint a provisional liquidator to protect assets pending the making of the winding-up order. The provisional liquidator has powers to the extent necessary to maintain the value of the assets of the company or to carry out the functions for which he was appointed. Importantly, following the decision in *Constellation Overseas Ltd BVIHC COM 2018/206*, a "light-touch" or "soft-touch" provisional liquidator can be appointed in aid of restructuring.

Insolvent members' liquidation

As an alternative to the BVI court appointment of a liquidator, the members of an insolvent company may, by a majority of 75% (or higher if required by the company's constitutional documents) of the votes of those present and voting, pass a resolution appointing an eligible insolvency practitioner as liquidator of the company. The winding-up commences at the time of appointment of the liquidator.

Solvent voluntary liquidation

Subject to the provisions of the memorandum and articles of association of the company, the voluntary liquidation of a solvent company may be commenced by the appointment of the liquidator by either a resolution of members or a resolution of directors. The process is only available to BVI registered companies. The winding-up again commences at the time of appointment of the liquidator.

Effects of liquidation

The purpose of a liquidation is to realise the company's assets and distribute the proceeds of realisation to creditors. On appointment, the liquidator takes custody and control of the company's assets and the directors' powers effectively cease (although they remain in office). Unless the BVI court otherwise orders, there is a stay against creditor action, proceedings may not be commenced by or against the Company and shares in the Company may not be transferred. Secured creditors remain able to enforce their security rights. No amendments can be made to the memorandum and articles of association of the Company, and members cannot exercise their rights under those

documents.

Liquidator

The liquidator of an insolvent company must be an “eligible insolvency practitioner”. This means that they must be a BVI-licensed insolvency practitioner. An overseas practitioner who is not BVI-licensed may be jointly appointed with a BVI-licensed insolvency practitioner. The liquidator has wide ranging powers including the power to sell the company's property and to borrow money and grant security over assets. The liquidator calls a meeting of creditors and a creditors' committee may be appointed. The liquidator is subject to the control of the court.

A liquidator appointed in relation to a solvent voluntary liquidation must have certain experience/qualifications and, since changes in law were brought in on 1 January 2023, must satisfy a BVI residency requirement in that they must have lived physically in the BVI for at least 180 days before their appointment. Where joint liquidators are appointed, only one needs to satisfy the BVI residency requirements. Liquidators appointed in relation to a solvent voluntary liquidation before 1 January 2023 can continue to act until the liquidation is concluded, without the need to satisfy the BVI residency requirements,

Creditor claims

Creditors submit claims in writing to the liquidator. The submission of such claims may amount to a submission to the jurisdiction of the BVI court. Where the liquidator issues a notice of their intention to declare a distribution, any creditor who has not submitted a claim by the date specified is excluded from the distribution. The liquidator adjudicates the claim and if they reject it, they must provide written reasons. Once all the company's assets have been realised and distributed, any surplus is returned to shareholders. The liquidator prepares a final report for creditors and members. The company is then dissolved.

Priority of payments

The proceeds of realisation of assets are paid in the following order of priority:

- the proceeds of sale of charged assets are paid to secured creditors; and
- unsecured assets are applied in the following order of payment:
 1. the costs of the liquidation and liquidator's remuneration
 2. preferential creditors; and
 3. unsecured creditors

The categories of preferential creditors are as follows: the BVI Social Security Board in respect of employee's contributions deducted from the employee and employer's contributions for the six

months prior to the winding-up (unlimited); the BVI government for taxes and other sums due to it up to a maximum of US\$50,000; the Financial Services Commission for any unpaid fees or penalties up to a maximum of US\$20,000; employees claims for wages for the six months prior to the winding-up (capped at US\$10,000), employees' entitlements to social security contributions for six months and pensions contributions for twelve months (capped at US\$5,000 per employee).

Registered charge holders will rank according to the registration of their security interest at the BVI Registry of Corporate Affairs. Other creditors within each category rank *pari passu*.

Any surplus assets are distributed to the members in accordance with their rights and interest in the company.

Creditors with retention of title and other proprietary claims remain entitled to their assets. There is a statutory set-off applying to mutual credits and debits and other mutual dealings between the company and its creditors.

Completion of liquidation

Once the liquidation is complete, the liquidator prepares a final report which is sent to all creditors and members and filed with the BVI Registrar of Corporate Affairs. The company will then be struck from the register of companies in the BVI and dissolved.

Receivers in general

Receivership is not a collective insolvency procedure as its primary aim is the satisfaction of debts owed to the secured creditor.

Appointment

A receiver may be appointed out of court by the holder of the security document, or they may be appointed by an order of the BVI court.

The appointment of a receiver out of court is governed by strict notice provisions set out in section 139 of the Insolvency Act, 2003 (as amended).

Further, whether appointed out of court or by the BVI court, a receiver must forthwith give notice of their appointment to the company and to the BVI Registrar of Corporate Affairs and, if the company is a regulated person, to the Financial Services Commission. The receiver must also advertise their appointment in newspapers within five business days and send a notice of their appointment to all creditors within twenty-eight days.

Qualifications and powers

An ordinary receiver (as opposed to an administrative receiver) need not be a BVI-licensed

insolvency practitioner.

The powers of a receiver are to be found in the charge document and/or the BVI court order appointing the receiver. Subject to those sources, a receiver is empowered by statute to demand and recover income of the assets over which they were appointed, to manage, maintain and repair those assets, and to exercise a right to inspect books and documents relating to those assets, which are in the possession or control of a person other than the company.

Duties

The receiver's primary duty is to exercise their power in good faith and for a proper purpose, and in the best interests of their appointor. Subject to that primary duty, they shall have reasonable regard to, amongst others, the interests of the creditors. They also owe a duty to manage the charged property with due diligence. If they exercise a power of sale, they owe a duty to, amongst others, the creditors, to obtain the best price reasonably obtainable at the time of sale.

Effect of appointment of receiver

The appointment of a receiver does not affect the corporate existence of a company, although the directors are divested of authority in respect of property covered by the appointment. The company remains liable on its existing contracts.

A receiver acts as the agent of the company, not the agent of the receiver's appointor. A receiver is personally liable on any contract entered into in performance of their functions and for certain liabilities under contracts of employment adopted by them after fourteen days of appointment. The receiver will be entitled to an indemnity out of the assets of the receivership for these liabilities.

Duty to report

A receiver must prepare accounts of their receipts and payments covering the first 12 months of their appointment and each subsequent 6 months, and on cessation of their appointment.

Termination of receivership

The receivership will terminate when the assets have been fully realised and distributed. Depending on how much is realised, this may or may not result in the appointor being fully repaid and an account being made to subordinate creditors.

On completion of the receivership, the receiver has to give notice to the company and if the company is or has been a regulated person, to the Financial Services Commission and then file a notice of completion of the receivership with the BVI Registrar of Corporate Affairs and if the company is or has been a regulated person, to the Financial Services Commission.

Administrative receivership

An administrative receiver is a receiver appointed by the BVI court or the holder of a debenture or other instrument of the company secured by a floating charge, over the whole or substantially the whole of the business, undertaking and assets of a company.

Qualifications and powers

An administrative receiver must be a BVI-licensed insolvency practitioner.

An administrative receiver has, in addition to the powers of an ordinary receiver, the power to execute documents on behalf of the company and to use the company seal, and the powers set out in Schedule 1 of the Insolvency Act, 2003 (as amended). These include the power to carry on the company's business, to sell its assets, and to commence legal proceedings on its behalf. An administrative receiver may also apply to the BVI court for authority to sell assets subject to prior ranking security provided that the secured creditor is paid out of the net proceeds. A person dealing with an administrative receiver in good faith and for value is not concerned whether the administrative receiver is acting within its powers.

Duty to report

In addition to the accounts required of an ordinary receiver, an administrative receiver must, within three months of their appointment, prepare and file with the BVI Registrar of Corporate Affairs and, if appointed by the BVI court, the BVI court, a report as to various matters, including the proposed disposal of any assets, the amounts owed to their appointor and to preferential creditors and the amount available to other creditors.

Creditors arrangements

A creditors' arrangement ("CA") is a procedure which enables a company to compromise liabilities with creditors. It is similar to a company voluntary arrangement under the English Insolvency Act 1986. A CA is flexible and can vary or cancel debts. A CA cannot affect the rights of secured or preferential creditors without their written consent.

A proposal for a CA may be made by the directors, or if the company is in liquidation or administration, by the liquidator or administrator. The company must be insolvent or likely to become insolvent. There is no moratorium on creditor rights and no court involvement.

The arrangement must name a BVI-licensed insolvency practitioner who will act as the interim supervisor. The interim supervisor calls a creditors meeting to consider the arrangement within 28 days of their appointment.

If the creditors approve the arrangement by 75% in value of those present at the meeting, the

arrangement takes effect. If approved, the arrangement binds all creditors of the company (including dissenting creditors) and creditors who were not present at the meeting or who did not have notice of it. There are safeguards for creditors who are unfairly prejudiced to apply to the BVI court for relief.

The duties and powers of the supervisor are set out in the arrangement. They will usually include the power to take control of assets. The arrangement will terminate upon completion of the arrangement, at which point notice is given to the company, the members, the creditors and the BVI Registrar of Corporate Affairs, together with a report summarising the receipts and payments.

Administration (not currently in force)

The provisions of the Insolvency Act, 2003 (as amended) relating to administration are not in force. There does not appear to be any current political intention to bring them into force. A brief summary of the procedure (which is based on the pre-Enterprise Act provisions of the English Insolvency Act 1986) is set out below.

Administration is a procedure whereby a company can be reorganised, restructured or have its assets realised under the protection of a statutory moratorium.

An administrator (a BVI-licensed insolvency practitioner) can be appointed by the BVI court over a company for the purpose of:

- rehabilitation of the company
- survival of all or part of the undertaking as a going concern
- achieving a better return for the company's creditors than would be achieved if the company were wound up
- the approval of a creditors' arrangement; or
- in aid of foreign proceedings

On the appointment of an administrator, a full moratorium on insolvency proceedings and other legal processes comes into effect to protect the company and its assets. This means that security cannot be enforced, nor goods repossessed nor any other proceedings commenced or continued without the consent of the administrator or leave of the BVI court. No winding up order can be made, nor may an administrative receiver be appointed. A secured creditor entitled to appoint an administrative receiver can, however, prevent the appointment of an administrator.

Antecedent transactions

Where a company goes into liquidation (and administration if and when that procedure comes into

force), certain transactions may be liable to be set aside.

Transactions at an undervalue

A transaction is at an undervalue if the company made a gift or the value of the consideration received, in money or monies worth, was significantly less than the value, in money or monies worth, than the consideration provided by the company.

Such a transaction can be set aside if it was entered into within ‘the vulnerability period’. The vulnerability period is six months prior to the onset of insolvency, or, if the transaction was with a connected person, two years prior to the onset of insolvency. For present purposes, onset of insolvency may be taken as the date of appointment of liquidators.

The company must have been insolvent at the time of the transaction or become insolvent as a result of it. If the transaction was made with a connected person, there is a rebuttable presumption of insolvency.

There is a defence if the transaction was entered into in good faith and for the purposes of the company's business and at the time there were reasonable grounds to believe that the transaction would benefit the company.

Upon proof of a transaction caught by these provisions, the BVI court may make such order(s) as it considers fit to restore the position, for example, by ordering the return of property or proceeds of its sale to the company.

Unfair preference

A liquidator may apply to the BVI court to set aside a preference that has the effect of placing a creditor in a better position than they would have been in the event of a liquidation. The preference must have occurred within the vulnerability period (see above) and the company must have been insolvent at the time or become so as a result of the preference. There is an exception for transactions in the ordinary course of business.

The test is that the transaction had the necessary effect and not, as in English law, a desire to prefer.

If the person is connected with the company, there is a rebuttable presumption that the company was insolvent at the time or became so as a result of the preference, and that it did not take place in the ordinary course of business.

The BVI court may make such order(s) as it considers fit to restore the position to what it would have been had the preference not occurred.

Avoidance of floating charges

Any floating charge created over the company's property is vulnerable if made within the vulnerability period (see above) and at the time it was created, the company was insolvent or became so as a result. Such a floating charge will however be valid to the extent of any new money or other consideration provided.

If a floating charge is created in favour of a connected person, there is a rebuttable presumption that the company was insolvent at the time or became so as a result.

Voidable Dispositions

In addition to the claims available to liquidators of insolvent companies in relation to antecedent transaction as set out above under the Insolvency Act, 2003 (as amended), Section 81 of the Conveyancing and Law of Property Ordinance, 1961 (as amended) provides a general voidable disposition principle in respect of conveyances of property. It provides that every conveyance of property made with the intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced. This action can be used by such prejudiced persons to recoup property conveyed with the intention to defraud creditors. In addition, unlike antecedent transaction as set out above under the Insolvency Act, 2003 (as amended), such action brought pursuant to Section 81 of the Conveyancing and Law of Property Ordinance, 1961 (as amended) does not require that the offending company was, or became, insolvent at the time of such transfer. It is possible in certain limited circumstances for the Conveyancing and Law of Property Ordinance, 1961 (as amended), or provisions of it, to be excluded from a conveyance of property. In this context, 'property' includes anything in action and any interest in real or personal property.

Directors liabilities

Fraudulent trading

In the context of a liquidation, a director may be pursued for fraudulent trading where the business of a company has been carried on with the intent to defraud creditors or for any fraudulent purpose. A director who was knowingly party to the fraudulent trading may be liable to contribute to the assets of the company.

Insolvent trading

A director or former director may be liable for insolvent trading if he continued to trade when he knew or ought to have concluded that there was no reasonable prospect that the company would avoid liquidation. There is a defence if the director took every step with a view to minimising the potential loss to the company's creditors. A director found guilty of insolvent trading may be liable to contribute to the assets of the company.

Misfeasance

Directors may also be liable for misfeasance or breach of fiduciary duty and can be required to make a contribution to the company's assets. An application may be made by a liquidator or any creditor or shareholder of the company.

Disqualification

A director may also be disqualified from acting as a director of a company or from being directly or indirectly involved in the management of a company. A disqualification order may be made by the BVI court if a director has been convicted of any offence in relation to an insolvent company, is guilty of fraudulent or insolvent trading or is guilty of any fraud or misfeasance.

Cross-border assistance

Part XIX of the Insolvency Act, 2003 (as amended) enables orders to be made in the BVI in aid of foreign insolvency proceedings in certain designated countries.

Under this Part, the BVI court has wide powers and may, for example, grant a stay of execution against a debtor's property located in the BVI, entrust the administration or realisation of property to a foreign representative, and facilitate the co-ordination of concurrent insolvency proceedings. In deciding whether or not to make orders, the BVI court is required to protect the interests of BVI creditors, and any order it makes may not affect the rights of secured creditors.

Although Part XVIII of the Insolvency Act, 2003 (as amended) contains provisions based on the UNCITRAL Model Law on Cross-Border Insolvency, this Part has not been brought into force.

The existence of a foreign insolvency process in respect of a BVI company does not prevent the BVI court appointing a liquidator and, as a matter of common law, the BVI proceedings will be treated as the primary proceedings.

Schemes of arrangement

Section 179A of the Business Companies Act, 2004 (as amended) enables a compromise or arrangement to be proposed between a company and its creditors or members. In law, a scheme is a contract varying or compromising the obligations owed by a company to its members or to its creditors. In substance, a scheme is a business plan. Since its content is not prescribed by law, it offers great flexibility.

Creditors' schemes are commonly proposed by insolvent companies in an effort to stave off liquidation. In this form, it is a survival strategy.

The key feature of a scheme is that it can be imposed on a minority against their will, which is why it is regulated by various statutory safeguards. In this respect, it is similar to a CAs (as mentioned

above).

The key difference between a scheme and a CA is the level of BVI court supervision or intervention. A scheme requires the BVI court's approval at two key stages of its implementation, and at each of these stages, the BVI court's scrutiny is thorough. However, once sanctioned by the BVI court, a scheme entails little or no interference by the BVI court.

Financial restructuring

Financial restructuring is an informal process effected by consensual agreement between a debtor and its financial creditors. A standstill agreement is often negotiated whereby creditors agree not to take action against the company for a period of time, in order to allow a financial restructuring to be implemented. New funding may be provided and given priority through inter-creditor agreements. A restructuring may also be achieved by means of a CA or a scheme of arrangement.

Funding

Unlike the position in some other jurisdictions (e.g. the provisions relating to debtor-in-possession financing in US Chapter 11 proceedings), the BVI does not provide any statutory priority for funding provided to a company which is in the grip of an insolvency procedure.

However, lenders can insist on additional security or priority being given as a condition of providing any new money to a company in financial difficulty. This can be done consensually through inter-creditor agreements. Loans made to a liquidator are repayable as an expense.

Cram-down

There are no specific cram-down provisions in BVI insolvency legislation. However, dissenting creditors may, subject to various statutory safeguards, be bound by the terms of a CA or scheme of arrangement.

The law is stated as at 17 March 2023.

How Ogier can help

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In addition to our team based in the Caribbean, we have specialist teams of BVI qualified lawyers in London, the Channel Islands and Hong Kong, offering BVI legal advice across all time zones.

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