The Legal 500 & The In-House Lawyer
Comparative Legal Guide
British Virgin Islands: Restructuring & Insolvency

This country-specific Q&A provides an overview of the legal framework and key issues surrounding restructuring and insolvency in British Virgin Islands.

This Q&A is part of the global guide to Restructuring & Insolvency.

For a full list of jurisdictional Q&As visit **http://www.inhouselawyer.co.uk/index.php/practice-areas/restructuring-insolvency/**

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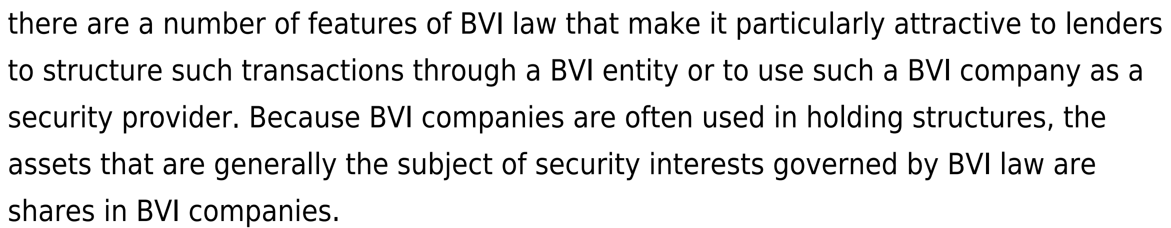
1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

BVI companies are often used as holding vehicles either on a stand-alone basis or as part of a wider group structure. When seeking to raise capital through debt financing,



there are a number of features of BVI law that make it particularly attractive to lenders to structure such transactions through a BVI entity or to use such a BVI company as a security provider. Because BVI companies are often used in holding structures, the assets that are generally the subject of security interests governed by BVI law are shares in BVI companies.

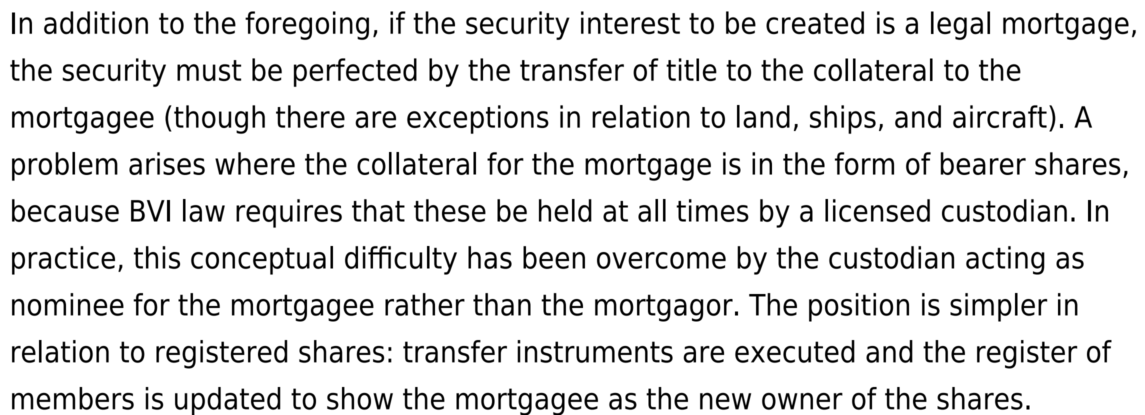
Broadly speaking, there are seven types of security interest that can arise under BVI law: legal mortgage, equitable mortgage, equitable charge (fixed or floating), pledge, legal lien, equitable lien, and hypothecation or trust receipt. Of these, mortgages, equitable charges, and pledges are most commonly used in relation to shares.

There are several other arrangements that parties can put in place that have the effect of conferring a type of security but which do not actually create a proprietary security interest in the subject matter. For example, it is possible to grant a power of attorney or conditional option in favour of the secured party relating to shares, to enter into a retention-of-title agreement, or to execute undated transfer instruments. While these methods may provide protection for the secured party, they do not confer a proprietary interest in the assets to which they relate, and for this reason they are not subject to the same legal considerations the courts have developed in the context of conventional proprietary security interests.

In order for a security interest to arise, it is generally necessary that six conditions be met:

1. There must be an agreement for the creation of the security. In some cases this agreement must be in writing (as where the interest to be created is a legal mortgage), and in some it must be by deed (where a legal mortgage is created in relation to land).
2. The collateral must be identifiable as falling within the security.
3. The chargor must have the power to create the security interest in the collateral.
4. There must be an obligation of the chargor that the collateral is intended to secure.
5. Any contractual conditions for the creation of the security must be satisfied.

A failure to comply with these requirements will generally mean that no security interest will arise.

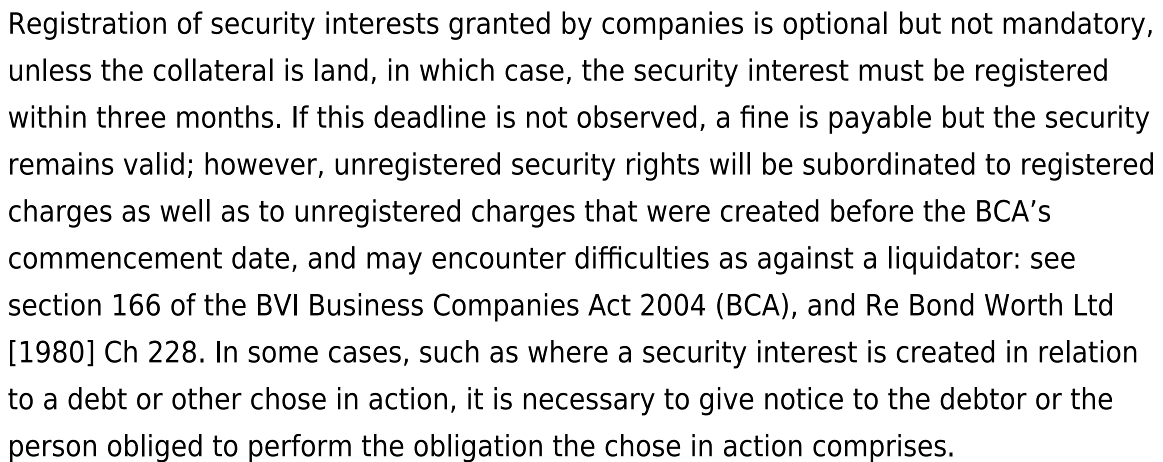


In addition to the foregoing, if the security interest to be created is a legal mortgage, the security must be perfected by the transfer of title to the collateral to the mortgagee (though there are exceptions in relation to land, ships, and aircraft). A problem arises where the collateral for the mortgage is in the form of bearer shares, because BVI law requires that these be held at all times by a licensed custodian. In practice, this conceptual difficulty has been overcome by the custodian acting as nominee for the mortgagee rather than the mortgagor. The position is simpler in relation to registered shares: transfer instruments are executed and the register of members is updated to show the mortgagee as the new owner of the shares.

If a legal mortgage is not perfected, it will take effect as an equitable mortgage. An equitable mortgage may also be expressly created. In some cases, the mere deposit of title documents can give rise to an equitable mortgage; however, this rule does not apply in relation to shares or land in the BVI. The deposit of share certificates may, however, give rise to a pledge.

An equitable charge may be fixed or floating. Floating charges are given a greater status in the BVI than in some other jurisdictions: although they may be made subject to the costs of liquidation and the claims of preferential creditors, in reality the likelihood of there being any preferential creditors is small; in addition, a properly executed and registered floating charge will take priority over fixed charges if the floating charge contains a negative pledge by the chargor; and floating charges will only generally be voidable by liquidators if entered into at a time when the company was insolvent on the cash-flow basis.

A pledge can only be created over a physical asset, because it requires that the secured creditor take possession of the collateral itself, in addition to the conditions outlined above. Again, a difficulty arises in relation to pledges over shares in BVI companies: as stated above, bearer shares must be deposited with a custodian, so cannot be given to the creditor; and creating a pledge by depositing a registered share certificate will create security over the certificate itself and not the shares. As in relation to legal mortgages, however, the conceptual problem in relation to bearer shares may be overcome by the custodian's agreeing to act as nominee or agent for the creditor.



Registration of security interests granted by companies is optional but not mandatory, unless the collateral is land, in which case, the security interest must be registered within three months. If this deadline is not observed, a fine is payable but the security remains valid; however, unregistered security rights will be subordinated to registered charges as well as to unregistered charges that were created before the BCA's commencement date, and may encounter difficulties as against a liquidator: see section 166 of the BVI Business Companies Act 2004 (BCA), and Re Bond Worth Ltd [1980] Ch 228. In some cases, such as where a security interest is created in relation to a debt or other chose in action, it is necessary to give notice to the debtor or the person obliged to perform the obligation the chose in action comprises.

Failure to perfect a security interest, whether, eg, by transfer of the asset in the case of legal mortgages, or by possession of the collateral in the case of pledges, does not render it void or even voidable. It does, however, increase the risk that subsequent interests may take priority, with the effect that the creditor will have little or no recourse to the collateral. As such, a creditor is advised to take as many steps as possible to protect their position, including registration where available, even though it is not generally a requirement.

2. What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

The enforcement of security interests is normally conducted in the jurisdiction where the relevant collateral is located. In most cases concerning the enforcement of security in assets located within the BVI, the assets in question are will be shares in BVI companies. As such, most of the legal issues that arise in this context are in relation to security over shares. In practice, the common-law remedies available in the BVI are similar to those remedies available under the laws of other common-law jurisdictions.

As to what remedies may be available to the security holder, this question depends to a degree upon the type of security interest. In the event that there is a default on the secured obligations, the holder of a security interest over shares may have up to four primary remedies (depending upon the type of interest they hold): foreclosure; power

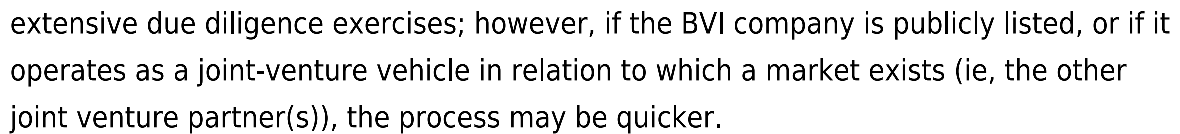
of sale; receivership; and taking possession.

As in many other jurisdictions, foreclosure is a draconian equitable remedy that is only available to a legal mortgagee. The mortgagee must obtain an interim order and then a final order from the court before the mortgage can be foreclosed and the mortgagor's beneficial ownership extinguished. This can be time consuming, and the courts are reluctant to grant this remedy. In some cases, the court may reopen the foreclosure, though this does not affect the title of a bona fide third-party purchaser. If the debt owed to the creditor is less than the value of the collateral, the court will generally order the sale of the asset and an account of the proceeds rather than foreclosure. In order to seek foreclosure, a payment must be due and owing to the creditor in law. Because foreclosure, if granted, extinguishes subsequent mortgages, any mortgagees with lower priority must be joined to the claim.

A secured creditor may be entitled to appoint a receiver over the collateral, whether out of court (if the terms of the security instrument permit it) or by order of the court. A receiver appointed over a company's shares has the power to exercise voting rights attached to them, to sell the shares, and to receive any income derived from them, such as dividends or redemption proceeds. In practice, receivers frequently exercise the shareholder's power to replace the company's directors in order to effect the sale of the company's underlying assets and distribute the proceeds by way of dividends or as direct repayment of the debt. Alternatively, the receiver may be entitled to exercise a power of sale of the asset, in which case they must obtain the best price for the asset that is reasonably obtainable.

If the creditor appointing the receiver over shares in a BVI company is another BVI company, they must file notice of the receivership with the BVI Registrar of Companies. This rule applies whether the receiver was appointed by court order or out of court; however, if the creditor is a natural person or a foreign company no notice is required.

Every mortgage, charge, or pledge contains an implied power of sale, and this may be exercised whether or not a receiver is appointed. The creditor may apply to the court for a judicial sale, or may alternatively conduct the sale privately, and there is no need for a court order before the power may be exercised. Where the collateral is in the form of shares in private BVI companies, the sale process can be lengthy because of



extensive due diligence exercises; however, if the BVI company is publicly listed, or if it operates as a joint-venture vehicle in relation to which a market exists (ie, the other joint venture partner(s)), the process may be quicker.

Whether the power of sale is exercised by the creditor or a receiver they have appointed, the asset must be sold for the best price that is reasonably obtainable, and any surplus must be accounted for to the debtor. If the sale is conducted by a receiver, the creditor may be able to purchase the shares by way of a credit bid. This is not something the creditor could do if selling the shares themselves.

The holder of an equitable mortgage has the same remedies as the holder of a legal mortgage, subject to two points. Firstly, the equitable mortgagee will not be able to enforce their rights against a bona fide purchaser of the asset for value without notice of the security interest. Secondly, they must seek the conveyance of the asset into their name before they can resort to remedies that are available only to a legal mortgagee, such as foreclosure. The security instrument should include an express entitlement to possession of the collateral when the security is in jeopardy. If it fails to do so, the equitable mortgagee will only be able to seek possession where the debtor is actually in default. If there is no default but the asset is imperilled, the creditor should seek the appointment of a receiver.

Neither a chargee nor a pledgee has a right to seek foreclosure, but may be able to exercise a power of sale. The holder of a pledge cannot appoint a receiver.

A secured creditor can usually sue upon the covenant to pay that appears in most security documents. There are other remedies available, in particular to the holder of a mortgage, but they relate predominantly to land and are rarely exercised in relation to shares. The holder of a security interest is entitled to pursue all of its remedies concurrently or consecutively.

A liquidator of a company in insolvent liquidation has the power to borrow money in the company’s name, if doing so is likely to be in the interests of the company’s creditors. In such circumstances the liquidator can grant post-commencement lenders security or higher priority than other creditors: section 186 and Schedule II, paragraph 11, of the Insolvency Act 2003 (IA). A liquidator of a company in solvent liquidation also has the

power to grant lenders security over the company's assets; however, as stated above the liquidator is required to keep the question of the company's solvency under review and be careful that borrowing does not cause the company to become insolvent. Unlike in some other jurisdictions, however, there is no provision in BVI legislation for the grant of super-priority status in respect of post-commencement finance, or for the grant of security over already-secured assets.

There are no insolvency procedures in the BVI that result in the imposition of a moratorium on secured creditors' rights to enforce their security. If a company goes into liquidation, the rights of secured creditors remain unaffected, unless there is a dispute over the validity of the security. After the commencement of the liquidation, the secured creditor can either value the assets subject to the security interest and, if there is a shortfall, prove for the balance as an unsecured creditor in the liquidation, or surrender his security interest to the liquidator and prove as a wholly unsecured creditor.

If the liquidator does not agree with the value placed on the asset by the secured creditor, he can require that the asset be offered for sale. The secured creditor will be paid his debt out of the proceeds of sale, and any surplus funds will be paid to the liquidator for the benefit of the general body of unsecured creditors.

3. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

A company is insolvent if—

1. it fails to comply with the requirements of a statutory demand that has not been set aside,
2. execution or other process issued on a judgment, decree, or order of a BVI court in favour of a creditor of the company is returned wholly or partly unsatisfied, or
3. either—

   (i) the value of the company's liabilities exceed its assets, or

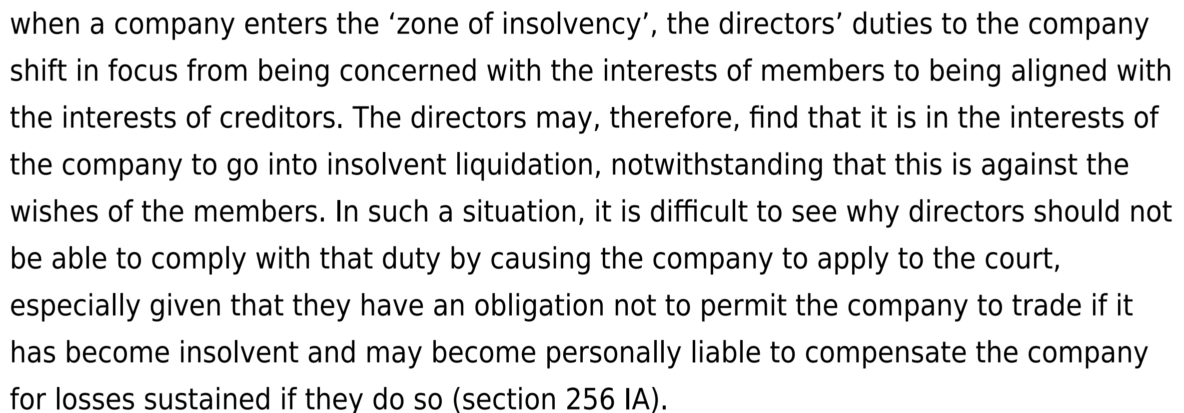
(ii) the company is unable to pay its debts as they fall due: see section 8(1) IA.

In the BVI, there is no express duty on the directors of a company to commence insolvency proceedings at any particular time; however, there is a substantial body of case law from a variety of common-law jurisdictions that suggests that in certain circumstances the directors' duty to act in the best interests of the company as a whole (and not to any individual person or class of persons) will require them to take put the interests of the company's creditors ahead of those of the company's members. In such circumstances, the directors must take those interests into account when deciding how to act until such time as solvency is restored, the company's debts are restructured, or the company goes into liquidation. In some cases, therefore, acting in the best interests of the company will mean recommending that the members put the company into liquidation or causing the company to apply for the appointment of a liquidator (if the power exists).

Section 162 IA provides that the court may appoint a liquidator because of the company's insolvency, on the just and equitable ground, or if it is in the public interest. The same section states that such an application may be brought by the company, a creditor, or a member (among others). It does not expressly state that directors may apply; similarly, directors do not have a power to put a company into voluntary liquidation without a resolution of the members. It is clear, therefore, that the directors of a company registered in the BVI have no standing under BVI legislation to apply for the appointment a liquidator in their own names, whether individually or as a board.

It is not immediately clear how the company may apply for the appointment of a liquidator other than by its directors: although it may be necessary that the company's members resolve (by the relevant majority) to put the company into liquidation by application to the court (rather than by members' voluntary liquidation), the members have no executive powers and their resolution can only be effected by the acts of the directors. If this is correct, the directors must a priori have power to cause the company to apply for an order, even if that power is only exercisable with the members' authorisation or ratification.

But in some cases, the directors' duty to act in good faith in the best interests of the company may require them to seek the liquidation of the company. As stated above,



when a company enters the ‘zone of insolvency’, the directors’ duties to the company shift in focus from being concerned with the interests of members to being aligned with the interests of creditors. The directors may, therefore, find that it is in the interests of the company to go into insolvent liquidation, notwithstanding that this is against the wishes of the members. In such a situation, it is difficult to see why directors should not be able to comply with that duty by causing the company to apply to the court, especially given that they have an obligation not to permit the company to trade if it has become insolvent and may become personally liable to compensate the company for losses sustained if they do so (section 256 IA).

Additionally, if a company goes into insolvent liquidation and the court is satisfied that a director ‘at any time before the commencement of the liquidation of the company, knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into liquidation’, then it can order any director to make such contribution to the assets of the company as it considers proper: section 256 IA.

In the English case of Smith v Duke of Manchester (1883) 24 Ch D 611, the court held that although a company’s right to apply for a liquidation order was independent of the members’ individual rights so to apply, the directors could only cause the company to exercise this right after a meeting of shareholders at which there had been a vote in favour of taking this step. One of the reasons for this was that the directors’ powers of management and administration did not extent to a power to bring about the company’s dissolution.

This decision was followed in the subsequent English case of In re Emmadart Ltd [1979] Ch 540, in which the court held that the directors could only bring an application in the name of the company if—

1. the company’s articles of association expressly gave them such a power, or
2. the members of the company authorised the application at a general meeting (or ratified an application after it had been filed, but presumably before it had been determined).

The position in England and Wales was altered by the introduction of a provision expressly permitting directors to apply for an order putting the company into liquidation in section 124 of the Insolvency Act 1986 (the 1986 Act). This suggests that there is a genuine need for directors to be able to put companies into liquidation in

cases where it obtaining the members' consent is not feasible because of time constraints, or where consent is unlikely to be forthcoming.

The question does not appear to have been determined by the BVI courts; it is not a foregone conclusion, however, that the position in the BVI is the same as the pre-1986-Act position in England and Wales: courts in other jurisdictions have declined to follow the Emmadart decision, finding instead that directors do not require the members' approval where the company is insolvent.

In Australia, for example, an application to appoint liquidators on the ground of insolvency brought by the company on a directors' resolution – in the face of opposition from two of the company's members – was granted because there were strong practical and commercial reasons for allowing this practice: see Re Inkerman Grazing Pty Ltd [1972] 1 ACLR 102. These reasons included the need to preserve the value of the company's assets and prevent a run on the company by its creditors. Inkerman Grazing was approved in Re Compaction Systems Pty Ltd [1976] NSWLR 477, in which it was noted that the presentation of an application did not lead ineluctably to the company's dissolution, so could come within the directors' powers of management and administration.

It has also been held that a common provision in the company's articles stating that the directors had every power not expressly reserved by the articles or legislation to the company's members conferred upon the directors the power to bring an application for the appointment of a liquidator: see In Re Interchase Corp (1992) 111 ALR 561. These two cases were both followed in preference to Emmadart in Re New England Agricultural Corporation Ltd (1982) 7 ACLR 231.

In Bermuda, the courts have decided to follow the Australian rather than the pre-1986-Act English approach: in Re First Virginia Reinsurance Ltd [2003] Bda LR 47, the court held that although if the company were solvent, members' approval was likely to be needed, if the company were insolvent, the directors' duty to act in the best interests of the company might require them to bring an application to apply for the appointment of a liquidator without the need for shareholder approval, which might be delayed by shareholders wishing to extract funds from the company or recklessly incur further debt and put the company further into insolvency. The decision in First Virginia

was followed in In the matter of Energy XXI Ltd [2016] SC (Bda) 79 Com, in which the court questioned whether or not the company's articles of association could deprive management of the power to take steps to protect the interests of third-party creditors when the shareholders' economic interests had been extinguished by insolvency.

It appears to be open to the BVI court to decide in which direction the common law should develop and there are compelling reasons why the current uncertainty should be resolved by declining to follow Emmadart.

If, however, directors of BVI companies cannot rely on an express provision in the company's articles, and the company's members will not give consent, they should, at the very least, ensure that the company does not trade if it has entered the 'zone of insolvency'.

As stated above, if a director permits the company to continue trading while it is insolvent, the court may make a compensation order, requiring the director to compensate the company for any losses it has suffered because of that period of insolvent trading. If the court is satisfied that the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, they will have a defence if they can show that they 'took every step reasonably open to him to minimise the loss to the company's creditors'.

Any contribution that the court orders will be compensatory rather than penal, and the money recovered will be pooled with the general assets of the company for distribution by the liquidator. The court has broad powers to order such person to repay, restore or account for the money or assets, or pay compensation for such misfeasance.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually**

take to complete?

The main insolvency procedure available in the BVI is liquidation. Although the IA contains provisions for administration, these have not yet been brought into force.

As touched on above, the company, a creditor, a member, a supervisor of a creditors' arrangement in respect of the company, the Financial Services Commission, or the Attorney General may apply to the court for the appointment of a liquidator on the bases—

1. that the company is insolvent,
2. that it is just and equitable to appoint a liquidator, or
3. that liquidation is in the public's interest.

If a member wishes to apply for the appointment of a liquidator on the insolvency ground, they must first seek the leave of the court, which must be satisfied that there is a prima facie case that the company is insolvent.

The court may make an order appointing a liquidator on the just and equitable ground in a variety of circumstances, including where the company was created for the purposes of fraud, or even where there is a pressing need to investigate the company's affairs.

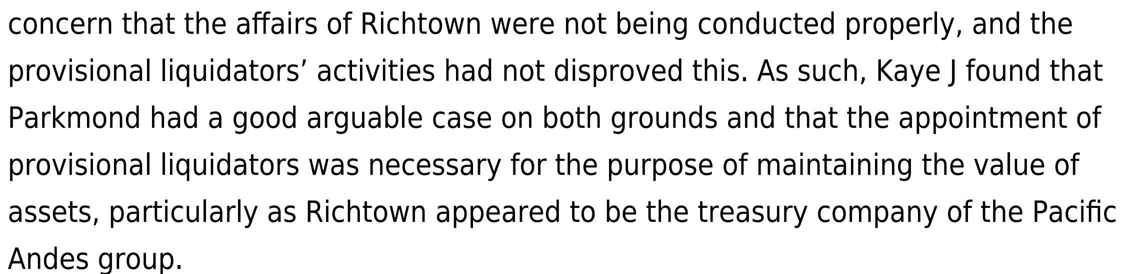
In In re Pacific Andes Enterprises (BVI) Limited BVIHC (COM) 132 of 2016, unreported (1 December 2016), the BVI court had to consider what weight to attach to the differing views of creditors when determining a number of contested applications for the appointment of a liquidator. The case concerned a number of companies in the Pacific Andes group, and the principal creditor opposing the applications was the companies' parent company, Richtown Development Limited, which also happened to be the companies' biggest creditor. Richtown opposed the applications on the ground that there were prospects of restructuring the companies' debts so as to avoid liquidation. Giving judgment in the Commercial Division of the BVI High Court, Davis-White J noted that although when there is no opposing creditor, the applicant is often regarded as being entitled to the order ex debito justitiae, if there were opposing creditors the court will listen to the views of the class, as it would regard the creditors as being best

placed to evaluate their own interests. Referring to the English case of Re P&J Macrae [2016] EWHC 2175 (Ch), he said that where the views taken on each side are both proper views that can be properly taken, the court is likely to go with the majority, though this will not always be the case.

The judge concluded that the views of the creditors seeking the liquidation order were reasonable, and it was therefore necessary to look at the opposing creditors and consider the grounds of opposition. He concluded that the proposed plan of restructuring was wholly unclear, and Richtown had not established that the restructuring would benefit the creditors of the company compared with their position on liquidation. There was also no indication as to what support there was for the proposed restructuring. Richtown was the main creditor, but it was the holding company of the debtor and there was no suggestion that it had received or acted upon professional advice in deciding whether or not to oppose the application. Taking account of the decision in Lummus Agricultural Services Ltd [1999] BCC 953 (in which Park J held that where the creditors who opposed an application were not independent outsiders but were associated with the company and its directors, the judge was entitled to discount their views), Davis-White J decided to discount entirely the views of Richtown. The consequence was that the majority of the creditors supported the application; accordingly, he ordered the appointment of liquidators over the companies.

Richtown Development Limited (in provisional liquidation) v Parkmond Group Limited (in liquidation) BVIHC (COM) 55 of 2017, unreported (10 May 2017) was a related case. The liquidators of Parkmond (one of the Pacific Andes group of companies referred to above) had applied for the appointment of a liquidator on the insolvency ground and the just and equitable ground. Parkmond obtained an order appointing provisional liquidators over Richtown, the group parent company, and Richtown applied to set that order aside.

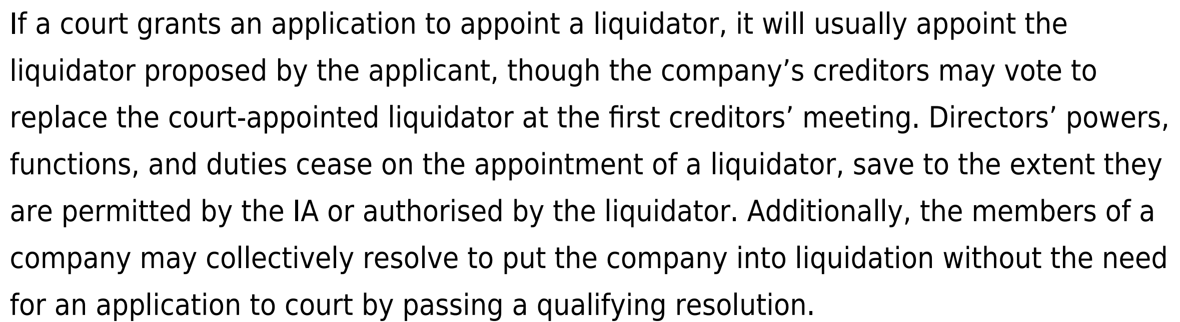
Kaye J, giving the judgment, stated that when the court is considering whether or not to appoint provisional liquidators, it must be satisfied that a winding-up order will probably be made at the final hearing, because the seriousness of the relief may cause the company in question to fail. Richtown, however, was not a trading company, so the question of harm to the business was mitigated. The judge found that it was more likely than not that Richtown would be shown to be insolvent. Kaye J also expressed


concern that the affairs of Richtown were not being conducted properly, and the provisional liquidators' activities had not disproved this. As such, Kaye J found that Parkmond had a good arguable case on both grounds and that the appointment of provisional liquidators was necessary for the purpose of maintaining the value of assets, particularly as Richtown appeared to be the treasury company of the Pacific Andes group.

In a subsequent judgment in the same case delivered on 2 June 2017 (sub nom Parkmond Group Limited v Richtown Development Limited), the BVI Commercial Court considered when an application for the appointment of a liquidator on the just and equitable ground may be granted. The liquidators of Parkmond applied for an order putting Richtown into liquidation. The liquidators asserted that Richtown owed Parkmond US $12.549 million, and consequently claimed that Richtown was unable to pay its debts and was therefore insolvent. In addition, the liquidators argued that Richtown had been so mixed up in intra-group fraud that it was necessary to wind the company up on the just and equitable ground.

The judge found that Richtown was insolvent, but in addition said that even if he was incorrect in that regard, it was just and equitable to wind the company up in any event. He noted that it was sufficient to grant an application on the just and equitable ground to find that the company's affairs were being conducted in an improper manner. He did not feel that he was able to make a finding of fraud; however, the directors of Richtown had failed to comply with repeated requests from the liquidators of Parkmond for information regarding group finances and had failed to comply with orders for the production of specific documents. He found that the directors had not complied with their duty to maintain records sufficient to show and explain the company's transactions and enable them to determine the financial position of the company. It was this failure that had given rise to the suspicion of fraud, and this constituted sufficiently serious misconduct on the directors' parts to make it just and equitable to liquidate the company.

The BVI courts will exercise insolvency jurisdiction over a company registered in the BVI as of right, even if the company does not have any assets in the BVI or has the its centre of main interests in another jurisdiction.



If a court grants an application to appoint a liquidator, it will usually appoint the liquidator proposed by the applicant, though the company's creditors may vote to replace the court-appointed liquidator at the first creditors' meeting. Directors' powers, functions, and duties cease on the appointment of a liquidator, save to the extent they are permitted by the IA or authorised by the liquidator. Additionally, the members of a company may collectively resolve to put the company into liquidation without the need for an application to court by passing a qualifying resolution.

Liquidations are conducted by the liquidator, though the liquidator must report to a committee of creditors, except in certain circumstances where the liquidator concludes that there is no real prospect of a distribution. The court exercises a supervisory jurisdiction and it is common for the order appointing the liquidator to require the liquidator to seek the court's sanction before exercising certain powers such as compromising claims and entering into arrangements with the body of creditors.

The liquidator's statutory duties are to gather in and preserve the company's assets, to decide on claims, to make distributions in accordance with the statutory priorities, and to distribute any surplus to the company's members. At the conclusion of the liquidation, the liquidator will apply to the court for release, and the company will be dissolved.

The BVI courts tend to hear commercial matters quickly and efficiently. It is possible to petition the court for a winding-up order and obtain the appointment of provisional liquidators within 24 to 48 hours, if the matter is very urgent. The order will be issued at the time of the hearing unless the decision is reserved. If judgment is reserved, it is typical for a decision to be given within a matter of days if very urgent, or two to three weeks.

In contested liquidations, it is possible to arrange a hearing very quickly if the matter is very urgent and if there would be significant consequences arising for one or more of the parties if the hearing were to be delayed.

In cases where no provisional liquidator is sought, the time between filing the initial application and the first hearing of the petition is generally around three weeks, to permit time for service of the application, advertisement of the hearing, and other

formal steps in relation to which there are specific time requirements.

5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

In general, the following priorities apply:

1. Set-off: An unsecured creditor may be able to take advantage of statutory set-off provisions where there is mutuality between credits and/or debts to the extent that there are any funds of the debtor's in its hands. In addition, netting agreements continue to be enforceable, save in cases of fraud or misrepresentation.
2. Secured creditors: secured creditors can enforce against their collateral notwithstanding the supervening liquidation, and may also add interest to their security, subject to the note at 3 below.
3. The costs and expenses of the liquidation: this includes the liquidator's remuneration (sanctioned, if necessary). If the assets of the company that are not subject to any security interest are insufficient to pay the liquidator's costs and expenses and the preferential claims, those two classes of claim take priority over any floating charge, and will be paid out of the assets subject to the floating charge. Any remaining assets may be applied towards satisfying the floating-charge-holder's claim: section 208 IA.
4. Preferential creditors: this class comprises—

   (i) the wages and salary of present and past employees in respect of the period of six months immediately before the commencement of liquidation up to US $10,000,

   (ii) accrued holiday pay in respect of the period before the commencement of liquidation up to US $10,000,

   (iii) any amount due by the debtor to the BVI Social Security Board in respect of employees' contributions deducted from the employee and in respect of employers' contributions payable for six months immediately before the

commencement of the liquidation,

(iv) any amount due in respect of pension contributions or medical-insurance contributions payable in the period of twelve months immediately before the commencement of the liquidation, including amounts deducted from employees, up to the amount of US $5,000 per employee,

(v) sums due to the government of the Virgin Islands in respect of any tax, duty (including stamp duty), licence fee, or permit, up to the total amount of US $50,000, and

(vi) sums due to the Financial Services Commission in respect of any fee or penalty up to the total amount of US $20,000.

Preferential claims rank equally between themselves, and if the assets of the company are insufficient to pay them all in full, they are paid rateably.

5. All other unsecured creditors' claims.
6. Subordinated claims: a creditor may acknowledge or agree that in the event of a shortfall of assets he will accept a lower priority in respect of a debt than that which he would otherwise have under the IA, that acknowledgment or agreement takes effect.
7. Post-commencement interest: any creditor in a liquidation is entitled to claim interest on its debt in respect of the period after the commencement of the liquidation. Payment of post-commencement interest will be made out of any surplus that remains after all claims in the liquidation have been paid in full before being applied for any other purpose.
8. Members: Any surplus remaining after paying the costs and expenses of liquidation and the claims and interest must be distributed among the members of the company in accordance with their rights under the company's memorandum and articles of association. If the company has preferential shares and ordinary shares, distribution among members will reflect this.

6. Can a debtor's pre-insolvency transactions be challenged? If so,

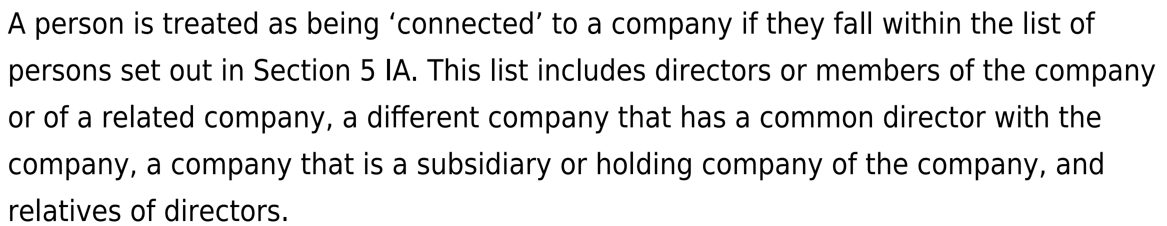
by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Part VIII of the IA provides a number of voidable-transaction claims by which a subsequently appointed liquidator may seek to recover company funds and property, thereby swelling the assets of the insolvent estate for the benefit of its creditors.

There are four types of voidable transaction that a liquidator may consider upon a company going into insolvent liquidation: unfair preferences, undervalue transactions, voidable floating charges and extortionate credit transactions. In relation to most of these, several defined terms are used: 'insolvency transaction', 'vulnerability period', and 'connected person'.

In relation to unfair preferences, undervalue transactions, and voidable floating charges, the liquidator must show that the transaction was an 'insolvency transaction': in order to be an insolvency transaction, the transaction must either have been made at a time when the company was insolvent, or have caused the company to become insolvent. For these purposes, 'insolvency' excludes balance-sheet insolvency: only cash-flow insolvency and technical insolvency are sufficient. The liquidator is not required to prove that an extortionate credit transaction is an insolvency transaction. In some contexts, the court will presume that the transaction was an insolvency transaction, as explained below.

In relation to unfair preferences, undervalue transactions, and voidable floating charges, the 'vulnerability period' is the period beginning six months before the onset of insolvency and ending on the date on which the liquidator was appointed. If the transaction was with a person connected to the company, this period is extended to two years. In the case of extortionate credit transactions, the vulnerability period begins five years before the onset of insolvency and again ends with the appointment of the liquidator. In relation to clawback actions brought in the context of liquidations, the term 'onset of insolvency' is defined as the date on which the application for the appointment of a liquidator was filed (in the case of insolvent liquidations by order of the court), or the date on which the liquidator was appointed (in the case of voluntary insolvent liquidations).



A person is treated as being ‘connected’ to a company if they fall within the list of persons set out in Section 5 IA. This list includes directors or members of the company or of a related company, a different company that has a common director with the company, a company that is a subsidiary or holding company of the company, and relatives of directors.

A company gives an unfair preference if it enters into a transaction that would have the effect of putting a creditor in a better position in the event of the company’s liquidation than the position in which the creditor would have been if the transaction had not occurred: section 245 IA. It should be noted that unlike in many other common-law jurisdictions it is not necessary that the liquidator show that the transferor had any intention or desire to achieve this result for the recipient.

The transaction will not be an unfair preference if it was entered into in the ordinary course of business. As stated above, the liquidator must show that the transaction was an insolvency transaction and that it took place within the vulnerability period. If the transaction took place between the company and a connected person, it will be presumed that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business, unless the contrary is proved.

A company enters into a transaction at an undervalue if it transfers an asset to another for no consideration, or sells an asset for consideration that is worth significantly less than the asset’s market value: section 246 IA. Again, and as stated above, the transaction must be an insolvency transaction and it must have taken place within the vulnerability period. The transaction will not be an undervalue transaction if it can be shown that the company acted in good faith and for the purposes of its business, and if at the time of the transaction there were reasonable grounds for believing the transaction would benefit the company. If the transaction is entered into between the company and a connected person, the court will presume that the transaction was an insolvency transaction and that the company did not act in good faith or have reasonable grounds for believing the transaction would benefit the company, though these presumptions may be rebutted.

If the grant of a floating charge took place within the vulnerability period and either was made at a time when the company was insolvent, or caused the company to

become insolvent (ie, was an insolvency transaction), it will be voidable: section 247 IA. If, however, the charge was not created in order to secure an existing debt, but secured new borrowing or liabilities, it will not be voidable. If a charge was created in favour of a connected person, it is presumed that the charge was an insolvency transaction.

Finally, a transaction is an extortionate credit transaction if it is concerned with the provision of credit to the company and either the terms of the credit arrangement require grossly exorbitant payments to be made in respect of the provision of credit (whether unconditionally or on the occurrence of certain contingencies) or otherwise grossly contravenes ordinary principles of fair trading: section 248 IA. It is not necessary to show that the extortionate credit transaction was an insolvency transaction.

Despite this group of liquidator claims coming within the Part of the IA that is headed ‘voidable transactions’, a successful claim by the liquidator does not necessarily result in the transaction being voided or becoming voidable at the liquidator’s election: the court has a very broad discretion as to what relief to grant, and may make any order it deems appropriate. It may order that the transaction be set aside in whole or in part, but it is not required to do so; alternatively or additionally, it may also make such orders as appropriate to restore the parties to their original positions or otherwise.

In addition to these four IA claims that are available to liquidators of insolvent companies, section 81 of the Conveyancing and Law of Property Ordinance of 1961 permits any person prejudiced by a conveyance of property to apply to the court for an order avoiding that conveyance. This cause of action may be used by liquidators to recoup funds, shares, or other assets that have been paid away and unlike the IA claims does not require that the company was insolvent at the time of the transfer.

7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors’ claims? Does that stay or moratorium

have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

N/A

8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?

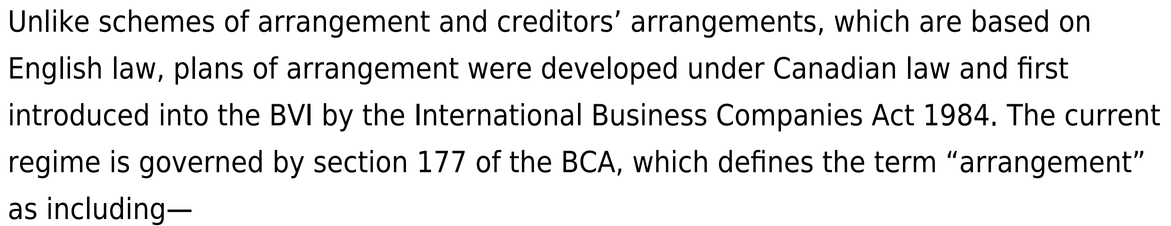
For companies seeking to reorganise a company's capital or debts there are three main routes available:

1. Plans of arrangement;
2. Schemes of arrangement; and
3. Creditors' arrangements.

Plans and schemes of arrangement are governed by the BCA and creditors' arrangements are governed by the IA.

None of these routes is directly analogous either to the English regime relating to company voluntary arrangements under Part 1 of the Insolvency Act 1986 or to that concerning company reorganisation under Chapter 11 of the United States Bankruptcy Code.

Unlike other offshore jurisdictions, such as the Cayman Islands and Bermuda, the BVI does not use provisional liquidators for restructuring; rather, provisional liquidators tend to be appointed simply to preserve assets until the application for the appointment of a permanent liquidator can be heard.



Unlike schemes of arrangement and creditors' arrangements, which are based on English law, plans of arrangement were developed under Canadian law and first introduced into the BVI by the International Business Companies Act 1984. The current regime is governed by section 177 of the BCA, which defines the term "arrangement" as including—

(a) an amendment to the memorandum or articles;

(b) a reorganisation or reconstruction of a company;

(c) a merger or consolidation of one or more companies that are companies registered under the BCA with one or more other companies, but only if the surviving or consolidated company is incorporated under the BCA;

(d) a separation of two or more businesses carried on by a company;

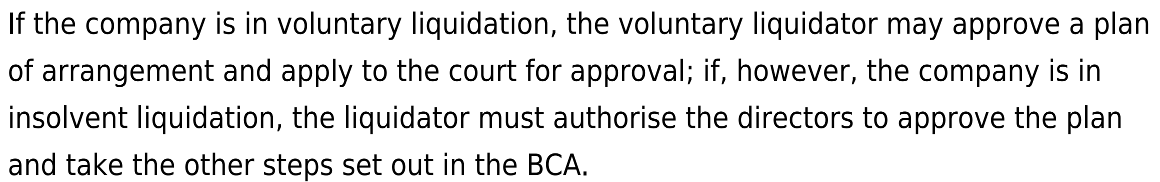
(e) any sale, transfer, exchange or other disposition of any part of the assets or business of a company to any person in exchange for shares, debt obligations or other securities of that other person, or money or other assets, or a combination thereof;

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

(g) a dissolution of a company; and

(h) any combination of any of the things specified in paragraphs (a) to (g).

This definition is clearly very broad. If a company's directors determine that it is in the best interests of the company, or the creditors or members of the company, they may approve a plan of arrangement. The plan must contain details of the proposed arrangement, and once the directors have approved the plan, the company must apply to the court for approval.



If the company is in voluntary liquidation, the voluntary liquidator may approve a plan of arrangement and apply to the court for approval; if, however, the company is in insolvent liquidation, the liquidator must authorise the directors to approve the plan and take the other steps set out in the BCA.

On hearing an application for approval, the court may make a variety of directions as to how the plan is to proceed, including requiring the company to give notice of the plan to specified persons or classes of persons, determining whether or not the approval of another person or class of person must be obtained, determining whether or not any shareholder or creditor of the company is entitled to dissent from the plan, conducting a hearing in relation to the adoption of the plan, and deciding whether to approve or reject the plan. If the court determines that a shareholder is entitled to dissent from the plan, that shareholder is permitted to demand payment of the fair value of his shares. If the fair value of shares cannot be agreed between the shareholder and the company, there is a statutory framework for referral of the question to a panel of appraisers, whose decision is binding.

Once the plan has been approved by the court, the directors (or voluntary liquidator) must then confirm the plan and comply with the court's directions relating to notice and obtaining the approval of specified parties. Once this has been done and the necessary approvals have been obtained, the company must execute articles of arrangement, which must contain the plan, the court's order, and details of the manner of approval. These articles must then be filed with the Registrar of Corporate Affairs, who will issue a certificate. The arrangement comes into effect when it is registered and its implementation is overseen by the company's directors.

There is no statutory moratorium available in relation to plans of arrangement; therefore, throughout the devising, proposing, and approval phases of a plan of arrangement, the company remains vulnerable to creditors' claims.

In the case of In re B&A Fertilisers Ltd; In re Rio Verde Minerals Development Corp BVIHC (COM) 132 of 2012, unreported (22 January 2013), a plan of arrangement was used as an alternative to the merger provisions under sections 170 to 173 of the BCA. B&A Brazil wished to take over Rio Verde with the consent of Rio Verde's board. The parties therefore proposed a plan of arrangement pursuant to which each member of

Rio Verde would have its shares in Rio Verde exchanged for the equivalent number of redeemable shares in B&A. These redeemable shares would then be redeemed by B&A at the same share price as Rio Verde's then share price the next business day. The effect of the plan of arrangement would be to achieve the takeover of Rio Verde by B&A.

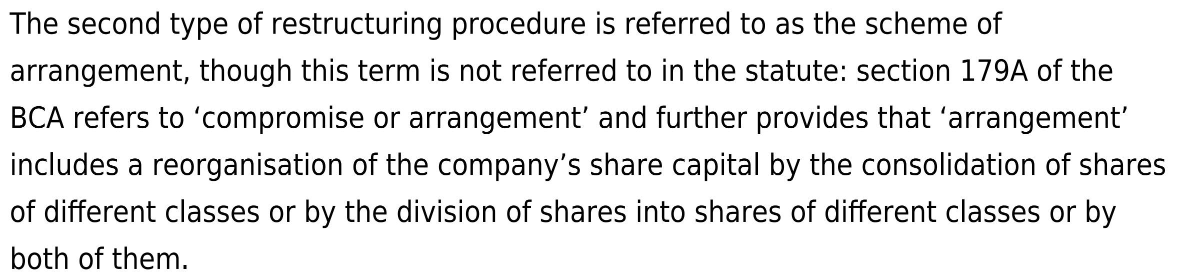
This route was chosen as a means of enabling Rio Verde to divest itself of its obligations to the holder of some 18 million warrants. The original plan of arrangement had proposed that upon the merger each of the warrants were to be repurchased and cancelled by B&A for no consideration. The Commercial Court judge however rejected this proposal on the basis that it amounted to forfeiture, saying—

"[T]here is nothing in section 177 which permits a company to promote an arrangement under which property of any person is forfeited or confiscated and … the Court could not approve an arrangement which purported to have any such effect."

The court gave directions that any plan would have to be subject to the approval of the warrant holder and that any plan affecting the warrant holder must entitle members of Rio Verde and the warrant holder to dissent in accordance with the provisions of section 179.
Rio Verde is significant for several reasons:

1. Firstly, section 177 of the BCA does not provide that a threshold number of shareholders must approve the plan. This is in contrast to the 75 per cent in value test under a scheme of arrangement. Under section 177(2) it is the directors of the company that determine whether or not the proposed plan is in the best interests of the company; however, the Court will not merely rubber stamp a plan of arrangement which has been proposed by the board under section 177(2) but will assess it critically.
2. Secondly, section 177 does not provide an automatic right to dissent. Under section 177(4)(c), the Court has a discretion to allow any holder of shares, debt obligations or other securities to dissent under section 179. In Rio Verde the judge considered that warrant holders would be within the ambit of section 179 as holders of "other securities" under section 177(4)(c).

Once a final order approving a plan of arrangement is made, it cannot be appealed except on a point of law. If a party does wish to appeal on a question of law, the notice of appeal must be filed within 20 days immediately following the date of the order.



The second type of restructuring procedure is referred to as the scheme of arrangement, though this term is not referred to in the statute: section 179A of the BCA refers to ‘compromise or arrangement’ and further provides that ‘arrangement’ includes a reorganisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of them.

The section does not contain a great deal of detail with regard to the procedure for obtaining the court’s sanction of a scheme of arrangement; consequently, the BVI court has based its approach on the practice followed by the English courts and, in particular, in the Chancery Division’s Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345, hence the adoption of the English terminology.

Whereas plans of arrangement may be very broad, schemes of arrangement specifically relate to the company’s relations with its shareholders and/or creditors. Schemes are aimed at facilitating an agreement that can enable the company to continue as a going concern and avoid formal insolvency proceedings. They are only available in relation to companies that have been formed under the BCA or companies incorporated under earlier BVI legislation or incorporated in another jurisdiction but continued under the BVI legislation, including companies in solvent or insolvent liquidation.

If a company proposes to enter into an arrangement with its creditors or members (or a class of either of those groups), the company will apply to court for an order that it should convene a meeting of creditors or members, as the case may be, to vote on whether or not to approve the scheme (the Convening Hearing). An application for such an order may be made by the company, a creditor, a member, or, if the company is in liquidation (whether solvent or insolvent), the liquidator.

At the Convening Hearing the court will consider issues concerning class composition and jurisdiction. As with an English scheme of arrangement, members and creditors are divided into classes depending on the respective rights that exist between them and the company, and the extent to which those rights stand to be varied by the scheme. The result is that often different classes of creditors and members are treated differently and a separate scheme meeting will be required for each different class.

If, at the meeting(s), a majority in number representing 75 per cent in value of the company's creditors or shareholders (or class thereof) present or by proxy vote to approve the scheme, the scheme will bind—

1. all creditors or shareholders (as the case may be),
2. the company,
3. any liquidator that has been appointed, and
4. any contributory,

subject only to the court's approval. If the majority rejects the scheme, it will not be approved.

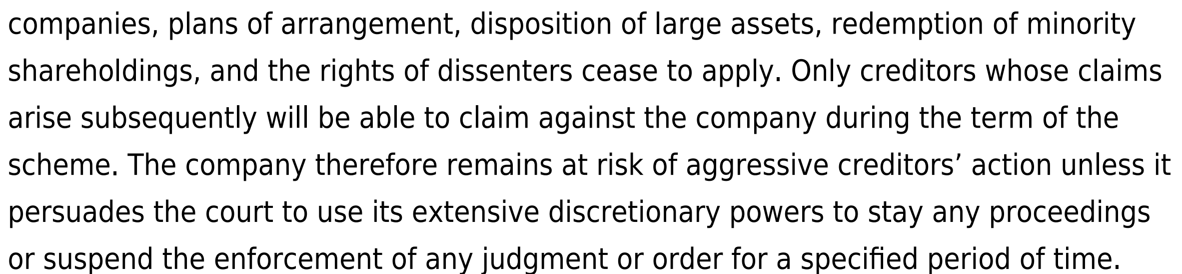
If the creditors and/or shareholders vote to approve the scheme, then an application must be made for the court's approval. The court will not rubber-stamp the scheme simply because it has been approved at the scheme meetings: it will have to be sure that the scheme is fair and reasonable, and that it will be efficacious.

Once a scheme has been sanctioned it must be filed with the Registrar of Corporate Affairs. The scheme takes effect from the moment of filing, and from that date onwards every copy of the company's memorandum issued after that date must have a copy of the order annexed to it.

Unless the company is insolvent when it proposes to enter into a scheme of arrangement, the directors will remain in control of the company; if the company is in liquidation, the liquidator will have control.

There is no fixed duration for a scheme of arrangement, and its length will be determined by the directions given by the court, the expedience with which meetings are convened, and the terms contained within the scheme itself.

In the BVI, the process of devising and obtaining sanction of a scheme of arrangement outside liquidation is not protected by any moratorium on creditors' claims; however, once the court sanctions the scheme, it becomes binding on all creditors and shareholders, and the provisions of the BCA relating to mergers and consolidations of



companies, plans of arrangement, disposition of large assets, redemption of minority shareholdings, and the rights of dissenters cease to apply. Only creditors whose claims arise subsequently will be able to claim against the company during the term of the scheme. The company therefore remains at risk of aggressive creditors' action unless it persuades the court to use its extensive discretionary powers to stay any proceedings or suspend the enforcement of any judgment or order for a specified period of time.

As with plans of arrangement, there is no moratorium available in the context of schemes of arrangement, so they remain liable to upset by creditors' claims until sanctioned by the court.

The third restructuring procedure referred to is the creditors' arrangement, which is governed by Part II of the IA. The aim of a creditors' arrangement is to facilitate arrangements between a financially distressed company and its unsecured creditors in order to stave off or mitigate the risk of insolvency. This is designed to be a simple process without any court involvement. A company may enter into a creditors' arrangement even if it is in liquidation.

A creditors' arrangement may affect all or part of the company's debts and liabilities and may affect the rights of creditors to receive all or only part of the debts they are owed. This is subject to the exception that the rights of secured creditors cannot be compromised without their written consent. Also, a creditors' arrangement cannot result in a preferential creditor receiving less than he would in liquidation without their written consent.

The arrangement may be proposed by any person, but a majority of 75 per cent of the company's unsecured creditors by value must vote in favour of the arrangement in order to approve it and bind dissenters. A licensed insolvency practitioner must be appointed as supervisor of the arrangement to oversee its implementation.

By contrast with plans and schemes of arrangement under the BCA, a creditors' arrangement does not require the court's approval or registration with the Registrar of Corporate Affairs. This appears to be in order to make it a quicker and simpler procedure to invoke, and any disgruntled creditor or member may apply to the court for relief on the basis that their interests have been unfairly prejudiced; however, there

have been relatively few creditors’ arrangements in the BVI since the provisions were enacted.

Again, there is no moratorium; however, as stated above, the effect of the decision by the majority of the company’s unsecured creditors to adopt a plan is to cram down any creditors who may have dissented, even where they did not receive notice of the meeting at which the arrangement was considered (although in such a case they may be able to bring a claim for unfair prejudice).

9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

None of the restructuring procedures specifically contemplate post-commencement financing; however, if a scheme or plan of arrangement that provides that the company may incur new borrowing is approved by the court, there is no reason in principle why such funding cannot be obtained. The position is similar in relation to creditors’ arrangements; however, if financing is obtained without the consent of the creditors and/or members, it may be that this would found a claim for relief or other sanction.

10. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

N/A

11. Is it common for creditor committees to be formed in

restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

N/A

12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?

The commencement of liquidation does not prima facie affect existing contracts, though the liquidator has a power to disclaim an unprofitable contract into which the company has entered by filing a notice of disclaimer with the court under section 217 of the IA. In many cases, however, the contract will include express provisions in contemplation of either party's insolvency. The liquidator has a power to carry on the business of the company so far as this is necessary to facilitate the liquidation.

Nothing in the BVI's insolvency legislation invalidates termination, retention-of-title, or set-off provisions in commercial contracts, though the general common-law rules concerning these principles apply, such as the need in retention-of-title cases for the assets in question to remain identifiable and not to have been worked into new property or transferred to an innocent third party. As stated above, the IA expressly provides for a right of set-off in relation to mutual credits.

A contractual counterparty may apply to the court for an order rescinding the contract on such terms as to payment between the company and the counterparty of damages for non-performance as the court may think fit. If a counterparty is awarded damages, these may be claimed as a debt in the liquidation. No contractual counterparty may commence or proceed with any proceedings against the company without permission of the court having jurisdiction in the insolvency.

Again, the legislative provisions relating to restructuring procedures do not make express provision in relation to existing contracts.

13. What conditions apply to the sale of assets/the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

From the date of their appointment, the liquidator has custody and control of the company's assets and also the power to sell the company's property, subject only to the supervision of the court or the creditors' committee, depending on the type of liquidation. The only other qualification on the liquidator's power to sell company property and give clear title is the requirement that the liquidator notify the creditors' committee of any sale to a person connected with the company.

It is important to note, however, that the general rule nemo dat quod non habet applies to liquidators: the liquidator cannot give a purchaser greater title to property than the company had, though if the company has legal title, a bona fide purchaser for value without notice affecting the property will take that legal title free of equities.

The appointment of a liquidator does not affect the right of a secured creditor to take possession of and realise or otherwise deal with his collateral. A secured creditor may therefore exercise rights to foreclosure, sale, the appointment of a receiver, and so forth, that are generally available to holders of security interests (see above). As always, a secured creditor exercising a power of sale must get the best price reasonably obtainable for the asset and account to the liquidator for any surplus. If the price obtained does not discharge the debt owed to the creditor, they may prove a claim for the balance as an unsecured creditor.

Alternatively, the secured creditor may choose to place a value on the assets that are subject to their security interest and submit a claim in the liquidation for the unsecured balance. If they do so, the liquidator may give notice of an intention to redeem the

security interest. On the expiry of 28 days, if the creditor has not sought to revise the valuation placed on the assets, the liquidator may redeem the security at the value placed on the assets.

If a secured creditor omits to disclose its security interest when submitting a claim in the liquidation of the company, the security is surrendered, though the creditor may apply to the court for relief. A secured creditor may also elect to surrender their security for the benefit of the estate, and submit an unsecured claim for the entirety of the debt they are owed.

There are no specific rules concerning credit bidding, though a secured creditor exercising a power of sale cannot purchase the asset themselves. A receiver selling on behalf of a creditor may accept a credit bid from the creditor, however. In certain cases concerning secured assets, the liquidator may cause a public sale by auction, and in those circumstances both the liquidator and the secured creditor may bid for the assets.

14. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Directors in the BVI owe a range of fiduciary and common-law duties to their companies, and these duties do not terminate with the appointment of a liquidator, though directors cease to have any role in the management of the company save to the extent permitted by the IA and/or the liquidator.

As stated above, when a company nears insolvency, the focus of the directors' duty to act in the company's best interests shifts from the members to the creditors. As such, the directors must be mindful of the effect their conduct of the company's affairs may have on creditors' likelihood of being repaid what they are owed. Directors are sometimes given indemnities for liability they may incur for negligence, default, breach

of duty, or breach of trust.

Part IX of the IA deals with malpractice and the principal ways in which a director may be ordered to contribute assets to an insolvent company, including liability for misfeasance, fraudulent trading and insolvent trading. An application pursuant to Part IX can only be brought by a liquidator, but the provisions are not limited territorially.

In the event that a director or officer of the company has misapplied or retained or become accountable for any money of the company, or if the director could be described as being ‘guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company’, then the court has broad powers to make an order that such director or officer repays, restores, or accounts for money or assets or any part of it to the company as compensation for the misfeasance or breach of duty. The IA misfeasance action merely puts the powers at common law on a statutory footing, but this statutory provision does not preclude any parallel liability arising under general directors’ duties at common law or otherwise.

The court can make an order against a company’s directors if it is satisfied that, at any time before the commencement of the liquidation of the company, any of its business has been carried on ‘with the intent to defraud creditors of the company or creditors of any other person; or for any fraudulent purpose’. In such cases, the court can declare that the director is liable to make a contribution that the court considers proper towards the company’s assets. This is not limited to directors and officers, but applies to anyone who has been involved in carrying on the business in a fraudulent manner. There is no statutory defence to fraudulent trading, but it is necessary that actual dishonesty be proved.

Directors’ liability for insolvent trading has been summarised above, and as stated in that context any contribution that the court orders under Part IX is compensatory and not penal, and will be used to swell the assets available for distribution to the company’s general body of creditors. The section 81 Conveyancing Ordinance claim is also a relevant consideration.

Other than claims against directors and other officers in respect of misfeasance, fraudulent trading, or insolvent trading, or other general grounds on which personal

liability may be incurred, such as assisting in a breach of fiduciary duty or fraud, there are no routes by which other parties connected to the liquidation of a company may be liable for the debts of an insolvent debtor. In relation to misfeasance, fraudulent trading, and insolvent trading, it should be noted that the liability is to the company to make good losses that have been suffered, and not to provide any third party with an additional person against whom they may seek a remedy.

At present, there is no regime applicable to insolvent partnerships, though the bankruptcy of a partner will trigger the dissolution of the partnership in the absence of agreement to the contrary. The court has jurisdiction to order the dissolution of a partnership where its business can only be carried on at a loss, but only the partners can apply for such an order, and creditors have no recourse. There is no specific regime relating to voidable transactions (though section 81 of the Conveyancing Act remains available). If the partnership is a limited partnership, only the general partner may be sued personally, and commonly limited liability companies are used as sole general partners, effectively removing the risk of personal liability for partnership debts.

Only if there is a specific contractual provision will parent or group companies become liable for the debts of a related company, unless it is possible to pierce the corporate veil and identify the parent with the subsidiary.

15. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

The effect of restructuring proceedings on directors' liabilities, etc, will depend on the terms of the arrangement in question. If there is no express provision releasing directors, they remain liable.

Directors of a company that is dissolved following its liquidation will be given a reprieve in relation to potential claims; however, in certain circumstances a dissolved company may be restored into liquidation for the purpose, eg, of realising an asset or pursuing a

claim that was not dealt with during the liquidation. A claim against a malfeasant director may be sufficient grounds on which to seek such a restoration.

16. Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or is it under consideration in your country?

Part XVIII of the IA adopts the UNCITRAL Model Law on Cross-Border Insolvency for recognising foreign office holders, and for giving and seeking assistance in insolvency proceedings; however, this Part has not been brought into force, and the generally held view is that it is unlikely to come into force in the near future. As such, there is no formal procedure by which foreign office-holders may seek recognition in the BVI courts and thereby be afforded the same powers as a locally appointed office-holder.

The position is ameliorated somewhat by Part XIX of the IA, which provides the basic statutory framework for judicial assistance in insolvency proceedings. It allows foreign representatives in certain types of insolvency proceedings to apply to the BVI court for assistance. It also preserves the court's common-law powers to provide aid in relation to foreign proceedings. The proceedings to which Part XIX applies are collective judicial or administrative proceedings in which the property and affairs of the debtor are subject to control or supervision by a foreign court taking place in designated territories. This definition is wide enough to encompass certain types of foreign restructuring procedures.

The BVI court, when faced with such an application, is required to do what will best ensure the economic and expeditious administration of the foreign proceedings, to the extent that this is consistent with certain guiding principles. Section 467 IA states that the orders that the court can make in aid of the foreign proceedings are wide, and include orders—

1. restraining the commencement or continuation of proceedings against a debtor or in relation to the debtor's property,

2. restraining the creation, exercise or enforcement of any rights against the debtor’s property,
3. requiring a person to deliver up the property of the company to the foreign representative,
4. making any order or granting any relief the court considers appropriate to facilitate, approve or implement arrangements that will result in the coordination of BVI insolvency proceedings with foreign insolvency proceedings,
5. appointing an interim receiver of any property of the debtor, and
6. making such other order or granting such other relief as it considers appropriate.

The provisions appear to be wide enough for the BVI court not only to provide procedural assistance but also to apply substantive principles of BVI insolvency law, and the BVI court has discretion whether to apply the law of the BVI or the law applicable to the foreign proceedings.

It is important to note that the court will only be able to assist the foreign office holder under these statutory provisions if the proceedings are taking place in one of the following jurisdictions: Australia; Canada; Finland; Hong Kong; Japan; Jersey; New Zealand; the UK; and the USA. If the foreign office-holder was appointed in proceedings in a different jurisdiction, the support they may receive will be very limited, though they will be able to bring certain claims based on their title to assets contained in the insolvent estate (including causes of action), if sufficient title is vested in them.

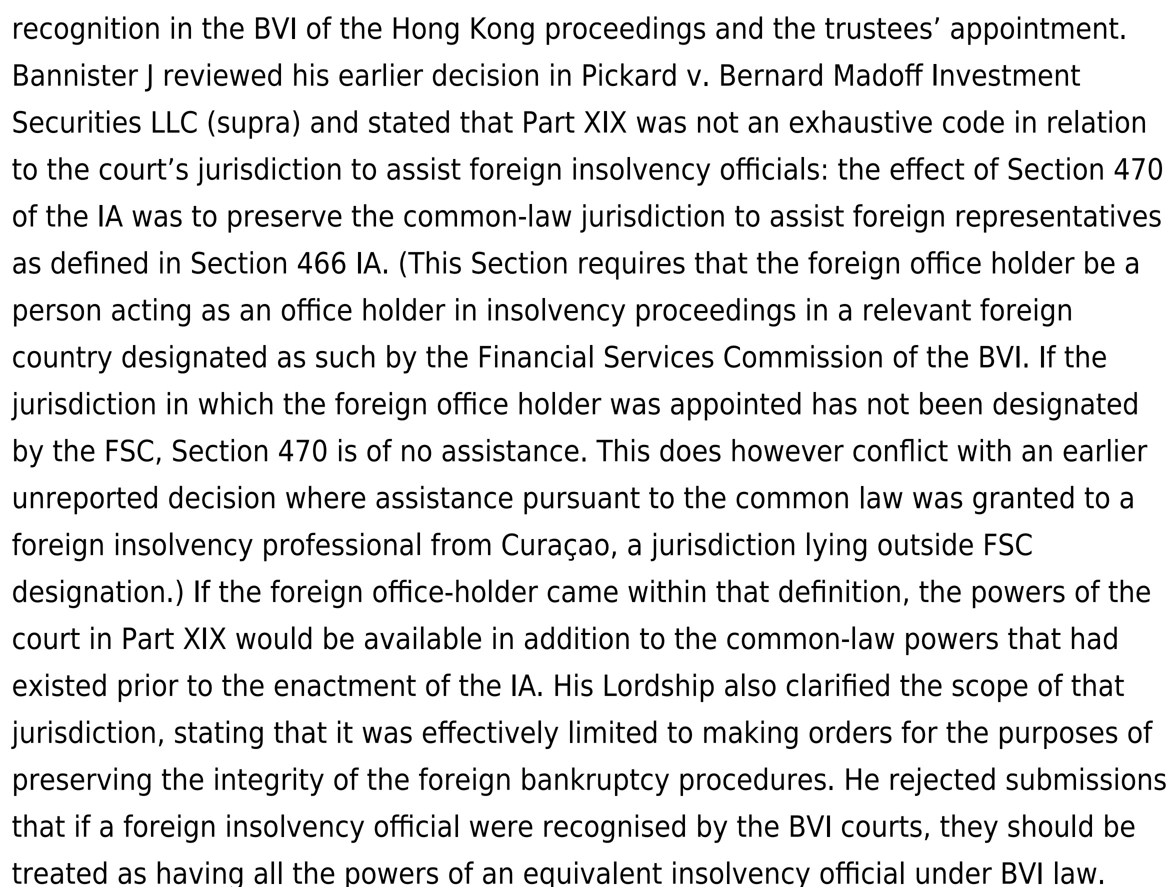
The BVI courts have had a number of opportunities to consider the scope of Part XIX. In Irving H Picard v. Bernard L Madoff Investment Securities LLC BVIHCV 140 of 2010, unreported (2010), Mr Pickard, the trustee appointed in the US liquidation of Bernard L Madoff Investment Securities LLC, sought (1) recognition in the BVI as a foreign representative, (2) permission to apply to the BVI court for orders in aid of the foreign proceedings, and (3) permission to require any person to deliver up to him any property belonging to the company. Deciding the case against Mr Pickard, Bannister J held that foreign representatives are confined to relying upon Part XIX, because the legislature had decided not to bring the alternative provisions in Part XVIII into force. The key difference between the two Parts was that whereas Part XVIII conferred status on foreign representatives through recognition of the foreign proceedings, Part XIX merely gave the foreign representative express rights to apply to the court for orders

in aid, but without conferring status. The codification of rules on recognition of foreign office holders in Part XVIII had resulted in the implied repeal of the common-law rules of recognition, so Mr Pickard could only rely on the support afforded by Part XIX. The court then held that because Part XIX operated on an ‘application-by-application’ basis it could not give Mr Pickard any general authority or special status, but would have to hear individual applications for specific orders.

In Re FuturesOne Diversified Fund SPC Ltd BVIHCM (COM) 113, 114, 115 and 116 of 2012, unreported (2013), the court had to consider the position of a receiver appointed by the United States District Court for the Northern District of Illinois on the application of the United States Commodity Futures Trading Commission. An application had been made by the joint liquidators of certain funds incorporated in the BVI for a declaration that they had been validly appointed. The receiver applied to be added to the proceedings, either under the court’s inherent jurisdiction or under Section 273 of the IA as a person ‘aggrieved by an act, omission or decision’ of a company liquidator so that he could oppose the liquidators’ application and seek orders reversing everything that had been done, on the basis that it was done to avoid the effect of the order by which the receiver had been appointed. He also sought an order under Section 467 of the IA in support of the Illinois proceedings staying the BVI liquidations.

This case was also heard by Bannister J. In relation to the latter application, his Lordship held that the ability to make orders in aid of foreign proceedings was limited to foreign proceedings for the purpose of ‘reorganisation, liquidation or bankruptcy’, and that on the evidence before the court it appeared that the purpose of the US receivership was to protect investors rather for any of the specified purposes. Accordingly, Bannister J held that the US-court-appointed receiver had no standing to make any application under Section 467 of the IA. In relation to the receiver’s application to reverse the acts of the liquidators, the court held that the liquidators’ claim that they had been appointed was not an ‘act, omission or decision’ of the joint liquidators within the meaning of the Act, so the receiver did not have standing under Section 273 of the IA. In any event, having concluded that the liquidators were validly appointed, the judge held that there was nothing that could have prejudiced the receiver.

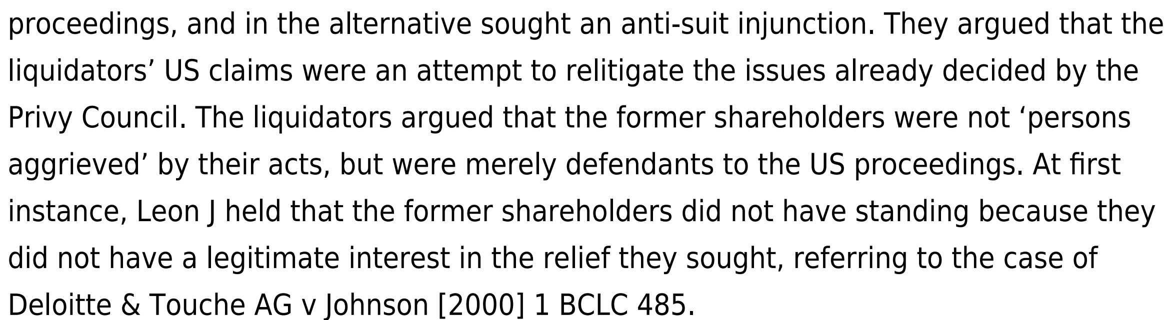
The case of In the Matter of C (a bankrupt) concerned an application brought by trustees in bankruptcy who had been appointed under the laws of Hong Kong for



recognition in the BVI of the Hong Kong proceedings and the trustees' appointment. Bannister J reviewed his earlier decision in Pickard v. Bernard Madoff Investment Securities LLC (supra) and stated that Part XIX was not an exhaustive code in relation to the court's jurisdiction to assist foreign insolvency officials: the effect of Section 470 of the IA was to preserve the common-law jurisdiction to assist foreign representatives as defined in Section 466 IA. (This Section requires that the foreign office holder be a person acting as an office holder in insolvency proceedings in a relevant foreign country designated as such by the Financial Services Commission of the BVI. If the jurisdiction in which the foreign office holder was appointed has not been designated by the FSC, Section 470 is of no assistance. This does however conflict with an earlier unreported decision where assistance pursuant to the common law was granted to a foreign insolvency professional from Curaçao, a jurisdiction lying outside FSC designation.) If the foreign office-holder came within that definition, the powers of the court in Part XIX would be available in addition to the common-law powers that had existed prior to the enactment of the IA. His Lordship also clarified the scope of that jurisdiction, stating that it was effectively limited to making orders for the purposes of preserving the integrity of the foreign bankruptcy procedures. He rejected submissions that if a foreign insolvency official were recognised by the BVI courts, they should be treated as having all the powers of an equivalent insolvency official under BVI law.

The question who may make an application under section 273 IA as a person aggrieved by an act, omission, or decision of an office holder for an order reversing, modifying, or confirming the act, was revisited in In re Fairfield Sentry Limited (in liquidation) and others BVIHCMAP 11, 12, 13, 14, 15, 16, 23, 24, 25, 26, 27, and 28 of 2016, unreported (20 November 2017). This was another case that arose out of the discovery of the long-running frauds perpetrated by Bernard Madoff. The appellants were former shareholders of Fairfield Sentry, which operated as a feeder fund to Madoff's company BLM Investment Securities (BLMIS).

The liquidators of Fairfield Sentry had brought claims in the BVI against former shareholders of the company in respect of redemption payments they had received that were allegedly based on a mistaken calculation of the shares' value. These claims were appealed to the Privy Council, which ultimately dismissed them. The liquidators then brought proceedings in the USA for recovery of different sums in respect of redemption payments. The former shareholders applied to the BVI court for an order under section 273 IA for an order reversing the liquidators' decision to bring the US



proceedings, and in the alternative sought an anti-suit injunction. They argued that the liquidators' US claims were an attempt to relitigate the issues already decided by the Privy Council. The liquidators argued that the former shareholders were not 'persons aggrieved' by their acts, but were merely defendants to the US proceedings. At first instance, Leon J held that the former shareholders did not have standing because they did not have a legitimate interest in the relief they sought, referring to the case of Deloitte & Touche AG v Johnson [2000] 1 BCLC 485.

The former shareholders appealed to the Eastern Caribbean Court of Appeal. The court noted that in Intertrade Corporation v Windjammer Landing Co Ltd SLUHCVAP 1 of 1996, unreported (24 November 1997), it had held that the term 'persons aggrieved' should be given a generous interpretation, though it should not permit claims by a 'meddlesome busybody'. The key question was whether, having regard to the context of section 273 of the IA and the remedy that was available there, a person who had no proper or legitimate interest in a liquidator's conduct may be said to be 'a person aggrieved'. It was therefore necessary to determine the capacity in which the person was bringing a section 273 application. A creditor of an insolvent company, a contributory of a solvent company, and a debtor would all have standing, and a person directly affected by the exercise of the power given to the office-holder would have standing if they would not otherwise have the right to challenge the exercise of the power. However, even if the applicant were a creditor or contributory, they would not have standing unless the relief they sought were brought in that capacity.

The former shareholders did not have any interest in the assets of Fairfield Sentry or the manner in which those assets were to be realised, distributed, or spent. Their complaint was that the US proceedings were vexatious, oppressive, or an abuse of process. The capacity in which they brought their application under section 273 was plainly as defendants in the US proceedings, not as creditors of the funds. In that capacity they were strangers to the liquidation and their interests were adverse to the liquidation. As such, they had no legitimate interest in the relief they sought, and had no standing to bring the applications.

If a BVI company has been wound up or is in the process of being wound up by a foreign court, it can nevertheless be placed in liquidation in the BVI by either of the two routes available (ie, the appointment of a liquidator by the court or by the members of a company). A foreign company that is in liquidation abroad may also be placed in

liquidation in the BVI, but only through the mechanism of a court-appointed liquidator.

In such situations, the liquidation of the company in its place of incorporation will generally be regarded as the primary liquidation and, in common-law countries at least, all others will be treated as ‘ancillary’ or secondary liquidations in which the liquidator’s powers will be confined to collecting and distributing the assets in that jurisdiction.

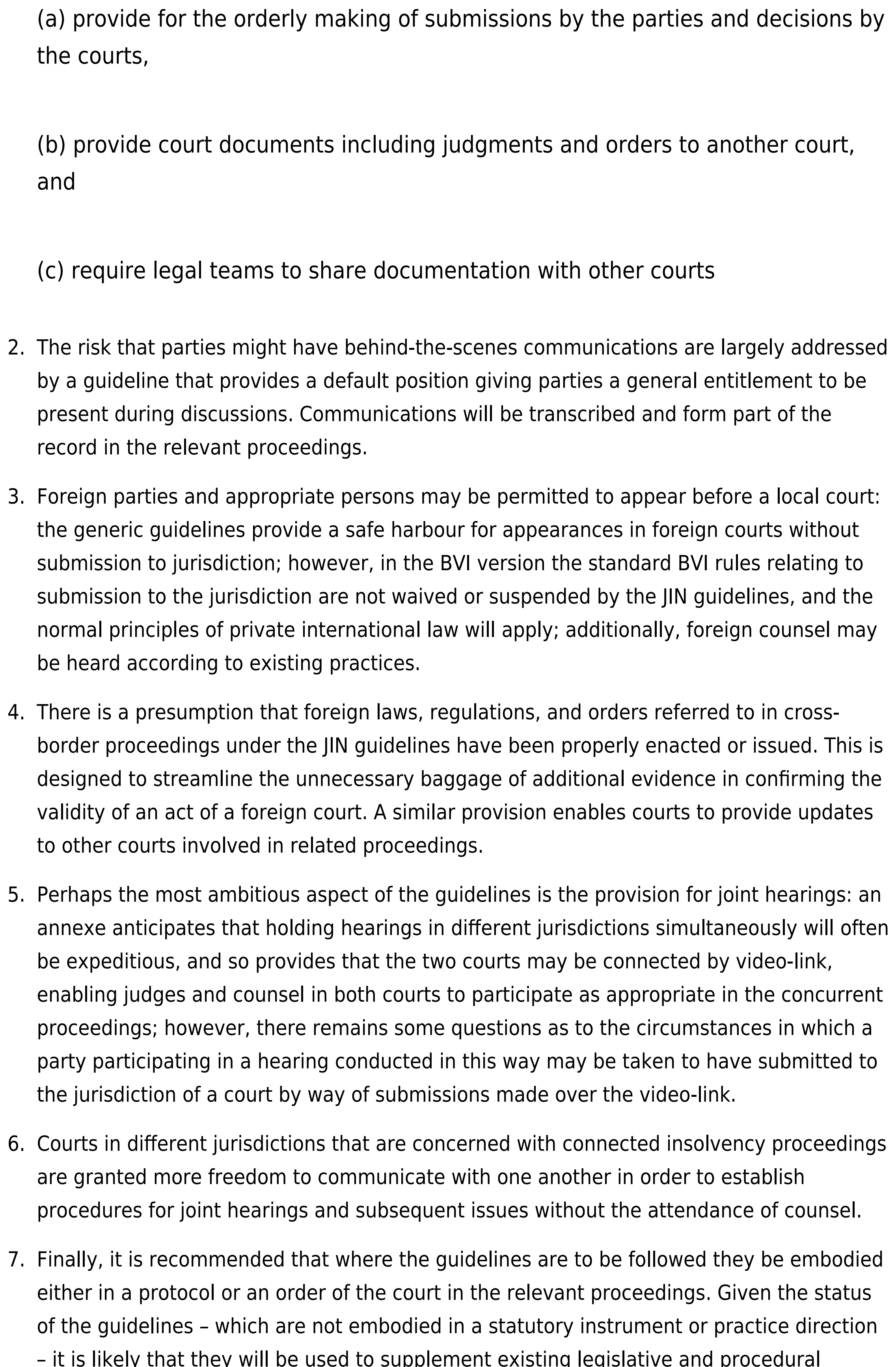
If a liquidator is appointed over a BVI company, he or she becomes the appropriate person to deal with the company’s assets in place of the directors. The liquidator will be recognised as having the authority to administer the assets of the company worldwide, but the recognition of his or her authority abroad is effectively a matter for the foreign courts in the relevant jurisdiction. Most common-law jurisdictions will generally recognise a liquidator of a foreign company appointed by the court of the place of incorporation.

Recently, the BVI has taken steps to promote the efficient management of cases involving concurrent insolvency or restructuring proceedings in multiple jurisdictions. In May 2017 the BVI Commercial Court formally adopted new guidelines for communication and cooperation between courts in cross-border insolvency matters. The initiative, which was the fruits of the Judicial Insolvency Network’s activities (the JIN), has proved very popular among offshore practitioners and judges alike. The BVI is the latest key commercial jurisdiction to adopt the JIN guidelines this year, joining New York, Delaware, Singapore, and Bermuda.

The guidelines are designed primarily to enhance communication between courts, insolvency representatives, and other parties as they deal with the vicissitudes of global restructurings and insolvency. One of the key objectives is that with the increase in efficiency stakeholders will see a reduction in delay and cost.

Key elements of the guidelines include the following:

1. Courts are encouraged to communicate directly with one another. There has traditionally been inconsistency and caution between judges to communicate, and a question as to its appropriateness. The guidelines actively promote case management and planning that—



(a) provide for the orderly making of submissions by the parties and decisions by the courts,

(b) provide court documents including judgments and orders to another court, and

(c) require legal teams to share documentation with other courts

2. The risk that parties might have behind-the-scenes communications are largely addressed by a guideline that provides a default position giving parties a general entitlement to be present during discussions. Communications will be transcribed and form part of the record in the relevant proceedings.
3. Foreign parties and appropriate persons may be permitted to appear before a local court: the generic guidelines provide a safe harbour for appearances in foreign courts without submission to jurisdiction; however, in the BVI version the standard BVI rules relating to submission to the jurisdiction are not waived or suspended by the JIN guidelines, and the normal principles of private international law will apply; additionally, foreign counsel may be heard according to existing practices.
4. There is a presumption that foreign laws, regulations, and orders referred to in cross-border proceedings under the JIN guidelines have been properly enacted or issued. This is designed to streamline the unnecessary baggage of additional evidence in confirming the validity of an act of a foreign court. A similar provision enables courts to provide updates to other courts involved in related proceedings.
5. Perhaps the most ambitious aspect of the guidelines is the provision for joint hearings: an annexe anticipates that holding hearings in different jurisdictions simultaneously will often be expeditious, and so provides that the two courts may be connected by video-link, enabling judges and counsel in both courts to participate as appropriate in the concurrent proceedings; however, there remains some questions as to the circumstances in which a party participating in a hearing conducted in this way may be taken to have submitted to the jurisdiction of a court by way of submissions made over the video-link.
6. Courts in different jurisdictions that are concerned with connected insolvency proceedings are granted more freedom to communicate with one another in order to establish procedures for joint hearings and subsequent issues without the attendance of counsel.
7. Finally, it is recommended that where the guidelines are to be followed they be embodied either in a protocol or an order of the court in the relevant proceedings. Given the status of the guidelines – which are not embodied in a statutory instrument or practice direction – it is likely that they will be used to supplement existing legislative and procedural

frameworks.

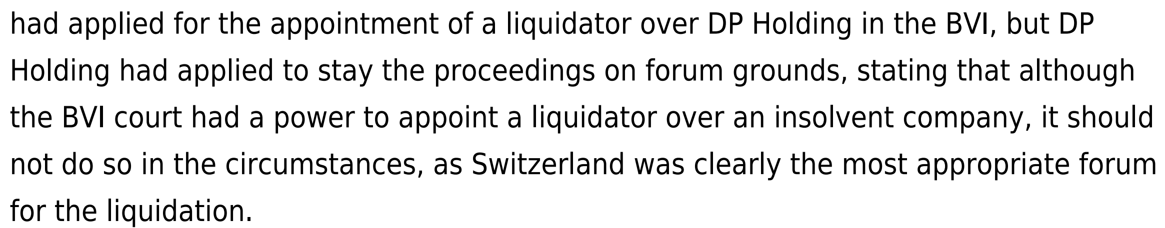
The guidelines are intended to be flexible and subordinate to local laws and sovereignty; however, they reflect the view of the judiciary on the importance of coordination and cooperation in cross-border insolvency proceedings: for example, the first guideline encourages practitioners to communicate and cooperate with their foreign counterparts from the outset of proceedings.

Although the JIN guidelines may not end turf wars between appointees, they are likely to bring these disputes before the courts at an earlier stage, to open the debate to the relevant courts, and to promote collaboration rather than conflict, and these aspects alone may well promote a culture of cooperation that will benefit stakeholders in cross-border insolvency procedures.

17. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

Section 163 IA gives the court power to appoint a liquidator over an insolvent company that is not incorporated in the BVI, but only if that company has a sufficient connection to the BVI. Such a connection will exist if the company has or appears to have assets in the BVI, if it is carrying on or has carried on business in the BVI, or if there is a reasonable prospect that the appointment of a liquidator in the BVI will benefit the creditors of the company. Even if such a connection is established, the BVI court retains discretion regarding whether or not to appoint a liquidator. The court may appoint provisional liquidators to protect and preserve the assets of foreign companies; however, schemes, plans, and creditors' arrangements are not available, though it is possible to migrate a foreign company to the BVI for the purpose of making use of the various restructuring procedures.

In KMG International NV v DP Holding SA BVIHC (COM) 144 of 2016, unreported (10 May 2017), the BVI court considered the question whether or not a liquidator appointed by a Swiss Court over a Swiss company that had a number of subsidiaries incorporated in the BVI could take control of and liquidate assets held by BVI companies merely by changing their boards and without the assistance of the BVI court. The creditor, KMG,



had applied for the appointment of a liquidator over DP Holding in the BVI, but DP Holding had applied to stay the proceedings on forum grounds, stating that although the BVI court had a power to appoint a liquidator over an insolvent company, it should not do so in the circumstances, as Switzerland was clearly the most appropriate forum for the liquidation.

KMG said that the BVI was the appropriate forum because the Swiss liquidator could not exercise DP Holding’s property rights without the assistance of the BVI court, and dealing with DP Holding’s shares in its subsidiaries, including by exercising voting rights in relation to those shares, constituted dealing with DP Holding’s property situated in the BVI. KMG also argued that what the Swiss liquidator would seek to do would be to bring about the liquidation of the BVI companies, in relation to which the Swiss liquidator would need the assistance of the BVI court.

DP Holding said that if a liquidator were to be appointed in Switzerland, its authority would displace the authority of DP Holding’s directors, and there would be no impediment on the exercise of DP Holding’s voting rights in relation to its subsidiaries. It would not be the liquidator exercising DP Holding’s voting rights, but the company exercising its own voting rights, through the agency of the liquidator as its representative. There was no statutory or common-law rule that prohibited any foreign liquidator from exercising voting rights that attached to shares belonging to a company in liquidation. The company’s constitutional documents established that the question whether or not a Swiss liquidator was properly appointed to represent the voting rights at the meetings of the members of the subsidiaries would be determined by the law under which that person was constituted, in this case, the law of Switzerland. Additionally, there was no reason to suppose that the BVI subsidiaries would need to be liquidated in the BVI. Their assets could be realised, their creditors paid, and the net proceeds distributed to DPH. The companies could then be left as empty shells or put into voluntary solvent liquidation and dissolved administratively without the involvement of the court.

Giving the judgment of the BVI Commercial Court, Wallbank J stated that although there might be situations in which a foreign liquidator would find it desirable to obtain the BVI court’s assistance, there is no requirement on him to do so. A foreign liquidator who causes the company of which he is liquidator to exercise its voting rights in BVI companies does not seek to exercise his statutory remit in a jurisdiction to which it

does not extend. The judge also held that even if the BVI subsidiaries needed to be liquidated, it would not be the Swiss liquidator qua liquidator who would be doing this. Accordingly, KMG had not succeeded in showing that the BVI was clearly or distinctly the appropriate forum by raising the possibility that a foreign liquidator might in some circumstances need or want to obtain the BVI court's recognition.

An appeal from this decision was heard by the Eastern Caribbean Court of Appeal in 2017, and the decision is pending. If the Court of Appeal upholds the decision of Wallbank J, this decision is likely to be important for foreign appointees who prefer not to seek recognition in the BVI, and instead exercise voting rights attached to shares over which their office gives them control; however, it might still be open to an applicant to seek to restrain an office-holder whose office or appointment offends public policy. An example of such a situation arises from the line of authorities from a variety of jurisdictions to the effect that a court cannot allow the claims of a foreign office holder who is effectively acting for the sole benefit of a revenue or penal authority of another state, because to do so would be to facilitate or permit the indirect enforcement of a foreign penalty or revenue claim: see, eg, Peter Buchanan Ld and another v McVey [1955] AC 516 (Note), in which this principle defeated a clear claim for fraud brought in the name of a company in liquidation, Government of India, Ministry of Finance (Revenue Division) v Taylor [1955] AC 491, QRS 1 ApS and others v Frandsen [1999] 1 WLR 2169, and Relfo Ltd (in liquidation) v Varsani [2008] 4 SLR 657, [2008] SGHC 105 (High Court of Singapore). Although the exercise of the company's voting rights in respect of its shares in subsidiaries would not involve the court entertaining a claim that was an indirect enforcement of a foreign revenue or penal action, the decision of Wallbank J may indicate a route by which such claims can be satisfied away from the court's supervision and public-policy concerns circumvented.

18. How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

There are no specific provisions of the IA that deal with the restructuring or liquidation of groups, though it is possible that an arrangement could be tailored towards rescuing a group of companies in financial difficulties. In such a situation, the relevant approvals

would be needed from the different classes of stakeholder and (save in the case of creditors' arrangements) the court would need to be satisfied that the arrangement satisfied the relevant requirements. Although a creditors' arrangement might be formulated to rehabilitate a group of companies, there might be a greater risk that a disgruntled shareholder or creditor might allege that their interests were unfairly prejudiced.

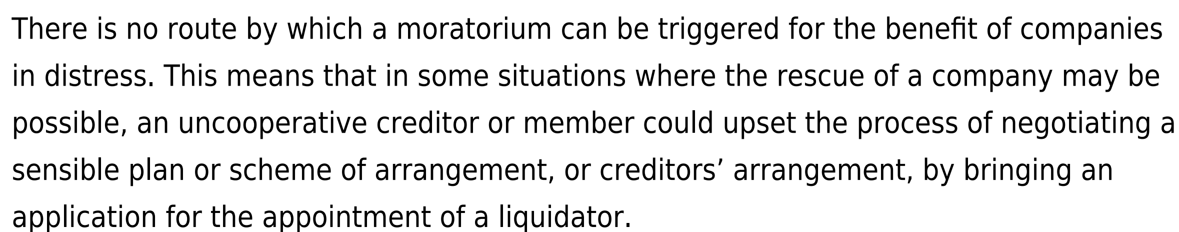
19. Is it a debtor or creditor friendly jurisdiction?

While there are measures that are designed to protect both types of stakeholder, and the BCA provides significant advantages for companies while they are solvent, the onset of insolvency triggers a number of important protections for creditors. As such, the BVI is likely to be seen as a creditor-friendly jurisdiction. There is no real parallel to the 'debtor-in-possession' principle that applies in some jurisdictions, and, as noted above, company directors only retain such powers after the making of a liquidation order as the liquidator permits.

20. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

As noted above, there are relatively few categories of preferential creditors. Because BVI companies generally operate exclusively outside the BVI, there is rarely any specific public-policy issue concerning employees or other protected group within the territory. In addition, many BVI companies are holding companies, so do not employ significant numbers (other than directors, local agents, and other professionals).

What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?



There is no route by which a moratorium can be triggered for the benefit of companies in distress. This means that in some situations where the rescue of a company may be possible, an uncooperative creditor or member could upset the process of negotiating a sensible plan or scheme of arrangement, or creditors’ arrangement, by bringing an application for the appointment of a liquidator.

In addition, the BVI has not developed the role of the provisional liquidator as a route by which a company may be restructured. It is not known whether or not there are any proposals to remedy these shortcomings.

Finally, the BVI has not brought provisions enacting the UNCITRAL Model Law into force, so the routes by which a validly appointed foreign office-holder can seek recognition and support are limited.