

Bermuda

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Bermuda is a major offshore business jurisdiction with more than 13,500 registered companies in the international business sector. In the insurance and reinsurance sector alone there are close to 1,500 companies. Bermuda's commercial insurance and reinsurance market is one of the three leading markets in the world (along with London and New York). These factors lead to a high percentage of restructuring and insolvency cases involving an international element.

Most of the legislation dealing with corporate restructuring and insolvency is contained in the Companies Act 1981 and the Companies (Winding Up) Rules 1982. There are also certain other statutes that deal with areas such as insurance, reinsurance, mutual funds and segregated accounts companies.

Bermuda law in this area is based closely on the law that was applicable in England and Wales prior to the introduction of the Insolvency Act 1986. There is no provision in Bermuda law for administration or company voluntary arrangements. The procedures available for dealing with companies in financial difficulty are as follows:

- Liquidation – a collective procedure for the benefit of creditors in which the company's operations are dismantled and its assets realised and distributed to creditors, with any surplus being returned to the shareholders;
- Receivership – a procedure benefiting only the secured creditor, which is entitled to appoint a receiver over some or all of the company's business and assets, with the aim of realising sufficient assets to pay the creditor; and
- Scheme of arrangement – a procedure which can be used to restructure a company or its debts to achieve, for example, a better management of the payment of its creditors and/or its winding-up.

I. The legal framework and the effectiveness of court processes/legal remedies

1.1 Describe the nature and the effectiveness of the following:

(a) Debt recovery remedies where the debtor has no security

An unsecured creditor may pursue an action against the company in the magistrates court (up to Ber\$25,000) or in the Supreme Court (above Ber\$25,000). The process may be time consuming if the action is defended. Pre-judgment relief may be obtained by way of an interim injunction requiring a party to the proceedings to do some act or refrain from some act. The purpose of interim injunctive relief is to safeguard the position of one of the parties pending determination of its rights at the trial of the action. For example, if there is a danger of the company dissipating its assets, the creditor may apply to the court for an order to freeze assets of the company (eg, its bank accounts) to prevent dissipation.

Once the creditor has obtained judgment, this may be enforced by various methods including:

- writ of execution to enforce payment of any damages or costs awarded to it by a judgment or order, pursuant to which a court official will seize goods and property of the company and sell them;
- appointment of a receiver;
- garnishee order; or
- attachment of earnings order requiring payment of income directly to the creditor.

The court processes for enforcing judgments can also be time consuming or difficult.

The creditor can issue a statutory demand in certain circumstances and avoid the time and expense of a legal action. This is a demand which may be issued in respect of an undisputed debt which is due of Ber\$500 or more, requiring the company to pay within three weeks, failing which the creditor may petition for the company to be wound up. Failure to pay a statutory demand is evidence that a company is unable to pay its debts, which is a ground for granting a winding-up order.

A foreign creditor which is a plaintiff in an action may be required to provide security for the defendant's costs under Rule 23 of the Rules of the Supreme Court – for example, by way of bond or letter of credit.

(b) The enforcement of security

Non-Bermudian individuals or entities are prohibited from owning land in Bermuda without a government-issued licence, which is granted only in limited circumstances. Therefore, it is unlikely that insolvency or reorganisation of an international company will involve secured lending and credit issues in respect of immovable property in Bermuda. Accordingly, this section addresses security over personal property only.

The ability of a secured creditor to enforce its claims against a Bermuda company will be affected by the location of the assets of the company and the law governing the security interest granted. It is common for assets to be located in other jurisdictions and for another law to govern the security interest. The enforcement of a security interest will depend on the nature and terms of the security. A security document under Bermuda law will typically give the person entitled to the security the right to appoint a receiver over the property.

The procedure for the private appointment of a receiver depends on the terms of the security document. Typically there will be provision for various events of default upon which the security

holder becomes entitled, among other things, to appoint a receiver. Notice of the default must normally be given to the borrower. If the default is not corrected, the security holder may appoint a receiver to take possession of the assets subject to the security. The powers of the receiver will be established by the terms of the security document and will normally include the power to sell the assets subject to the security.

There are also statutory provisions relating to receivers, including:

- a statutory power for the court to appoint a receiver where this is just and expedient, although this is rarely invoked;
- provisions of the Conveyancing Act 1983 relating to the powers of receivers; and
- provisions of the Companies Act 1981 regulating the activities of both receivers appointed under a security document and those appointed by the court.

A secured creditor remains entitled to enforce its security when the company goes into liquidation, although it will require the leave of the court to continue or commence any proceedings against the company to enforce its security.

(c) Corporate bankruptcy/liquidation processes

Liquidation proceedings under Bermuda law may be voluntary (out-of-court proceedings) or compulsory (winding-up by the court).

Voluntary liquidation: There are two types of voluntary liquidation in Bermuda:

- members' (ie, shareholders') voluntary liquidation – this is a solvent liquidation and is thus not discussed further; and
- creditors' voluntary liquidation, which is an insolvent liquidation.

A company may commence creditors' voluntary liquidation proceedings by passing a resolution to do so at a general meeting of its members. The meeting may also pass a resolution appointing a liquidator. A creditors' meeting is called and the creditors pass resolutions in relation to the appointment of a liquidator and a committee of inspection (the creditors' committee). The creditors' choice of liquidator will prevail over the members' choice.

In a creditors' voluntary liquidation, the liquidator will collect in and realise the assets of the company and adjudicate creditors' claims. The

liquidator will then distribute the assets in payment of creditors' claims, to the extent that assets are available, by way of dividend.

Compulsory liquidation: A winding-up by the court is commenced by the presentation of a winding-up petition and the formal liquidation process starts if a winding-up order is subsequently made against the company. A winding-up petition may be presented by:

- the company;
- its directors (where the company is insolvent);
- one or more creditors or contributories (ie, shareholders and some former shareholders); and
- in certain circumstances, the regulator of the company.

There are a number of grounds for presentation of a petition. The one usually relied upon by creditors is that the company is unable to pay its debts, taking into account contingent and prospective liabilities. A company will be deemed under the Companies Act 1981 to be unable to pay its debts in certain specified circumstances, as follows:

- The company has failed to pay a statutory demand;
- The company has failed to satisfy a judgment against it; or
- The creditor can otherwise prove to the court that the company is unable to pay its debts, taking into account its contingent and prospective liabilities.

A provisional liquidator may be appointed at any time after presentation of the petition and will usually be appointed if there is a need to protect the assets of the company, pending hearing of the winding-up petition, or if the company wishes to attempt to effect a restructuring. The powers of the provisional liquidator may be limited by the order appointing him. The provisional liquidator will take such steps as are necessary to preserve the assets, but will not usually attempt to realise assets or deal with claims.

The permanent liquidator will be appointed after a winding-up order is made as detailed in section 1.2 below. The liquidator will collect in and realise the assets of the company, and adjudicate unsecured creditors' claims and distribute the assets in payment of their claims, to the extent that assets are available, by way of dividend.

Where the company is insolvent, the

effectiveness of the liquidator in realising assets and achieving payment of the debts will often depend upon the extent to which there are assets available to meet the expenses of the liquidation. If there are insufficient liquid assets for this purpose and the creditors are not willing to fund the actions of the liquidator, the liquidator may experience difficulty in achieving significant recoveries for the creditors.

(d) Formal corporate rescue processes

Sections 99 to 101 of the Companies Act 1981 set out the procedure for formal corporate rescues of companies, which are known as schemes of arrangement. A scheme of arrangement may be put into effect as an alternative to liquidation or may be commenced within a liquidation. A scheme of arrangement may be effected between a company and its creditors (or a class of creditors), or between a company and its shareholders (or a class of shareholders). A meeting of each class of creditors (or shareholders) must be held to consider and vote on the proposal for the scheme of arrangement. If a simple majority in number representing 75 per cent or more of the value of the creditors (or shareholders), present (in person or by proxy) and voting at each meeting, vote in favour of the proposal, and the court approves the scheme, the scheme will be binding on all creditors (or shareholders) which are subject to the scheme.

A scheme can be used to compromise or vary the rights of creditors and shareholders in order to restructure the company and allow it to continue in business. Almost any variation of rights can be achieved by the scheme, provided that it constitutes a compromise in which the creditors (or shareholders) will receive something in return.

The Companies Act does not provide for any stay of proceedings against the company while the procedure for approving a scheme is underway. Until such time as the scheme is approved by the court, the company remains vulnerable to actions by creditors, including liquidation proceedings. For that reason, winding-up proceedings will often be commenced and a provisional liquidator appointed before a scheme is proposed, to obtain the protection of the statutory stay, even though it may not be the intention of the company that it be wound up.

(e) Informal corporate rescue procedures

There are no informal corporate rescue procedures as such under Bermuda law. However, companies

are free to attempt to negotiate a compromise with any of their creditors at any time. Such compromises will bind only those creditors which are party to them.

1.2 What are the formal processes to effect a liquidation of the company's assets?

In a compulsory liquidation, the formal liquidation process starts when the winding-up order is made. A provisional liquidator will be appointed when the winding-up order is made; alternatively, if a provisional liquidator has already been appointed, he may continue in office. The Companies Act 1981 requires that meetings of creditors and contributories (shareholders) of the company be held within 30 days of the making of the winding-up order to determine whether an application should be made to the court for the appointment:

- of someone other than the official receiver (or other person appointed as provisional liquidator) as liquidator; and
- of a committee of inspection and if so, its composition.

If the meetings vote in favour of any of these resolutions, an application is then made to the court for the appointment of the person(s) chosen by the meetings as liquidator and the appointment of the committee of inspection (if voted for). The court will generally give precedence to the decision of the creditors' meeting on these issues.

The committee of inspection has various powers and functions which are specified in the Companies Act. The committee represents the creditors and acts with the liquidator.

The liquidator in a compulsory liquidation has various powers specified in the Companies Act 1981, some of which require the approval of the court or the committee of inspection (if appointed), including the power to commence or defend legal proceedings on behalf of the company, and to carry on the business of the company. There are other powers which he can exercise without approval, including the power to sell the company's property, raise funds on security of the company's assets and do any other things as may be necessary for the winding-up. In a creditors' voluntary liquidation, the liquidator has the same powers as a liquidator in a compulsory liquidation, but requires approval for fewer of them.

The liquidator will take steps to collect in and realise the company's assets and will deal with creditors' claims in accordance with the procedure

for proof of claims in the Companies (Winding-up) Rules 1982. The liquidator may pay creditors' claims from time to time during the course of the liquidation by way of dividends.

In a compulsory liquidation, once the affairs of the company have been completely wound up, the liquidator may apply to the court for an order that the company be dissolved from the date of the order.

In a creditors' voluntary liquidation, the liquidator calls final meetings of shareholders and creditors once the winding-up is complete and files a return with the registrar of companies. Following the expiry of three months from registration of the return, the company will be deemed dissolved.

1.3 What is the effect on debt collection and the enforcement of security of:

(a) An adjudication of corporate bankruptcy/liquidation?

After the making of a winding-up order, or prior to that if a provisional liquidator is appointed, there is an automatic stay of all proceedings against the company and proceedings may be commenced or continued against the company only if the court gives leave. Secured creditors are entitled to enforce their security notwithstanding the liquidation proceedings and may continue to do so. A secured creditor is likely to be granted leave to continue or commence proceedings against the company if this is necessary for such enforcement. An unsecured creditor is unlikely to be granted leave to continue or commence proceedings, as the purpose of the liquidation proceedings is to enable the liquidators to realise all of the assets of the company (subject to the interests of secured creditors) and to distribute the assets to unsecured creditors on an equal basis. This process would be undermined if individual unsecured creditors were allowed to bring their own proceedings.

(b) The commencement of a formal corporate rescue process?

There is no automatic stay of proceedings while a scheme of arrangement is in the process of being approved, unless the company is already in liquidation. After a scheme has been approved and implemented, the question of whether a creditor (secured or unsecured) may commence or continue any proceedings against the company will depend upon the terms of the scheme. It is usual for the scheme to include dispute resolution provisions

which displace any rights to bring proceedings which the creditors would otherwise have had; for example, a scheme may provide for all disputes to be dealt with by a scheme adjudicator whose decision will be binding on the company and the creditor.

(c) The initiation of an informal corporate rescue process?

The initiation of informal compromise negotiations by a company has no effect on debt collection, except to the extent that the company reaches agreement with the creditors in question that they will not pursue any remedies against it while negotiations are underway.

1.4 Are insolvency procedures started in another jurisdiction in respect of a corporation incorporated in your jurisdiction recognised? In particular, what would be the impact of US bankruptcy proceedings being commenced?

Bermuda has no legislation expressly dealing with the recognition of foreign proceedings and office holders, with regard to proceedings relating to either companies incorporated abroad or Bermuda-incorporated companies which are subject to foreign insolvency proceedings. The Bermuda courts will recognise the right of a foreign office holder, who can establish that he has been validly appointed, to act on behalf of a company; but the office holder's powers within his own jurisdiction will not be exercisable in Bermuda. Any stay or moratorium on proceedings against a company imposed by a foreign court will not be effective in Bermuda against any party not bound by the jurisdiction of that foreign court.

In recent years, several Bermuda-incorporated companies listed on international stock exchanges have commenced reorganisation proceedings in the United States under Chapter 11 of the US Bankruptcy Code. Typically, the Bermuda company is the holding company of a group which has operating subsidiaries in the United States and other countries. In many instances parallel provisional liquidation proceedings have been commenced in Bermuda, to ensure that the interests of creditors of the Bermuda companies are protected and to obtain the advantage of the stay of proceedings in Bermuda against the Bermuda company imposed upon the appointment of a provisional liquidator. The overall aim of the parallel proceedings is to achieve a restructuring of

the entity in question which will maximise the return to relevant creditors. The Bermuda courts have been willing to allow the board of directors of such companies to remain in office, continue the business of the company and effect the reorganisation of the company through the Chapter 11 process, subject to the control of the US bankruptcy court and the Bermuda court, and to the oversight of the joint provisional liquidators appointed in Bermuda. The joint provisional liquidators in such cases are given certain specific powers, essentially to supervise and oversee the reorganisation. To date, several significant restructurings have completed in this manner, such as those of the Global Crossing Group and the Loral Space & Communications Group.

1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential liability for continuing to trade? In practice, are any such provisions actually enforced?

Directors' duties: Section 97(1) of the Companies Act provides:

Every officer of a company in exercising his powers and discharging his duties shall

- *act honestly and in good faith with a view to the best interests of the company; and*
- *exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*

Section 97(1) codifies the common law position in Bermuda in respect of directors' duties.

A company's 'officers' includes its directors and company secretary. The Companies Act includes in the definition of a 'director' "an alternate director and any person occupying the position of director by whatever named called". The latter category is intended to cover *de facto* directors: persons who act as directors without having been properly appointed as directors.

As a general rule, directors owe their duties to the company. When a company is solvent, the directors' duties include having regard to the interests of the general body of shareholders. However, once a company is insolvent or in danger of becoming insolvent, the directors' duties require them to consider the interests of creditors, weighing the gravity of the company's financial predicament against the realistic prospects of the company solving its financial problems.

In either case, it is the company or its liquidator, and not its shareholder or creditors (except in

special circumstances), which generally has the right to bring claims against directors for breaches of duty. However, due to indemnities against liability which are commonly given by Bermuda companies to their officers, such claims are usually brought only if based on fraud or dishonesty.

Fraudulent trading: Under Bermuda law, there is no provision which prevents a company from continuing to trade while insolvent. However, when the directors know that the company is insolvent and allow the company to continue to trade, incurring further liability, they may render themselves personally liable to creditors of the company for fraudulent trading, under Section 246 of the Companies Act.

Section 246 provides that if, in the course of the winding-up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the court, on the application of the official receiver or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in that manner be personally responsible, without any limitation of liability, for all or any of the debts or other liability of the company as the court may direct.

The test of a person knowingly carrying on the business of a company with intent to defraud creditors is as follows:

- At the time when debts were incurred by the company, the person had no good reason to think that funds would be available to pay those debts when they became due or shortly thereafter; and
- There was dishonesty involving real moral blame according to current notions of fair trading.

There appears to be no decided case in Bermuda of any person being held liable for fraudulent trading with respect to a Bermuda company. The Bermuda courts are likely to follow the approach of the English courts prior to the enactment of the 1986 Insolvency Act and require a high standard of proof of dishonest intent.

There is a statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misapplied any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the

company. This provision is not thought to provide any substantive remedies which would not otherwise exist, but provides a summary mechanism.

Offences: Apart from liability for fraudulent trading, the Companies Act also prescribes a number of criminal offences for which a past or present officer of the company may be found liable. These all relate to acts which may be committed in the 12 months immediately preceding the commencement of the liquidation, or after that commencement. The offences are offences of fraud or dishonesty and include such things as:

- failing to deliver up assets to the liquidator;
- destroying or falsifying books or papers; and
- obtaining goods on credit by false representation or fraud which the company does not subsequently pay for.

The penalty for these offences is imprisonment for terms of up to five years.

2. What are the advantages and disadvantages of triggering a formal insolvency or corporate rescue procedure?

A compulsory liquidation is deemed to commence from the date of presentation of the petition for winding-up and the company enters into formal liquidation upon the making of a winding-up order. The advantages to a creditor of presenting a winding-up petition against a company include the following:

- Any disposition of the property of the company and any transfer of shares or any alteration of the status of the shareholders of the company made after the commencement of the liquidation is void, unless approved by the court. This should prevent any further dissipation of the company's assets pending liquidation.
- If a provisional liquidator is appointed before the making of the winding-up order, there is an automatic stay of all proceedings against the company and proceedings may be commenced or continued against the company only if the court gives leave. This halts all creditor and other actions against the company, ensuring that its assets are preserved for distribution and that the company does not waste any assets on defending individual creditor claims.
- If a provisional liquidator is not appointed before the making of the winding-up order, between presentation of the petition and making of the order the company or any creditor or contributory (ie, shareholders and

some former shareholders) may apply to the court for a stay of any proceedings pending against the company.

The disadvantages of triggering a compulsory liquidation include the following:

- Unsecured creditors are unable to pursue individual remedies.
- The proceedings can be costly.
- The commencement of the proceedings triggers a six-month look-back period in which transactions may be challenged as fraudulent preferences (see section 7.3 below).

3. What are the practical options for out-of-court restructuring?

See section 1.1(e) above.

4. What is the effect on the management of a company of:

4.1 An adjudication of corporate bankruptcy/liquidation?

In a voluntary liquidation, the powers of the directors and officers of the company cease once the liquidator is appointed, except insofar as the company in general meeting (in a members' voluntary liquidation) or the committee of inspection, or (if none) the creditors, approve the continuance of their powers.

In a compulsory liquidation, the powers of the officers cease upon the making of the winding-up order or, if earlier, upon the appointment of a provisional liquidator. If a provisional liquidator is appointed before the making of the winding-up order, the directors retain only a residual power to cause the company to defend the winding-up petition.

4.2 The commencement of a formal corporate rescue process?

The commencement of the scheme of arrangement process outside of a liquidation does not affect the powers of the directors and officers of the company. It is often they who propose the scheme and conduct the scheme process.

4.3 The initiation of an informal corporate rescue process?

This does not affect management.

5. Parties in interest/key players

5.1 Who is responsible for the 'case management' control and administration of a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?

In a formal proceeding where liquidation has been commenced, the provisional liquidator or liquidator is responsible for the case management.

In a formal rescue by scheme of arrangement, the promoter of the scheme – which may be the company's management on behalf of the company, a creditor or the liquidator if the company is in liquidation – is responsible for the management of the process up to court approval. Thereafter, it is usual for a scheme administrator, appointed under the terms of the scheme, to implement the scheme to have responsibility for case management.

In an informal rescue or reorganisation, the case management will sit with the management team/directors who are carrying out the rescue.

5.2 Who is responsible for preparing the restructuring plan?

The preparation of the restructuring plan will be the responsibility of the individuals responsible for the case management.

5.3 Who are the key players? What are their roles and responsibilities?

The key players are as detailed above.

6. What financial information is available to creditors?

In a liquidation, liquidators are generally required to report to creditors on an annual basis. Creditors are not entitled to access the books and records of the company as of right and must apply to the court for such access. Creditors are entitled to inspect the court file only once their debts have been proved and allowed in the liquidation.

In a scheme of arrangement, an explanatory statement must be submitted to creditors prior to the creditors' meeting(s) by the promoters of the scheme. The explanatory statement should provide relevant information, including financial information where appropriate, to creditors to enable them to make an informed decision in relation to the scheme. Once the scheme is approved, the extent to which creditors will be

entitled to further financial information will depend on the terms of the scheme.

7. Common questions

7.1 Funding and priority given to new money

(a) If an insolvent corporation requires urgent working capital funding, what difficulties are likely to be encountered in the provision of such funding?

Any funding introduced in a formal insolvency must be approved by the court and has priority over other liabilities. Such funding is repaid from the realisation of assets as an expense of the liquidation. In an arrangement for funding prior to the commencement of liquidation proceedings, issues of fraudulent preference must be considered (see section 7.3 below).

(b) Are lenders providing new money, or debtor-in-possession financing, given any statutory priority?

Statutory priority is given in a formal liquidation proceeding only, with the approval of the court, as above.

In the absence of liquidation proceedings, priority is not granted by statute and can be created only by the grant of security, contractual subordination by other existing creditors or incorporation into the terms of a scheme in relation to the ranking of claims created pursuant to the scheme.

7.2 Ranking of creditors

In what order are creditors paid in a corporate bankruptcy/liquidation?

Certain claims in a liquidation have preferential status and are paid in priority to other unsecured claims. These are:

- claims of employees to wages and other payments due under their contract or under the Employment Act 2000 including severance pay, redundancy payments and compensation for unfair dismissal;
- government taxes and municipal rates; and
- certain government pension scheme contributions and workmen's compensation payments.

The costs and expenses of the liquidation are paid out of the assets of the company in priority to the preferential claims and the claims of unsecured creditors.

These preferential claims do not have priority over secured creditors which have fixed security over assets of the company. Such creditors may realise the property which is charged independently of the liquidation proceedings. If the amount realised exceeds the amount of the secured debt, the balance must be paid to the liquidator. If the amount realised is less than the amount of the debt, the creditor may claim in the liquidation as an unsecured creditor for the balance remaining due. Secured creditors which have a valid floating charge are also entitled to enforce their security, unless the assets available to pay unsecured creditors are insufficient to pay the preferential creditors in full. In that case, preferential creditors have priority over the claims of holders of debentures under any floating charge and will be paid out of assets which are subject to the floating charge.

7.3 Avoidance of antecedent transactions

Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?

There are various doctrines under the law of Bermuda whereby a transaction, such as the creation of security or the disposal of an asset by a company facing financial difficulties, may subsequently be found to be illegal.

A disposition in favour of a creditor made in the six months prior to the commencement of winding-up for the purpose of preferring the creditor will, in the event of the company being wound up, be deemed a fraudulent preference and invalid. An express statutory exemption protects the interests of any person obtaining title to property in good faith and for valuable consideration.

Within certain limits, a disposition of property is voidable at the instance of certain eligible creditors if it is made:

- with the dominant intention of putting property beyond the reach of a person (or class of persons) which have a claim or may at some time have a claim against the transferor; and
- without adequate consideration.

This rule applies within or outside liquidation (and in fact, a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite.

In a compulsory liquidation, any disposition of the property of a company made after the filing of a petition for the winding-up of a company is void unless approved by the court.

A floating charge granted by a company while it was insolvent and in the 12 months prior to the commencement of its liquidation is void, except to the extent of cash advances made in consideration for the floating charge.

A conveyance or assignment by a company of all its property to trustees for the benefit of its creditors shall be void to all intents.

For details of the position in the event of fraudulent trading, see section 1.5 above.

7.4 ‘Cram-downs’

What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or informal rescue plan?

If the requisite majority of creditors vote in favour of a scheme of arrangement (see section 1.1(d) above), and the court approves the scheme, the scheme will be binding on all creditors of the company which are subject to the scheme, including those which voted against or otherwise did not consent to the scheme.

However, if there is more than one class of creditor, a separate meeting of each class of creditor must be held to vote on the scheme and each class must vote in favour of the scheme in the requisite majorities. Therefore, if any class votes against the

scheme, the scheme will fail, as no application to approve the scheme can be made if all classes have not approved the scheme. Therefore, it is not possible for a dissenting class to be ‘crammed down’.

7.5 Creditor protection

What action can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?

Scheme of arrangement: A creditor may raise objections to a scheme (eg, to the constitution of scheme classes) at the hearing in the scheme proceedings of the application for leave to convene the scheme creditors’ meeting(s).

A creditor may raise objections to a scheme at the scheme creditors’ meeting, which the promoters of the scheme must report to the court when they apply for the scheme to be approved.

Finally, a creditor may oppose the application to the court for approval of a scheme of arrangement on the basis that the classes of creditors were improperly constituted or on the basis of unfairness.

Liquidation: In a liquidation of a company, creditors have a broad range of rights to apply to the Bermuda court for relief. Examples of such rights include the right to appeal the rejection of a claim by a liquidator and to apply for a review of the liquidators’ conduct.

The court may, on cause shown, remove a liquidator and appoint another.