INSOL INTERNATIONAL

ESG IN RESTRUCTURING

BRITISH VIRGIN ISLANDS

1. General overview of the restructuring regime

1.1 Formal restructuring procedures

The BVI Business Companies Act 2004 (BVI BCA) provides the statutory framework for a BVI company to undertake a restructuring. The BVI BCA allows a BVI company to approve a plan of arrangement to restructure the company's affairs or enter into a compromise or arrangement with any class of its creditors or any class of its members. There are no statutory restrictions on the types of debts, liabilities or claims against the company that can be restructured under the BVI BCA.

1.1.1 Plan of arrangement

Under section 177 of the BVI BCA, the board of directors of a BVI company is permitted to approve a plan of arrangement to restructure the company's affairs, which might involve:

- a reorganisation or reconstruction of a company;
- a merger or consolidation of one or more companies with one or more other companies, if the surviving company or the consolidated company is a company incorporated under the BCA;
- a separation of two or more businesses carried on by a company;
- 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;
- 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;
- a dissolution of a company; or
- any combination of any of the above.

Once directors have resolved to approve a plan of arrangement, they must then make an application to the BVI court for approval of the proposed arrangement. At the hearing (which is normally referred to as the first hearing), the court has the power to:

- determine what notice, if any, of the proposed arrangement is to be given to any person;
- determine whether approval of the proposed arrangement by any person should be obtained and the manner of obtaining the approval;
- determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of their shares, debt obligations or other securities;
- conduct a hearing and permit any interested person to appear; and
- approve or reject the plan of arrangement as proposed or with such amendments as it may direct.

Once the court has approved the plan of arrangement, the directors may, if they still wish to proceed, confirm the plan as approved by the court and then give notice of the plan to each person who the court requires notice to be given, and obtain the consent of each person whose consent the court has indicated is required. Once all relevant consents and approvals are in place, the directors should prepare the articles of arrangement (which include the plan of arrangement and the relevant court order) and file them with the BVI Registrar of Companies. The Registrar will issue a certificate in approved form and the arrangement has effect from the date of registration (or on such later date, up to 30 days later, as may be specified in the articles).

In practice, the court will usually prescribe which persons must be given notice and which persons must give their consent at the first hearing and will then fix a subsequent hearing date (the second hearing) at which all of the relevant persons would normally be expected to attend and comment on the plan of arrangement. In the normal course of things, the court will usually require the widest possible notice of the proposed arrangement to be given and will expect any person who might dissent or be adversely affected to be given the fullest opportunity to make their objections known. The plan is fully approved at the second hearing after the court is satisfied that all of the relevant parties have either received the necessary notice or given consent.

Many of the plans of arrangement in the BVI are entirely consensual and the relevant parties have all agreed to the relevant plan in advance. Plans of arrangements are often used to take advantage of extreme flexibility of BVI company law to reorganise groups in a single stroke in a way which might be time consuming, expensive or otherwise undesirable if done in a series of individual steps. They simply provide an expedited system for taking a series of steps and can be used to sidestep "chicken-and-egg" problems which can bedevil complicated reorganisations.

Where plans of arrangement are contested, the court will be particularly mindful of the risk of imposing an arrangement that may unfairly prejudice the rights of a particular stakeholder. Inevitably, where there is disagreement, one party is going to be disappointed with the outcome, but the presupposition is that maintaining an uncomfortable status quo is preferable to stripping a party unwillingly of its rights. However, unlike a scheme of arrangement or a creditor's arrangement, there are no specific approval thresholds which must be met. The court will specify the approvals and the requisite majority required and will normally follow any requirements specified in the memorandum and articles of association of the company.

In the event there are dissenters, the BVI BCA[1] provides that on an application to approve a plan of arrangement, the court may determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of the relevant shares, debt obligations or other securities held. The court may also permit any interested person to appear at a court hearing. If the court makes such a determination, its order should structure the method by which dissenters raise their objections and be bought out at fair value. The BVI BCA[2] entitles members of a company who dissent to a plan of arrangement to receive payment of the fair value of their shares and gives the process for the member to exercise this right to payment. Section 179 of the BVI BCA outlines the process for a shareholder to dissent but the section does not refer to holders of shares, debts or other securities. The expectation would be that the valuation mechanisms given in section 179(9) of the BVI BCA would apply to both shareholders as well as the holders of debt and other securities.

1.1.2 Scheme of arrangement

A compromise or scheme of arrangement commences when the company devises, and the company's creditors agree, to a proposal by the company. A proposal must include an explanatory statement, a restructuring framework agreement, a term sheet and a practice statement letter.

When the company and its stakeholders have reached a compromise, the formal process commences with an application to the court for directions on the convening of a meeting of scheme creditors as the parties to the compromise or scheme. The BVI BCA allows a range of persons to make the application – the company, a member of the company or an administrator, voluntary liquidator or liquidator (as applicable).

Administration and insolvency are governed by the Insolvency Act 2004 (Insolvency Act). However, the statutory provisions relating to administration are not in force in the BVI.

The existing management of a company remains in control of the company during its restructuring under a scheme.

A court-sanctioned scheme of arrangement follows the following process:

- the company makes an application to the court by way of a claim form, usually *ex parte*, seeking leave to convene a meeting of creditors. The application usually gives details of the location and time for a scheme

1 BVI BCA, ss 177(4)(c), 177(4)(d).
2 *Idem*, s 179.

meeting, the name of the proposed person to act as chairperson for the scheme meeting and if necessary, the appointment of a foreign representative. The application usually requests a hearing date for the court to sanction the scheme subject to approval by creditors. The company's supporting affidavit will exhibit for the court the company's scheme supporting documents such as the restructuring support agreement and practice statement letter;

- the BVI BCA requires the approval of 75% in value of the creditors or class of creditors or members or class of members present in person or by proxy of any compromise, if sanctioned by the court. Any application to the court to convene a scheme meeting must confirm to the court that the statutory quorum is attained. At the sanction hearing, therefore, the court is not considering the merits or fairness of the scheme.[3] To determine whether to grant leave to convene a scheme meeting, the court considers:
  - whether it has jurisdiction to make the order for the company to convene a meeting of creditors under the relevant BVI BCA provision;
  - whether the scheme has a reasonable prospect of success;
  - the classes of creditors proposed by the scheme;
  - the notice, timing and conduct of the scheme meeting; and
  - the documentation to be approved at the scheme meeting;
- following a scheme meeting, the company is required to obtain the court's sanction of the scheme. The company must therefore file further supporting evidence of the steps taken to advertise the scheme meeting and report on the outcome of the scheme meeting. The evidence should specify the documents supplied by the company to creditors, confirm whether the requisite majority of creditors approved the scheme and enclose the chairperson's report of the scheme meeting. At the hearing to sanction the scheme, the court seeks to be satisfied that:
  - the statute was complied with;
  - the class of creditors affected were fairly represented by those who attended the scheme meeting so that the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to the class they purport to represent; and
  - the scheme as approved is one that an intelligent and honest person, as a member of the affected class acting in the person's best interests, might reasonably approve.[4] A scheme sanctioned by the court is binding on all creditors or class of creditors or members or class of members and on every person liable to contribute to the company's assets in the event of its liquidation.

There is no provision for dissenters' rights. There is also no requirement for any form of official supervision of the scheme of arrangement (beyond the requirement of court sanction).

A court order sanctioning a successful scheme has no effect until the company files a copy of the court's order with the Registrar of the BVI Registry of Corporate Affairs.

1.1.3 Soft touch liquidation

The traditional appointment of a provisional liquidator under the Insolvency Act occurs where an application to appoint a liquidator is pending determination and it is necessary to make the appointment. The court needs to be satisfied the appointment is necessary for the purpose of maintaining the value of the assets owned or managed by the company or it is in the public interest. The provisional liquidator has all the rights and powers of a liquidator as is necessary to preserve the company's assets.

3 BVIHC(COM) 2022/0008 *In the Matter of Rongxingda Development (BVI) Ltd*, Judgment 1, 13 April 2022.
4 *Ibid*.

Significantly, however, the BVI court for the very first time in the *Constellation* matter in February 2019 appointed provisional liquidators in aid of restructuring over six BVI companies[5] and stayed proceedings against the companies. As explained in *Constellation*, the essence of a "soft touch" provisional liquidation is that a company remains under the day-to-day control of the directors but is protected against actions by individual creditors. The purpose is to give the company and its group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation. The court described this option as potentially appropriate where there is no alleged wrongdoing of the directors. The application was described as a protective measure serving the primary purpose of warding off predatory creditors who could commence satellite *ex parte* actions against the BVI subsidiaries in an attempt to gain an advantage over creditors generally.

In *Constellation*, the holding company was insolvent being unable to pay its debts as they fell due. Therefore, the holding company, along with its subsidiary companies, embarked on a major cross-border restructuring involving a Brazilian judicial reorganisation and a United States Chapter 15 recognition application. The group had a complex, integrated, multi-national corporate structure and debt structure, thereby requiring relief from the BVI and United States courts. The company applied to the BVI court to support and facilitate the restructuring through the Brazilian process, already supported by the Chapter 15 proceedings. The company's largest unsecured creditor, being owed US $1 billion out of a US $1.5 billion debt, also supported the company's application for the appointment of provisional liquidators. The decision made it clear that the application did not seek the recognition of an international insolvency or foreign representative under the Insolvency Act. Therefore, the principles of modified universalism as discussed in *Rubin v Eurofinance*[6] and *Cambridge Gas*[7] did not arise. Likewise, the issue of legislation impliedly excluding the use of common law powers as arose in *Singularis*[8] did not apply.

The *Constellation* decision has established that when seeking the appointment of soft touch liquidators, the court need not be satisfied that a restructuring will occur. From the English authorities followed by the court, the only requirement is to show "some prospect" of promoting a restructuring. Historically, a distinction has been drawn between applications for provisional liquidator appointments made by the company as opposed to its creditors. If the company itself makes the application or consents to it, "the appointment is almost a matter of course."[9]

1.2 Informal restructuring procedures

There are two main informal restructuring options available in the BVI, both prescribed by the Insolvency Act: the out of court appointment of a liquidator by a members' qualifying resolution and a creditors' arrangement (an agreement between the company and its creditors to restructure the company's debt).

1.2.1 Member appointed liquidator

The Insolvency Act allows members of a company to pass a qualifying resolution to appoint an eligible insolvency practitioner as a liquidator of the company. The court's approval is not necessary for a member appointed liquidation to be valid. The resolution appointing the liquidator marks the date of the commencement of liquidation of the company. A qualifying resolution is defined in section 159 of the Insolvency Act as one that is passed at a properly constituted meeting of the company by a majority of 75%, or any higher majority that the company's memorandum or articles of association requires, who are present at a meeting and entitled to vote on the resolution. The proposed liquidator must provide his / her consent to act. The Insolvency Act bars members of a foreign company from passing a resolution to appoint a liquidator. Similarly, members of a regulated company must first give five days' written notice to the Financial Services Commission of a resolution to appoint a liquidator. Members of a company cannot appoint a liquidator if there is a pending application to the court for a liquidator to be appointed, or a liquidator has been appointed by the court or the proposed liquidator has not consented to being appointed.

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5 BVIHCM 2018/0206, 0207, 0208, 0210, 0212 *In the Matter of Constellation Overseas Ltd and five others*, Adderley, J, 5 February 2019.

6 [2013] 1 AC 236.

7 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigation Holdings Plc* [2006] UKPC 26.

8 *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36.

9 *Palmer's Company Law*, referred to in *Re Union Accident Insurance Co Ltd* [1972] All ER 1105.

The liquidator on appointment has restricted functions until 14 days has elapsed, at which time the liquidator is required to convene a meeting of the company's creditors. The liquidator's restricted activities include:

- taking the company's assets into his / her custody and control;
- disposing of perishable goods and other assets that will diminish in value if they are not disposed of immediately; and
- doing everything necessary to protect the company's assets. If the liquidator desires to engage wider powers given to a liquidator prior to the meeting of creditors, he / she must obtain the court's sanction. The objective of the creditors' meeting is to allow the liquidator to give an account of the steps he / she has taken, to appoint a creditors' committee and, if the creditors determine, to replace the member appointed liquidator. If the parties dispute the replacement of the liquidator, they have liberty to apply to the court to resolve the appointment.

1.2.2 Creditors' arrangement

Section 14 of the Insolvency Act allows a company to enter into a compromise with its creditors. The compromise is then implemented with the supervision of an insolvency practitioner appointed as a trustee or otherwise. The arrangement may cancel or vary all or any part of a liability of the debtor, vary the rights of the debtor's creditors or the terms of a debt and include any other provision that may be prescribed. The arrangement cannot affect the rights of the company's secured creditors to enforce their security interest or vary the liability secured by the security interest or result in a preferential creditor receiving less than it would receive in a liquidation if liquidation were commenced at the time of the arrangement. Sureties or co-debtors of a company remain liable to the company unless the terms of the arrangement expressly provide otherwise. Regulated companies entering into a creditor's arrangement are required to give notice to the BVI Financial Services Commission.

For a creditors' arrangement, the board of the company remains in place. The Insolvency Act provides that if the company is not in liquidation or administration, the company's board may propose an arrangement and nominate an interim supervisor to act in relation to the proposed arrangement if it believes on reasonable grounds that the company is insolvent or is likely to become insolvent, and it has passed a resolution stating its belief that the company is insolvent or is likely to become insolvent.

The resolution should approve a written proposal containing the information prescribed and nominate an eligible insolvency practitioner to act as interim supervisor. It becomes an offence if a director signs such a resolution without having reasonable grounds for believing the company is insolvent or likely to become insolvent. The company passing such a resolution is then required to provide the nominated insolvency practitioner with a copy of the resolution passed, a copy of the board-approved proposal, the company's statement of affairs no older than two weeks before the date of the appointing resolution and a notice of intention to appoint the nominated insolvency practitioner as interim supervisor.

The proposed insolvency practitioner is required, if he / she accepts the appointment, to deliver notice to the company's board within five days from the date of the resolution. The interim supervisor's appointment takes effect from the date the endorsed notice is delivered to the board. Any appointment of an interim supervisor by a company in liquidation has to occur via the liquidator. The interim supervisor's appointment takes effect when he / she returns the endorsed notice to the liquidator. Where a liquidator intends to make a proposal, he / she may act as the interim supervisor himself / herself or can appoint someone else. There are no restrictions on the types of debts, liabilities or claims that parties can agree to restructure in the BVI.

If a company is a regulated entity, it will be subject to the restriction in the Insolvency Act that it must first notify the Financial Services Commission of an intention to restructure and / or the terms of the restructuring. Similarly, the liquidation of a foreign company that is deemed to be connected to the British Virgin Islands will require the court's involvement. A foreign company is a body corporate incorporated, registered or formed outside the British Virgin Islands. Under the Insolvency Act, a foreign company is deemed to have a connection with the British Virgin Islands if it has assets, or appears to have assets, in the Virgin Islands, it is carrying on or has carried on business in the Virgin Islands, or there is reasonable prospect that the appointment of a liquidator of the company will benefit the creditors of the company. Where an arrangement is approved, the company is to take steps to put the appointed supervisor into possession of the company's assets.

2. Restructuring of ESG-related liabilities

2.1 Environmental (E): restructuring environmental liabilities

The liability for environmental obligations is not contained in one statute in the BVI but is imposed by multiple statutes. The Ministry of Natural Health & Resources has confirmed that it now has a draft of a comprehensive environmental law to be presented to the House of Assembly shortly. The obligations imposed under BVI law include the following:

- the Ports Authority Act;
- the Radioactive Minerals Ordinance, Cap 152;
- the Prevention of Oil Pollution Act 1971 (Overseas Territories) Order 1982;
- the Merchant Shipping (Prevention of Oil Pollution) Order 1983;
- the Merchant Shipping Act 2001;
- the BVI Electricity Corporation Ordinance with the BVI Electricity Corporation (Renewable Energy) Regulations 2018;
- the United Kingdom Food and Environment Protection Act (1985);[10]
- the Food Security and Sustainability Act; and
- the Environmental Protection and Tourism Improvement Fund Act 2017 (the Environmental Protection Fund Act).

2.1.1 Types of environmental liabilities

The Ports Authority Act imposes liability on the owner or master of a vessel which causes any damage, pollution or injury to the marine environment, or the marine life of the BVI. The sums payable for any damage caused will be recoverable in civil proceedings as a debt to the Port Authority or the Crown. Vessels involved in pollution or damage may be seized and detained until the estimated cost of repairing the damage or clearing the pollution has been fully paid or the Crown or a security has been given to the Port Authority.

The Radioactive Minerals Ordinance prohibits mining within the BVI for radioactive minerals without a licence. Liability for offences under the Act, upon summary conviction or on conviction on indictment, consists of imprisonment with hard labour for 12 months or a fine of US $25,000 or both.

The United Kingdom Food and Environmental Protection Act 1985 imposes the requirement to obtain a licence for the deposit of substances and articles into the sea or incineration at sea. It is an offence to do anything requiring a licence without a licence and a person shall be liable on summary conviction to a fine not exceeding £50,000. On conviction on indictment, a person is liable to a fine or to imprisonment for a term of not more than two years or to both.

The Prevention of Oil Pollution Act 1971 (Overseas Territories) Order[11] enables taking measures to prevent, mitigate or eliminate grave and imminent danger to the coastline or related interests from pollution or threat of pollution of the sea by oil, following a maritime casualty. Such measures may include those permitted under the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, opened for signature in Brussels on 29 November 1969.

The BVI Electricity Corporation (Renewable Energy) Regulations 2018 govern the process for the creation and use of renewable energy generation systems. The Regulations stipulate that persons setting up renewable energy systems must obtain the relevant authorisation, grant or permit called a “green energy licence”.

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10 Extended to the BVI by section 26 of the Environment Protection (Overseas Territories) Order 1988 No 1084.

11 Extends to the BVI with the exceptions and modifications specified in Schedule 2.

Failure to obtain a permit is an offence liable on summary conviction to a fine not exceeding US $5,000 or an imprisonment term not exceeding three months or both. For each day the offence continues, the fine is US $500 per day. For a corporate entity, the fine is US $10,000 on summary conviction. For each day the offence continues, the fine is US $1,000 per day.

The Environmental Protection Fund Act regulates the collection of funding to be used for the protection and improvement of the environment, the tourism product and for incidental matters. It imposes a US $10 charge to non-residents arriving by sea or air collected by Financial Secretary to be paid to the Environmental Protection and Tourism Improvement Fund.

2.1.2 Priority given to environmental liabilities

There are no priorities given to environmental liabilities under the insolvency laws of the BVI.

2.1.3 Disclaimer of environmental obligations

Section 217 of the Insolvency Act defines onerous property as an unprofitable contract or assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act. The liquidator of a company may file a notice of disclaimer with the court, thereby disclaiming onerous property of the company even though the liquidator has taken possession of it, has tried to sell or assign it or otherwise exercises rights of ownership in relation to the property.

In the absence of any special provisions governing the disclaiming of environmental obligations, section 217 of the Insolvency Act applies.

2.2 Social (S): restructuring health or safety-related liabilities

In the absence of any statutory provisions to the contrary, health and safety related liabilities are restructured in the same way as ordinary debt claims. There are no special restrictions or conditions applicable when restructuring such liabilities.

2.2.1 Types of health and safety-related liabilities

Under the Public Health Act, the Minister for Health is responsible for promoting and preserving the health of the inhabitants of the BVI. Premises serving the public are liable to inspection by the Minister and his / her agents. If an owner receives a notice to carry out remedial works, if those works are not undertaken, the Minister may obtain an order for the premises to be closed. Similarly, where there is a communicable disease in the territory, the Minister may restrict the assembling of persons together. Any person who is present at, promotes or aids the promotion of a prohibited assembling may be convicted by summary process and liable to a fine of US $1,000 and to imprisonment for 12 months.

2.2.2 Treatment of health and safety-related liabilities

Health and safety-related liabilities do not have specific priority under the Insolvency Act. Schedule 2 of the Insolvency Rules outlines the preferential claims and their maximum amounts that will be regarded as preferential. They include:

- sums due to a person as a present or past employee of the debtor that represent, *inter alia,* wages and salary due six months prior to the liquidation date or accrued holiday pay incurred before liquidation to the maximum of US $10,000;

- without limit, any sums payable to the BVI Social Security Board in respect of employee contributions deducted from the employee and in respect of an employer's contributions payable for the six months immediately before liquidation;

- sums due for pension contributions in respect of medical insurance payable within 12 months immediately before the liquidation of the debtor to the maximum of US $5,000 in respect of each employee;

- sums due to the BVI Government for any tax, duty, licence fee or permit to the maximum of US $50,000 and

- sums due to the BVI Financial Services Commission in respect of any fees or penalty to the maximum sum of US $20,000.

2.3 Governance (G): third party releases in favour of directors and officers of the company

The BVI BCA is silent on the power of the court to allow third parties to receive releases of liability under a restructuring plan whether or not it relates to liabilities of a director or officer in relation to potential claims against them personally.

3. Protection of stakeholders' interests

3.1 Environmental (E): influence by environmental protection authorities or environmental advocacy groups in a restructuring

The involvement of the court in approving a restructuring plan and the relevant considerations are outlined in section 1 above. The court is therefore not concerned with wider public interest considerations and there are no other regulatory bodies involved in the approval of a restructuring plan in the BVI.

3.1.1 Approving a restructuring plan

The relevant factors the court will consider when approving a plan of arrangement or a scheme of arrangement are considered in section 1 above and do not include the views of other regulatory bodies, including environmental protection authorities.

3.1.2 Discretion to consider wider public interest concerns

The court, being the only approving body for a plan or scheme of arrangement, is not concerned with wider public interest considerations.

3.1.3 Influence by environmental protection authorities or environmental advocacy groups in a restructuring

Environmental protection authorities and advocacy groups do not have standing to air their views or concerns in a restructuring. Most BVI companies that will be subject to restructurings or rescue procedures are generally holding or finance companies with operations elsewhere in the world. Environmental matters will therefore be subject to the legislation of the countries in which the operations are based.

3.2 Social (S): influence by labour authorities, unions or employee / worker advocacy groups in a restructuring

In the BVI, there are no provisions giving labour authorities, unions or employee / worker advocacy groups standing to air their views in a restructuring.

The courts may consider employment issues in terms of any employees who meet the criteria for a preferential creditor as determined by the Insolvency Act in the event of liquidation proceedings.

3.2.1 Approving a restructuring plan

As noted, labour authorities play no role in the approval of a restructuring plan.

3.2.2 Discretion to consider wider public interest concerns

The BVI court, as the sole approving body for a restructuring plan, does not have discretion to consider the wider public interest concerns.

3.2.3 Protection of employee rights

Most BVI companies that are subject to restructuring or rescue procedures are holding or finance companies with operations elsewhere in the world. Most often, these companies will have no local BVI employees. Employment contracts and environmental matters will therefore be subject to those other countries' legislation where that company's operations are based.

3.3 Governance (G): board / management conflicts addressed in a restructuring

As a matter of general law, where a company becomes insolvent, the directors' duties switch from considering the best interests of the company's shareholders, to prioritising interests of the company's creditors. Directors are expected to exercise their powers in the best interests of the company's creditors until such times as solvency is restored, or the company goes into liquidation. The BVI court treats decisions of the English Supreme Court as highly persuasive. The BVI court is therefore likely to follow the principles of the court outlined in the recent Supreme Court decision in *BTI 2014 LLC v Sequana SA,*[12] and as articulated in *West Mercia Safetywear Ltd v Dodd.*[13]

The "interests of the company's creditors" means the interests of its creditors as a general body, not the interests of particular creditors.

The BVI BCA deals with the potential conflict that directors may encounter when performing their duties. A director of a BVI company is required, forthwith after becoming aware of the fact that he or she is interested in a transaction entered into or to be entered into by the company, to disclose his or her interest to the full board of the company and / or to the shareholders of the company.

Directors are also subject to the common law duty to avoid actual or potential conflicts of interest.

Where a company, in formulating its restructuring plan, offers an instruction fee, this is usually offered to creditors. We have guidance from the BVI court that a payment of a 1.5% instruction fee to creditors committed to supporting a scheme would not create a separate class. Further English authority supports the position that a fee of up to 2.5% would not fracture a class of creditors.[14] There is no authority on payments to board members or management.

4. "Soft law" framework

4.1 Environmental (E): industry guidelines and / or best practices that are prescribed for the protection of the environment in a restructuring

As previously highlighted, many BVI companies are by nature holding or finance companies with operations outside of the BVI. Nevertheless, there are no soft law instructions available to guide or influence a BVI company to take environmentally responsible actions or decisions in a restructuring context.

4.2 Social (S): industry guidelines and / or best practices that are prescribed for the protection of employee rights in a restructuring

The BVI has no soft law instruments that guide or influence a company to take actions or decisions that protect an employee's interests especially in a restructuring context.

4.3 Governance (G): industry guidelines or codes of conduct relating to the avoidance of conflicts of interests that restructuring professionals are subject to

Insolvency practitioners are governed by the Insolvency Code of Practice (issued under section 487 of the Insolvency Act). Chapter IV sets out the ethical principles that a licensee must comply with in conducting all insolvency work. The principles are integrity, objectivity, competence, due skill and courtesy. The Code notes that the greatest threat to an insolvency practitioner's objectivity is likely to be a conflict of interest. An

12 [2022] UKSC 25.
13 [1988] BCLC 250.
14 *In Re RongXingDa Development (BVI) Ltd* (Judgment No 1) BVIH (COM) 8 of 2022 (13 April 2022).

insolvency practitioner must be aware of actual or potential conflicts of interest in the form of self-review threats and self-interest threats.

A self-review threat to objectivity may arise where an insolvency practitioner, or his or her firm, has or had a material professional relationship with the company or individual in relation to which or whom insolvency work is performed. The threat that lies behind a material professional relationship is that the licensee, who is the custodian of what are often competing interests in the prosecution of insolvency work, may improperly and inappropriately favour one or more of these interests. In that way, an insolvency practitioner's objectivity would be lost. Any such relationship would usually require the insolvency practitioner to decline insolvency work.

A self-interest threat is one that could affect the reasoning an insolvency practitioner applies because it is, or might be, affected by considerations that either favour or are prejudicial or disadvantageous to the insolvency practitioner.

In particular, the Code states that it is improper for an insolvency practitioner to be influenced by a significant financial or other benefit accruing, or which might accrue, or the avoidance of disadvantage, to himself or herself or to anyone with whom he or she is associated or connected.

The special nature of insolvency appointments makes it inappropriate to pay or offer any valuable consideration for the introduction of insolvency appointments. This does not, however, preclude an arrangement between an insolvency practitioner and a bona fide employee whereby the employee's remuneration is based in whole or in part on introductions obtained for the insolvency practitioner through the effort of the employee.

5. ESG in financing

5.1 ESG-linked loans, bonds or investments

There are no specific ESG-linked loans or bonds observed in the BVI. Nevertheless, the BVI Government and banks are alert to the need for green financing. The BVI Government promotes the adoption of measures and projects that are environmentally friendly. Local banks also state their own commitment to protect and preserve the BVI's natural resources and to sustainable development. There are, however, no such loans available as "green loans."

5.2 Financial institutions (banks and funds) and their commitment to achieve ESG targets

The BVI has seven entities that are licenced to provide banking services in the BVI. There are no legal requirements for financial institutions to sign onto commitments to achieve ESG targets in their lending and investment portfolios or to apply ESG risk management policies such as the United Nations Environment Programme Net-Zero Banking Alliance. Individual banks nevertheless adopt strategies as they consider appropriate. For example, one bank is included in the new sustainability indices launched by SIX Swiss Exchange – which are guided by the three internationally recognised standards comprising the UN Global Compact, the UN Guiding Principles for Business and Human Rights and the International Labour Organisation Labour Standards, together with the controversies identified by MSCI.[15] Another bank became an official signatory to the Global Principles for Responsible Banking in September 2020 and has aired its commitment to align with the Paris Agreement. This bank has pledged to lend, invest and arrange US $200 million by 2025 and has expressed its intention to achieve a net-zero greenhouse-gas emissions in its financing activities by 2050.[16]

5.3 Promoting ESG by the central bank and regulators

The BVI Financial Services Commission acts as the regulatory body for banks in the BVI. There are no known policies promulgated by the FSC to promote ESG in financing. Banks are therefore free to adopt the policies they deem appropriate for ESG funding.

15 VP Bank (BVI) Limited, https://vg.vpbank.com/en/about-us/responsibility/group-sustainability.

16 The Republic Bank, https://www.republictt.com/republic-journal/sustainable-development-goals-our-commitment-you-environment-clean-energy.

INSOL International, 6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

INSOL INTERNATIONAL