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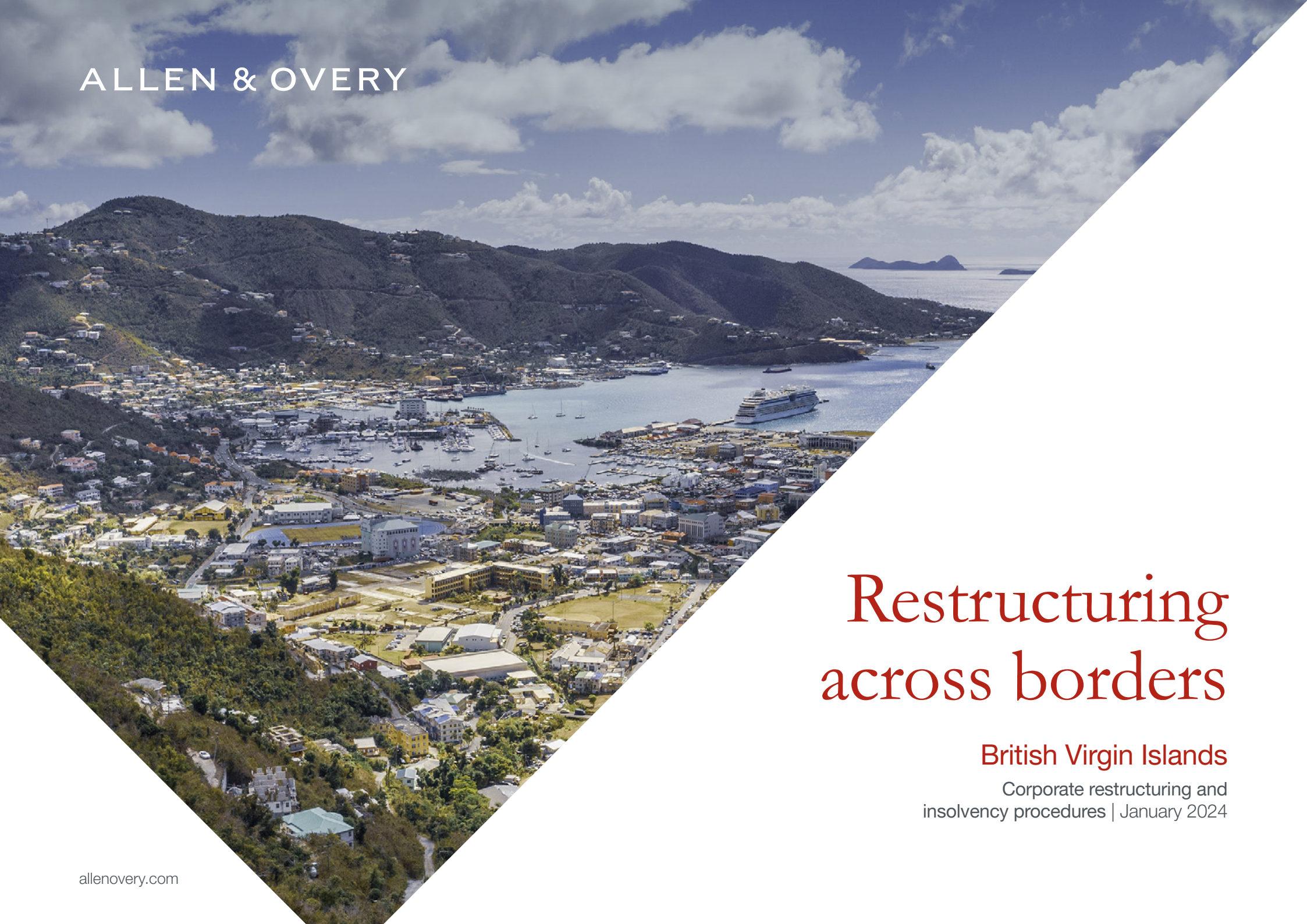

Restructuring across borders

British Virgin Islands

Corporate restructuring and insolvency procedures | January 2024

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Contents

Introduction

When a corporate borrower faces financial difficulties in the British Virgin Islands (the **BVI**), there are a variety of restructuring and insolvency options available.

These procedures are governed by the Insolvency Act 2003 (the **IA**) and the BVI Business Companies Act 2004 (as amended) (the **BCA**).

From a creditor's perspective, the choice of procedure will depend on whether the borrower has granted security. If security has been granted, receivership may be the most appropriate choice. Receivership may be classified as a self-help remedy for secured creditors.

If no security has been granted, the choice of procedure will depend on whether there is a viable business to be rescued. If there is a business to be rescued, an informal workout outside of the formal insolvency procedures may be appropriate (ie the restructuring of the company on an informal, consensual basis by agreement between the company and its principal lenders or creditors).

Alternatively, a restructuring or rescue may be conducted via a formal creditors' arrangement, plan of arrangement or scheme of arrangement (any of which may potentially be used in tandem with provisional liquidation proceedings).

In the BVI the most commonly used formal restructuring procedure is the scheme of arrangement although creditors' arrangements are becoming increasingly popular.

Where there is no viable business to be rescued, it may be more appropriate to appoint liquidators over the assets and affairs of the company, which is the formal dissolution procedure for BVI companies.

Commencing January 1, 2023, the BCA underwent significant modifications resulting from the enactment of the BVI Business Companies (Amendment) Act, 2022, and the BVI Business Companies (Amendment) Regulations, 2022 (the **BCA Amendments**).

The BCA Amendments ushered in a suite of changes that will significantly impact companies incorporated in the BVI and how they are administered. Among these changes were: a revised procedure for reinstating dissolved companies, modifications to the strike-off regime, adjustments to voluntary liquidator requirements, the elimination of bearer shares, obligations for filing annual financial returns for BVI companies, and a new provision for public access to BVI director details upon request. The BCA Amendments are significant, and impact not only commercial litigation in the Territory, but also the mechanics of insolvency and restructuring processes.

The five principal restructuring and insolvency regimes for companies under BVI law are:

- Receivership;
- Creditors' arrangements;
- Plans of arrangement;
- Schemes of arrangement; and
- Liquidation (also known as winding up).

Enforcement of security

The main forms of security available under BVI law are:

– legal and equitable mortgages;

– pledges; and

– fixed and floating charges.

BVI law recognises the concept of a trust.

Security interests in relation to real estate must be in writing and signed by the secured creditor. There are no particular formalities under BVI law in relation to security taken in respect of other types of property. However, security registration will determine the priority between competing creditor interests. Registering a security interest ensures priority over subsequently registered security interests and prior unregistered security interests. Parties are free to contractually agree an alternative ranking.

Receivership

Receivership is essentially a self-help remedy largely available to secured creditors. It is not a collective insolvency procedure but a method by which a secured creditor can enforce its security, realise the assets secured and obtain repayment of the debt outstanding.

Two types of receivership may be available to secured creditors. First, receivers appointed in respect of specific assets (a **Receiver**) and, second, receivers appointed by a secured creditor holding a floating charge over the entire business, assets and undertaking of the debtor (an **Administrative Receiver**). A receiver, when appointed (whether a Receiver or an Administrative Receiver), acts principally in the interests of his/her appointer and not for the general body of creditors.

A Receiver may be appointed:

– by a secured creditor out of court in accordance with the terms of the security document pursuant to which the appointment is to be made and any legislative requirements; or

– by order of the court.

Administrative Receivers may be appointed:

– out of court by a secured creditor holding a floating charge over the entire business, assets and undertakings of the debtor; and

– in certain circumstances by order of the court (for example, where the Administrative Receiver is being appointed in order to dispose of property over which there exists a prior ranking security interest).

The powers of a receiver are derived from the security instrument pursuant to which he is appointed and section 127(2) of the IA. The IA grants the receiver, among other things, the power to receive income from and manage, insure, repair and maintain the assets over which he is appointed.

A receiver need not be a licensed insolvency practitioner. Section 128 of the IA imposes certain duties on a receiver when exercising his/her powers, and requires those powers to be exercised: (i) in good faith and for a proper purpose; and (ii) in a manner which he/she believes (on reasonable grounds) to be in the best interests of the person/entity for whom he/she was appointed.

The powers granted to an Administrative Receiver are derived from the security instrument pursuant to which he/she is appointed and Schedule 1 of the IA. The powers are wide and generally enable him/her to do all things necessary to realise the secured property for the benefit of the secured creditor including to carry on the business and sell the assets of the debtor.

Administrative Receivers must be BVI licensed insolvency practitioners, which requires, amongst other things, BVI residency. Non-BVI residents may be appointed jointly with a BVI licensed insolvency practitioner, provided that the Official Receiver (an employee of the Financial Services Commission who has various statutory duties under the IA and other legislation) is satisfied with the foreign appointee's qualifications and experience.

The principal duty of an Administrative Receiver is to ensure, as far as is reasonably practicable, that the secured debt is repaid and to account for any surplus.

Unsecured creditors may, in certain circumstances, apply to the court for the appointment of a receiver. Recently the BVI Court has demonstrated a flexible approach to the appointment of receivers in circumstances where there is a need to preserve or recover assets or in aid of equitable execution of judgments (and the remedy may, in limited circumstances, be available pre-judgment). This is a Court-led interim remedy to 'hold the ring' in respect of assets which are the subject of ongoing litigation. The BVI court has discretion to appoint equitable receivers where it would be 'just and convenient' to do. The appointment of equitable receivers is becoming more commonplace in the BVI and is a useful tool to protect the position of unsecured creditors of a BVI company that do not benefit from security or proprietary rights over a specific asset (or assets) of the debtors. However, where the respondent company is insolvent (in that it is unable to pay its debts when they fall due) (but not in liquidation) the Court may refuse a request to appoint a receiver if the appointment would be fruitless, for example because there is no property which can be reached either in law or equity. That is an aspect of the maxim that equity does not act in vain. However, a receiver may be appointed if there is a reasonable prospect that the appointment will assist in the enforcement of a judgment or arbitral award. The Court may also refuse a request if the appointment would be unjust to the interests of the unsecured creditors as a whole[1] in the event that a liquidator is appointed (eg the appointment would result in the appointing unsecured creditor being treated in preference to all other unsecured creditors).

1 Note that this phrase is discussed in the Cruz City case (*citing Bourne v Colodense*). CPR 51.3 also states that the court must have regard to the amount likely to be obtained by the receiver when considering whether or not to appoint.

Arrangements

BVI legislation contains three types of statutory 'arrangements' into which a BVI company can enter. These enable a BVI company to enter into arrangements, restructurings and transactions which, with BVI court approval under the relevant process, will be binding on members and creditors of the company. These routes consist of 'schemes of arrangement' and 'plans of arrangement' under the BCA, and 'creditors' arrangements' under the IA.

Schemes of arrangement and creditors' arrangements are derived largely from English law, and benefit from a substantial body of well-developed case law from across the Commonwealth.

In contrast, plans of arrangement were inspired by Canadian law. Although plans of arrangement have been available in a previous form under the old International Business Companies (IBC) Act since 1984, and, in the BCA since 2005, BVI companies had been reluctant to consider a plan of arrangement until its provisions had been tested in the BVI courts. As on the date of this factsheet, BVI courts have approved some plans of arrangement but there is still very limited judicial guidance on this process.[2]

Where any 'arrangement' is being used in a debt restructuring context, if a moratorium is likely to be beneficial (for example where a company is unable to enter into a lock up agreement with its creditors), consideration should be given to applying to the BVI courts to appoint a 'light-touch' restructuring provisional liquidator in conjunction with an order pursuant to section 174 of the IA to stay or restrain any action or proceeding pending against the company. The BVI courts have confirmed that the BVI legislation allows for a provisional liquidator to be appointed for the purpose of effecting a restructuring. In principle each of the arrangements below should be available to be used in conjunction with a provisional liquidation.

[2] Note that there is only one reported case (*B&A Fertilizers v RIO Verde*) that we are aware of.

Arrangements (cont.)

Creditors' arrangements

Creditors' arrangements were introduced by the IA in an attempt to provide a relatively simple procedure for an insolvent company to bind its unsecured and non-preferential (mainly creditors claiming post liquidation interest) creditors with an arrangement compromising its debts (including those of creditors who may have voted against the arrangement). A creditors' arrangement is similar to an English company voluntary arrangement. Unlike a scheme of arrangement (see below) there are no court hearings (unless a creditor challenges the arrangement) and creditors do not need to be split into separate classes. Secured creditors or preferential creditors (eg amounts due to employees in salary, holiday or pension contributions, amounts due to the BVI security board, amounts due to the BVI government in taxes or duty, and amounts due to the Financial Services Commission in respect of any fees or penalties) cannot be bound by a creditors' arrangement unless they consent in writing. A creditors' arrangement is available to all BVI incorporated companies only (to the exclusion of foreign companies). It may be used independently or in conjunction within an existing insolvency procedure (ie BVI liquidation proceedings).

The directors of the company may propose a creditors' arrangement by passing a resolution formulating a proposal for a creditors' arrangement and nominating an interim supervisor, who will be responsible for calling a creditors' meeting. The resolution must acknowledge the debtor's insolvency.

The interim supervisor must be a BVI licensed insolvency practitioner. In circumstances where a liquidator has been appointed over the affairs of the company prior to the directors proposing a creditors' arrangement, a liquidator or provisional liquidator may also make a proposal for a creditors' arrangement and elect an interim supervisor to call the creditors' meeting. At the creditors' meeting, the interim supervisor will present the proposal for approval by the creditors together with a statement of the company's affairs.

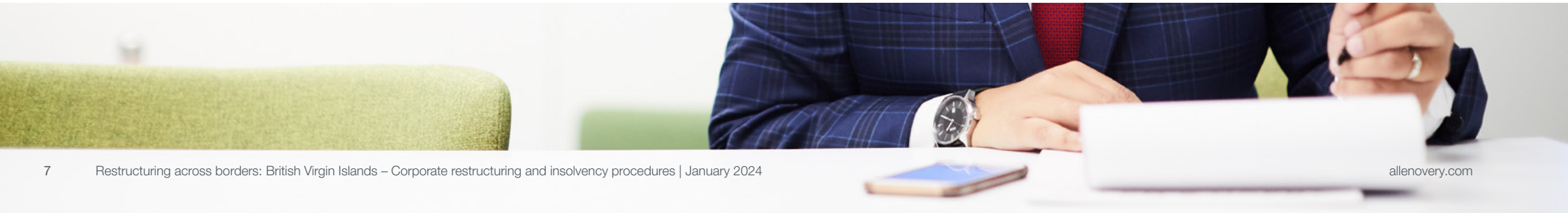
The creditors' arrangement will require approval of 75% in value of the creditors present or by proxy who vote at the meeting. Following approval, the creditors' arrangement will bind all creditors including dissenting creditors (with the exception of secured and preferential creditors who must consent in writing).

The appointment of a supervisor displaces the directors' power of management over the assets that are subject to the arrangement and the directors (or the administrator or liquidator) forthwith after the approval of the arrangement must take all necessary steps to put the supervisor in possession of the assets included in the arrangement. Notably, the appointment of the supervisor does not displace the directors and therefore a creditors' arrangement outside of liquidation proceedings is a "debtor in possession" proceeding.

Unless there is a moratorium in place by virtue of the debtor being subject to a pre-existing BVI liquidation proceedings, calling a creditors' meeting and making a proposal for a creditors' arrangement will not of itself result in a stay of proceedings. Unsecured creditors will be entitled to commence enforcement action against the debtor until they are bound by the creditors' arrangement. Secured creditors will be entitled to enforce their security at any time unless they have approved the creditors' arrangement in writing.

Any member, creditor, surety or co-debtor may apply to the BVI courts where the arrangement unfairly prejudices its interests or where there has been a material irregularity in relation to the meeting at which the arrangement was approved.

The BVI courts have wide discretion as to the remedy in such circumstances, including the power to revoke or suspend the decision approving the arrangement.



Arrangements (cont.)

Plans of Arrangement

The BCA permits almost any type of reorganisation or reconstruction of a company to be effected under a plan of arrangement (**Plan**). Among other things, the following may be the subject of a Plan:

(a) any sale, transfer, exchange or other disposition of any part of the assets or business of a company to any person in exchange for shares, debt obligations or other securities of that other person, or money or other assets, or a combination thereof;

(b) any sale, transfer, exchange or other disposition of shares, debt obligations or other securities held by the holders thereof for shares, debt obligations or other securities in the company or money or other property, or combination thereof; and

(c) any combination of any of the above.

If the directors of a company determine that it is in the best interests of the company (or the creditors or members of the company), the directors may approve a Plan.

Upon approval of the Plan by the directors, the company must make an application to the BVI courts for its approval. The BVI court may:

(a) determine what notice, if any, of the proposed arrangement is to be given to any person;

(b) determine whether approval of the proposed arrangement is to be given by any person;

(c) determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of his/her shares, debt obligations or other securities under the dissent and appraisal provisions of the BCA;

(d) conduct a hearing and permit any interested person to appear; and

(e) approve or reject the Plan as proposed or with such amendments, as it may direct (the court has a much wider ability to amend a plan than it would have to amend a scheme of arrangement).

An important distinction between a Plan and a scheme of arrangement or creditors' arrangement is that the BCA does not prescribe the majority in number or value of members or creditors who must approve the Plan. The Plan route enables the directors to submit to the BVI courts a threshold for approval which they consider appropriate (whilst acting in the best interests of the company).

The Plan procedure will often require an initial hearing at which the BVI court can give directions as to what notifications should be given and which approvals sought, and a final hearing at which any interested parties may appear. Where the BVI court makes an order approving a Plan, the directors of the company, if they still desire to execute the Plan, shall confirm the Plan as approved by the BVI court.

After the Plan has been approved, articles of arrangement must be executed by the company. These will contain the Plan, any order of the court approving the Plan and the manner in which the Plan was approved.

The Plan will be effective on the date that the articles of arrangement are registered by the Registrar of Corporate Affairs (**Registrar**) or on such subsequent date, not exceeding 30 days, as is stated in the articles of arrangement.

While BVI companies were historically slow in their adoption of a Plan as a means by which to reorganise or reconstruct the shareholding of the company and/or its debt, recent case authority has brought much-needed clarity to the process which has seen a stark rise in the use of Plans as additional tools available to BVI companies looking to structure transactions to meet particular onshore considerations.

Arrangements (cont.)

Schemes of arrangement

Schemes of arrangement involve a compromise or arrangement between a company and its creditors or members (or any class of them). In an insolvency or potential insolvency situation, schemes are principally used to: (i) restructure the company's debts when the company is in financial difficulties, with a view to the company continuing its operations; or (ii) reach a compromise with creditors following commencement of liquidation (the scheme being used as the mechanism for making distributions in the liquidation).

A scheme may be initiated, on application to the BVI courts, by the company itself (acting through its directors, a suitably authorised liquidator or provisional liquidator), or any creditor or member. Detailed scheme proposals will be put to the company's creditors and/or members. The terms of the scheme will vary from case to case; it is essentially a commercial deal between the company and its creditors and/or members. A scheme could, for example, vary the contractual rights of creditors, including the amounts owed to them, the repayment dates or the methodology for determining their claims, and/or involve a complete write-off of debt and/or a debt for equity swap.

Where there are different classes of creditors or members involved, each class is required to hold separate meetings to vote on the scheme proposals. The scheme will be approved by the company's creditors/members if a majority (ie over 50%) in number, representing at least 75% in value of each class of creditors (and/or members), present and attending, either in person or by proxy, vote in favour of the scheme.

Once approved, the scheme must be sanctioned by the BVI court and delivered to the Registrar to become binding on all affected parties, regardless of whether and how they voted at the class meetings. Essentially, the BVI courts will sanction a scheme where the statutory provisions have been complied with and the arrangement is one that an intelligent and honest man, acting in respect of his interests, might reasonably approve. English case law is highly persuasive in this regard and will generally be followed.

Once the resolution has been passed and has been sanctioned by the BVI court, it is final. There is no provision for the rights of dissenting shareholders, they are bound by the scheme of arrangement (see BCA s179A(8)). Any subsequent issuance of the company's memorandum of association must have annexed to it a copy of the court order.

Liquidation

There are three separate statutory routes by which a company can be put into liquidation, depending on its solvency. A solvent company may be put into voluntary liquidation by its directors and members under the BCA. Otherwise, the IA provides for the appointment of a liquidator either following the passing of a qualifying resolution by the members or by the Court.

Voluntary Solvent Liquidation under the BCA

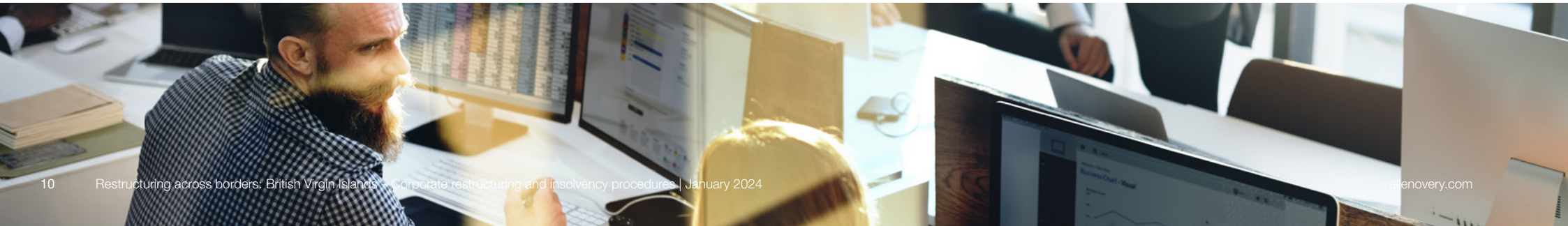
A company's voluntary liquidation is deemed to commence at the time the notice of liquidator's appointment is filed with the Registrar and continues until the company is dissolved by the Registrar or the liquidation is terminated by the BVI court. A liquidation plan must be prepared and adopted by the members and directors of the company which must specify, among other things: (i) the reasons for the liquidation of the company; (ii) the directors' estimate of the time required to complete the liquidation; (iii) whether the liquidator is authorised to carry on the company's business if he/she determine that to do so would be in the best interests of the company's creditors and members; (iv) the names and addresses of each individual to be appointed liquidator; and (v) the remuneration to be paid to each liquidator.

In addition, the directors must make a declaration of solvency stating that in the directors' opinion the company is (and will continue to be) able to discharge, pay or provide for its debts as they fall due. A statement of the company's assets and liabilities as at the latest practical date must be incorporated in the declaration of solvency. If a director makes a declaration of solvency without having reasonable grounds for reaching the opinion regarding the continuing solvency of the company, the director is guilty of an offence and, upon conviction, is liable to a fine of not more than USD10,000.

The liquidator must consent to act as liquidator of the company prior to his/her appointment. A liquidator may not be appointed by the company's directors or members if any of the following apply: (i) a different liquidator has already been appointed in respect of the company under the IA; (ii) an application has been made to the court to appoint a different liquidator under the IA; (iii) the person to be appointed as liquidator has not consented in writing to the appointment; (iv) the directors have not made a Declaration of Solvency; or (v) the directors have not approved a liquidation plan.

Following the introduction of the BCA Amendments on January 1, 2023, voluntary liquidators must now meet specified minimum experience qualifications and BVI residency requirements, including a newly enacted provision whereby at least one appointee under a joint liquidator appointment must have resided in the BVI for a minimum of 180 days prior to their appointment. Prior to the BCA Amendments, non-resident liquidators could be appointed and could liaise with creditors and conduct restructurings without a need to establish a close connection with the BVI (save for the company's place of incorporation). Following the BCA Amendments, any such restructurings involving a BVI company/ies will require a BVI qualified insolvency practitioner.

If, during the course of a voluntary solvent liquidation, the liquidator is of the opinion that (i) the value of the company's liabilities exceeds, or will exceed, its assets or (ii) the company is, or will be, unable to pay its debts as they fall due (ie the company is insolvent), he/she is required to file a written notice to this effect, such written notice must be sent to the Official Receiver, and, if the company is regulated (ie an individual that must be licensed under the (i) Banks and Trust Companies Act, 1990; (ii) Insurance Act, 2008; (iii) Company Management Act, 2008; and/or, (iv) Mutual Funds Act, 1996), also to the Financial Services Commission (see BCA s209(2)). From that time onwards, they must conduct the liquidation as if they were appointed as a liquidator under the IA.



Liquidation (cont.)

Insolvent Liquidation under the IA

A liquidator can be appointed either by:
(i) a resolution of the members of the debtor passed by a 75% majority (or such greater majority as is specified in the debtor's articles of association); or
(ii) the court following an application by the debtor, a creditor, a member, a supervisor of a creditor's arrangement, the Financial Services Commission or the Attorney General.

The grounds for court appointment of a liquidator include:

– that the debtor is insolvent;

– that it is just and equitable to appoint a liquidator; or

– that the liquidation is in the public interest.

Where an application is made to the BVI courts for the appointment of a liquidator, the BVI courts may as an interim measure, appoint a provisional liquidator. The grounds for the appointment of a provisional liquidator include:

– that it is in the public interest;

– the debtor consents to the appointment; or

– the appointment is necessary for the purpose of maintaining the value of the assets of the debtor.

Most commonly, a provisional liquidator is appointed where it is shown that the assets of the company may be in jeopardy during the interim period between the filing and hearing of the application to appoint a liquidator (usually a period of 6-8 weeks).

As set out above, a provisional liquidator may also be appointed in order to facilitate a restructuring of the debtor where the debtor consents or if the court is satisfied that the appointment of a provisional liquidator is necessary for the purpose of maintaining the value of assets owned or managed by the debtor.

The commencement of liquidation triggers an automatic stay of proceedings, including any action by unsecured creditors to enforce their rights over the debtor's assets without the consent of the court. However, notwithstanding this, secured creditors will retain all rights to enforce their security.

The IA provides for the setting-off of mutual claims between the debtor and a creditor in a liquidation provided that those claims arose prior to the commencement of the liquidation and the creditor did not have actual notice that the debtor was insolvent at the time such claims arose. This is subject to Part XVII of the IA which provides that, notwithstanding anything contained in the IA or the BVI Insolvency Rules 2004 or in any rule of law relating to insolvency, the provisions relating to netting, the set-off of money provided by way of security, the enforcement of a guarantee, and the enforcement of a collateral arrangement (and the set-off of the proceeds thereof), as contained within a netting agreement or a guarantee provided for in such an agreement, are enforceable against each party to that agreement. In short, this means that contractual set-off and netting provisions trump the insolvency set-off rules.

The liquidator's role is to wind up the affairs of the company, agree creditors' claims and distribute the assets of the company in accordance with the statutory order of priority. The liquidator is required to distribute the proceeds from the realisation of assets in the following order:

1. Payments to secured creditors from the proceeds of secured assets;
2. Costs and expenses of the liquidation;
3. Preferential debts to be paid pari passu including employee salaries, holiday pay and amounts due to the government;
4. floating charge creditors (fixed charge creditors will be paid from the proceeds of secured assets);
5. unsecured creditors;
6. subordinated debts;
7. post liquidation interest; and
8. shareholders (according to their rights and interests in the company).

Non-admissible claims (ie non-provable liabilities) are not recognised under BVI law and therefore do not rank in the hierarchy.

The IA also provides that certain transactions entered into prior to the commencement of liquidation are voidable by the court. These transactions include unfair preferences and transactions at an undervalue which would be set aside by the court if they were entered into at the time the debtor was insolvent or caused the debtor to become insolvent.

Cross-border issues

The IA adopts certain provisions of the UNCITRAL Model Law on Cross Border Insolvency (primarily set out in Part XIX of the IA), although these provisions are not yet in force. The prevailing industry view is that these provisions may never come into force in the BVI. Public policy in the BVI generally favours protecting secured creditors and there is a general consensus that the UNCITRAL Model Law on Cross Border Insolvency would cut across the rights of secured creditors.

Part XIX of the IA specifically provides that BVI courts should offer assistance to foreign insolvency representatives of designated countries (Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the U.S.A.) in relation to certain court-monitored collective insolvency proceedings. Provided the foreign representative is from a designated country, the BVI courts may make a wide range of orders to facilitate cross-border insolvency proceedings, to offer procedural assistance, and to apply substantive principles of BVI insolvency law.

However, in November 2020 the Eastern Caribbean Supreme Court, Court of Appeal (appellate court of the BVI) considered whether the BVI Court can provide assistance (under the IA and common law principles) to foreign insolvency representatives that were not from one of the designated counties. Whilst the Court of Appeal found (in February 2021) that the common law right of recognition survived following the passing of the IA, it went on to find that recognition did not necessarily carry with it the right of assistance and found that a foreign representative not from a designated country was not entitled to assistance under the IA or the common law.

The Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the **JIN Guidelines**) were introduced by the BVI courts in May 2017. The JIN Guidelines provide a framework for courts and professionals to communicate and cooperate when dealing with cross-border insolvency matters.

In terms of jurisdiction over foreign companies, the BVI courts can appoint liquidators over foreign debtors who are connected with the BVI. A debtor will be connected with the BVI if:

- The debtor has (or appears to have) assets in the BVI;
- The debtor is carrying on or has carried on business in the BVI; or
- There is a reasonable prospect that the appointment will benefit creditors.

BVI law allows the enforcement of foreign judgments as a matter of common law or statute, depending on where the judgment was originally made. Civil judgments in relation to sums payable obtained in certain specified jurisdictions may be registered and enforced in the BVI pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1964, provided that certain stipulated conditions are met. The registration of a foreign judgment must be made within 12 months after the judgment is issued, unless otherwise extended by the court. Alternatively, where the Foreign Judgments (Reciprocal Enforcement) Act 1964 does not apply, the judgment creditor may commence fresh proceedings in the BVI with the original judgment being treated as the cause of action so that no retrial of the issues will be necessary.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email r**ab@allenovery.com**

This factsheet has been prepared with the assistance of Maples and Calder. Any queries under BVI law may be addressed to the key contacts from Maples and Calder listed below:

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Further information

Developed by Allen & Overy's market-leading Global Restructuring Group, "**Restructuring Across Borders**" is a free and easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, the Middle East, Asia and the U.S.

To access this resource, please **click here**.

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