

# British Virgin Islands

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The British Virgin Islands (BVI) is a British overseas territory situated in the Eastern Caribbean. There is a governor appointed by the United Kingdom and the United Kingdom retains responsibility for certain matters including national security and external affairs. Otherwise, there is a large measure of self-government. This includes legislation concerning corporate and insolvency law, which is appropriate as the BVI is a leading jurisdiction for the incorporation of companies.

The courts of the BVI are part of the Eastern Caribbean Supreme Court, which encompasses nine jurisdictions in the Eastern Caribbean. The court of first instance in the BVI for insolvency matters is the High Court. Appeals are to the Court of Appeal of the Eastern Caribbean Supreme Court and thereafter to the Privy Council in London.

The sources of law in the BVI are generally local legislation and English common law and equitable principles.

The Insolvency Act and the Insolvency Rules 2005 have replaced the former insolvency regime which was contained in the (now repealed) Companies Act. The act and the rules provide a comprehensive modern code for liquidation and other insolvency processes.

## **1. 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 action may be brought seeking a money judgment against the debtor. It is also generally possible either to register a foreign money judgment as a judgment of the court or to bring an action on a foreign money judgment in the BVI without a retrial of the merits of the case. Injunctive relief, particularly freezing injunctions, and orders for the appointment of receivers are frequently granted to prevent defendants from dissipating assets prior to the enforcement of a money judgment.

#### ***(b) The enforcement of security***

The BVI is a secured creditor-friendly jurisdiction and the usual mechanisms for the enforcement of security are well recognised. Secured creditors generally enforce their security in accordance with the terms of the contractual security documents governing the relevant transaction. Typically, these provide out-of-court mechanisms for the enforcement of security. Insofar as these documents are expressed to be governed by a foreign law, the choice of law will be recognised and enforced by the court. However, a creditor that wishes to take advantage of administrative receivership is well advised to ensure that its charge, as created, is one that would be a valid floating charge

under BVI law. Administrative receivers are typically appointed out of court. However, the court has jurisdiction under the act to appoint an administrative receiver in circumstances where, had that person been appointed out of court, he would have been an administrative receiver.

### **(c) Corporate bankruptcy/liquidation processes**

Companies that are solvent may generally be voluntarily wound up cheaply and quickly pursuant to provisions contained in the BVI Business Companies Act 2004.

The act and the rules have replaced the former insolvency regime which was contained in the (now repealed) Companies Act.

A notable feature is the regulation of insolvency practitioners and the introduction of a stringent licensing requirement for individuals before they may act as insolvency practitioners in the BVI. The aim is to ensure that the affairs of an insolvent company are conducted by experienced professionals. At least one of the office holders appointed under the act in respect of any insolvency process must be a BVI licensed insolvency practitioner (or, alternatively, the official receiver). However, in recognition of the international nature of the businesses conducted by BVI companies and the fact that the assets will typically be located elsewhere, there is provision (which is often utilised) for an overseas insolvency practitioner to be appointed jointly with a BVI licenced insolvency practitioner in an appropriate case.

The act also created the office of official receiver, who may be appointed instead of a licensed insolvency practitioner.

The act provides for two ways in which a company may be liquidated. An insolvent company may be wound up by a resolution for the appointment of a liquidator that is passed by a majority of 75 per cent of the members. Alternatively, the court may make an order for the appointment of a liquidator on an application made to it by the company, a creditor or a member. In certain circumstances, if applicable, such an application may also be made by the supervisor of a creditors' voluntary arrangement in respect of the company, the Financial Services Commission, the attorney general or an administrator of the company.

The grounds on which the court may make an order for the appointment of a liquidator are as follows:

- The company is insolvent;
- The court is of the opinion that it is just and

equitable that a liquidator should be appointed; or

- The court is of the opinion that it is in the public interest for a liquidator to be appointed.

There is also jurisdiction in the court to make an order for the appointment of a liquidator in respect of a foreign company if it has a connection, as defined in the act, with the BVI.

The court may grant interim relief between the filing and the hearing of an application for the appointment of a liquidator. A provisional liquidator may be appointed by the court if:

- the company in respect of which the application to appoint a liquidator has been made consents; or
- the court is satisfied that the appointment of a provisional liquidator:
  - is necessary for the purpose of maintaining the value of assets owned or managed by the company; or
  - is in the public interest.

A provisional liquidator has the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which he was appointed.

As an alternative to the appointment of a provisional liquidator, the court may appoint a receiver in the interim. This has proved to be a typical interim remedy in the case of shareholder disputes which have been pursued through applications for the appointment of a liquidator on the 'just and equitable' ground.

Another form of interim relief which may be granted where an application for the appointment of a liquidator has been filed but not yet determined is a stay on any action or proceeding pending against the company.

### **(d) Formal corporate rescue processes**

**Administration:** The act includes provision for the making of an administration order in the case of an insolvent company to achieve one or more statutory purposes, most of which are aimed at corporate rescue. The filing of an application for an administration order will bring about a statutory moratorium restricting the ability of creditors to enforce their claims. However, the provisions in the act concerning administration are not in force and there are currently no plans to bring them into force.

The principal formal rescue processes in the act which are in force are creditors' voluntary arrangements and administrative receivership.

**Creditors' voluntary arrangements:** The act provides a relatively simple procedure for a company that is insolvent to bind all its creditors with an arrangement for compromising its debts (including creditors that dissent or do not vote) if the requisite majority (75 per cent in value) of its creditors approve the arrangement. The arrangement must be supervised by a supervisor, who must be an insolvency practitioner. The procedure can be used when the company is in liquidation (or administration, were the provisions concerning administration ever to be brought into force). No court involvement is required.

If the company is not in liquidation (or administration), the company's board may propose an arrangement by passing a resolution approving a written proposal for an arrangement (which must contain the information prescribed in the rules), nominating an eligible insolvency practitioner to be appointed as interim supervisor and stating that in its belief the company is insolvent. The proposal, the resolution and a statement of affairs must be sent to the nominated insolvency practitioner. If the insolvency practitioner accepts, he is appointed interim supervisor and his main duty is to call a meeting of creditors to consider the proposal, together with his own report on the arrangement. The board may amend the proposal up to the time of the creditors' meeting. The creditors' meeting must approve or reject the proposal, or adjourn the meeting for not more than three months. Approval of the arrangement requires a majority of 75 per cent in value of the creditors present or represented at the meeting.

If the proposal is approved, a supervisor (who must be an insolvency practitioner) is appointed pursuant to it to supervise its implementation. This can include the carrying on of the company's business if the arrangement so provides. The directors must take all necessary steps to put the supervisor in possession of the assets included in the arrangement.

A creditors' voluntary arrangement may not affect a secured creditor's rights to enforce its security and cannot result in any preferential creditor receiving less than it would be entitled to on liquidation, unless the relevant secured or preferential creditor has provided its agreement thereto in writing.

A proposal for a creditors' voluntary

arrangement does not bring about any moratorium on creditors' claims, but once it is approved it binds all creditors in accordance with its terms (subject to the above-mentioned limitation with respect to the rights of secured and preferential creditors).

**Administrative receivership:** The act provides for administrative receivership. This is primarily an enforcement procedure for the holder of a floating charge to realise the assets under its security. The floating charge needs to allow the secured creditor to appoint a receiver over the whole or substantially the whole of the business, undertaking and assets of the company. Once the conditions for an appointment have arisen, an insolvency practitioner may be appointed by the holder of the charge as an administrative receiver.

The administrative receiver is deemed to be the agent of the company and may exercise an extensive list of powers set out in the act, except to the extent that the instrument by which he is appointed provides otherwise. These include the power to carry on the business of the company. The administrative receiver can even apply to the court to dispose of assets which are subject to a security interest that has priority over any security interest of the debenture holder by which he was appointed if it would be likely to promote a more advantageous realisation of the company's assets. The senior creditor is, however, protected in that the net proceeds of sale must be applied towards its security interest.

The company and its officers must provide the administrative receiver with all the books and information relating to the assets over which the receiver is appointed, and must give him such assistance as he reasonably requires. He must also require a statement of affairs to be produced. His primary duty is to ensure that the secured debt is repaid and to account to the company for any surplus remaining after realising the assets under the security.

The administrative receiver must prepare a report within three months of his appointment. Creditors are entitled to access this report. He must also generally call a meeting of unsecured creditors.

Generally, the court has no or only a limited role to play in administrative receiverships, and they have in practice provided a quick and effective method for secured creditors to enforce their security.

**Provisional liquidation:** In the absence of the provisions in the act concerning administration

coming into force, it may be possible to utilise provisional liquidation in order to achieve a moratorium on creditors' claims and a restructuring of the affairs of the a company. This has not yet been fully tested.

**Schemes of arrangement:** There is potential for achieving a restructuring of creditors' claims through a scheme of arrangement, which is a mechanism introduced by the BVI Business Companies Act 2004.

Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between a company and its members, or any class of them, the court may order that a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, be summoned in such manner as the court directs. If a majority in number representing 75 per cent in value of the affected class present and voting agree to any compromise or arrangement, it becomes, if approved by the court, binding on the affected class and on the company (or, in the case of a company in liquidation, on the liquidator).

The high degree of involvement of the court in a scheme of arrangement and the fact that it requires the approval of the court may make it an appropriate procedure if it is likely that recognition and enforcement by foreign courts will be required.

#### **(e) Informal corporate rescue procedures**

A company may try to persuade its creditors to enter into a binding contractual arrangement whereby debts are restructured. However, this would obviously require the agreement of the relevant creditors and would be effective to bind only those which had entered into such an agreement.

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

The act provides for two ways in which a company may be liquidated. An insolvent company may be wound up by a resolution for the appointment of a liquidator that is passed by a majority of 75 per cent of the members. Alternatively, the court may make an order for the appointment of a liquidator on an application made to it by the company, a creditor or a member. In certain circumstances, if applicable, such an application may also be made by the supervisor of a creditors' voluntary arrangement in respect of the company, the Financial Services Commission, the attorney general or an

administrator of the company.

An application to the court will be supported by evidence on affidavit.

The grounds on which the court may make an order for the appointment of a liquidator are as follows:

- The company is insolvent;
- The court is of the opinion that it is just and equitable that a liquidator should be appointed; or
- The court is of the opinion that it is in the public interest for a liquidator to be appointed.

At least one of the persons appointed to the office of liquidator must be a licensed insolvency practitioner (or the official receiver).

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

##### **(a) An adjudication of corporate bankruptcy/liquidation?**

The effect of an order for the appointment of a liquidator is that proceedings cannot be commenced or continued against the company without the leave of the court. Instead, a creditor may submit a claim in writing to the liquidator, who must then admit or reject the claim in whole or in part.

However, a secured creditor's rights in respect of the company's assets are not affected (save to the extent that they are vulnerable as voidable transactions). There is no stay on its right to possession or enforcement of its security, and it does not need any order of the court to enforce such rights.

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

The filing of an application for the making of an administration order would have the effect of imposing a statutory moratorium restricting the rights of creditors to enforce their claims. However, there are no plans currently in the BVI for the provisions in the act concerning administration orders to be brought into force.

A proposal for a creditors' voluntary arrangement under the act or a scheme of arrangement under the BVI Business Companies Act has no effect on debt collection or the enforcement of security, unless or until the creditors' voluntary arrangement is approved by

the requisite majority of creditors or, in the case of a scheme of arrangement, is approved by the court. Once a creditors' voluntary arrangement has been approved, it binds all creditors (but cannot affect the interests of secured or preferential creditors without their written agreement). A scheme of arrangement, once approved by the court, binds all creditors subject to the scheme.

The appointment of an administrative receiver has the effect of preventing any unsecured non-preferential claim from being enforced against the assets over which the administrative receiver has been appointed.

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

There will be no effect on the ability of a creditor to collect a debt or enforce a security, unless the relevant creditor has voluntarily agreed to restrict the exercise of its rights.

**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?**

Part XVIII of the act includes the provisions of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency. However, these provisions have not been brought into force and there are currently no plans to bring them into force.

Recognition may be possible either through the provisions of Part XIX of the act or in certain circumstances through the application of common law principles of comity.

Under Part XIX, a foreign representative may apply to the court for an order in aid of the foreign proceeding in respect of which he is authorised. A foreign representative is a person who is authorised in a foreign proceeding to administer the reorganisation or liquidation of the company's property or affairs or to act as a representative of the foreign proceeding. 'Foreign proceeding' means a collective judicial or administrative proceeding in a relevant foreign country pursuant to which the property and affairs of the company are subject to control or supervision by a foreign court.

Only foreign representatives appointed in respect of proceedings in a relevant foreign country may apply under Part XIX. To date, the following countries have been designated as relevant foreign

countries for these purposes: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States.

The court has a very wide discretion as to what orders it may make on an application under Part XIX, and may apply the law of the BVI or the applicable foreign law. However, no order may be made which would adversely affect the rights of a secured or preferential creditor.

In determining such an application, the court is guided by what will best ensure the economic and expeditious administration of the foreign proceeding to an extent that is consistent with the following guiding principles:

- the just treatment of all persons claiming in the foreign proceeding;
- the protection of persons in the BVI that have claims against the company against prejudice and inconvenience in the processing of claims in the foreign proceeding;
- the prevention of preferential or fraudulent dispositions of property;
- the need for distributions to claimants in the foreign proceeding to accord substantially with the order of distributions in a BVI insolvency; and
- comity.

If a US bankruptcy proceeding were commenced in respect of a BVI company, the foreign representative in respect of such a proceeding would be able to apply for relief under Part XIX of the act and the court would exercise a wide discretion as to what, if any, relief to grant.

**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?**

The act permits a liquidator to make application to the court to recover assets of an insolvent company or recoup its losses under three statutory provisions:

- Section 254 (summary remedy against delinquent officers and others);
- Section 255 (fraudulent trading); and
- Section 256 (insolvent trading).

Section 254 allows the court to make orders where a person has misapplied or retained or become accountable for any money or assets of the company in insolvent liquidation, or has been guilty of misfeasance or breach of any fiduciary

duty or other duty in relation to the company.

Section 255 applies where the company's business has been carried on with intent to defraud its creditors or the creditors of any other person, or for any fraudulent purpose. The court can order any person who was knowingly a party to the carrying on of the business to make such contribution to the company's assets as it considers proper. The court is not confined to making compensatory orders, but can also include a punitive element to reflect any dishonesty on the part of the defendants.

Section 256 empowers the court to order a director to contribute to the company's assets where he knew or ought to have known at any time before the commencement of the liquidation that there was no reasonable prospect of the company avoiding insolvent liquidation and he failed to take every reasonable step open to him to minimise the loss to the company's creditors. The powers of the court under Section 256 are primarily compensatory rather than penal.

There is also provision under the act for the official receiver to bring proceedings for a disqualification order to be made. The grounds for the court to make a disqualification order include the making of an order under Section 254, 255 or 256 against the former director, or simply that the conduct of the former director in respect of the insolvent company is such as to make him unfit to be concerned in the promotion, formation or management of companies. If any of the grounds are made out, the court may make an order disqualifying the former director from acting as a director or from participating directly or indirectly in the promotion, formation or management of a company for a specified period of up to 10 years.

In practice, since the entry into force of the act, these provisions may not always have been enforced to the full extent that they might have been.

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

**Advantages:** A formal appointment will assist in enabling the assets of the company to be dealt with in an orderly and efficient fashion for the benefit of creditors. Individual creditors are prevented from seizing assets, taking undue preferences or undertaking costly litigation at the expense of the company's remaining assets.

Early intervention, especially undertaking the formal rescue procedures, can avoid many of the

problems as outlined below, provided such steps are taken when there is still value and potential remaining in the business.

Under the act, the statutory rescue package includes the following:

- administrative receivership, which can achieve an orderly sale where the secured creditor provides funding for the continuation of the business;
- provisional liquidation, in which the role is to maintain the assets of the company;
- an administration order (not yet in force) – where a court order may provide a moratorium period while the affairs are managed by an administrator; and
- a creditors' arrangement, which can allow a compromise between the company and its creditors. This is supervised by a licensed insolvency practitioner acting as a supervisor.

There is also the ability to undertake a scheme of arrangement through Section 179A of the BVI Business Companies Act 2004, which requires extensive court involvement and is binding on creditors once approved.

**Disadvantages:** The major disadvantage is the destruction of value in the company following the triggering of a formal insolvency appointment. This can occur through:

- default clauses in important contracts being triggered, often leading to their termination;
- suppliers/customers being reluctant to trade, thereby affecting the business;
- crystallisation of damages claims;
- loss of goodwill;
- additional costs of an independent officeholder having to be borne by the business; and
- the potential loss of customers and key staff.

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

The act provides (although this provision is not in force) for an administration order which, while starting as a court order, is not a process that is directly supervised by the court. It places the management of the company under an administrator, who is to present a proposal to the creditors for its future reorganisation or winding-up. A secured creditor with a floating charge is not prevented from appointing 'over the top' an administrative receiver (which process in itself can also act as a way to achieve restructuring).

**Creditors' arrangements:** Management, through the board, can initiate the appointment of an interim supervisor. However, there is no moratorium on claims following such an appointment. Following the approval of an arrangement by the creditors, the supervisor is expected to take possession of the assets included in the arrangement. The arrangement may allow the supervisor to carry on the business of the company and such terms may see the management act subject to the control of the supervisor in respect of those assets under the arrangement.

Once an arrangement has been approved by creditors, it binds all unsecured creditors.

**Administrative receivership:** This is where a secured creditor can appoint an administrative receiver. Occasionally, this process can see the company's business restructured; however, this is often at the expense of a number of the key stakeholders such as shareholders and unsecured creditors. Nonetheless, a business can be sold through this process and continue to operate going forward without much of its past indebtedness.

**Informal arrangements:** These can be workable with small numbers of creditors but remain vulnerable to the voidable transactions provisions of the act. Directors involved in the informal arrangements need to stay mindful of the insolvent trading penalties should the informal approach fail to achieve its goals.

However, this could be mitigated through the use of standstill agreements with major creditors to allow the company to ensure it does not trigger technical insolvency (as defined in section 8).

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

##### **4.1 An adjudication of corporate bankruptcy/liquidation?**

This has the following effects:

- The directors and other officers retain office, but they cease to have any powers, functions or duties other than as set out in act or allowed by the liquidator;
- Management will be seen as 'relevant persons' and therefore likely to be required by a liquidator to provide a statement of affairs;
- Management will be expected to hand over to the liquidator control and possession of any assets or documents, or face a court order

requiring same;

- Management may be subject to a notice requiring either information or assistance, or be subject to examination on oath; and
- There are prohibitions on the transfer of assets and shares in the company.

##### **4.2 The commencement of a formal corporate rescue process?**

If this is via a liquidation or provisional liquidation process (depending on the scope of the court order appointing the provisional liquidator), then the comments in section 4(a) above are applicable.

The remaining formal avenues are outlined below.

**Administration:** Were this part of the act in force, then the impact on management could be seen in two stages:

- Following the granting of the administration order, while the directors and officers remain in office and their powers continue, they are subject to the direction of the administrator (or the court). The administrator in this situation has powers not dissimilar to those of a liquidator to ensure management cooperation – even the ability to remove directors.
- In the second stage, the impact depends on the scope of the proposal agreed to by the creditors. There may be a role for management to resume its powers as prescribed by the terms of the proposal.

**Administrative receivership:** Where a secured creditor appoints an administrative receiver, the board and officers must provide the receiver with documents, information, assistance and explanations as required (Section 124(1)). A statement of affairs may be required. The powers of the board are not terminated by the appointment, but are proscribed by the receiver's powers.

**Creditors' arrangements:** Management, through the board, can initiate the appointment of an interim supervisor. However, the board remains in place, although it has express obligations to provide an interim supervisor with documents, information, assistance and explanations as required (Section 25(2)). Following the approval of an arrangement by the creditors, the supervisor is expected to take possession of the assets included in the arrangement (Section 35(1)). The arrangement may allow the supervisor to carry on

the business of the company and such terms may see the management act subject to the control of the supervisor in respect of those assets under the arrangement.

#### **4.3 The initiation of an informal corporate rescue process?**

This has no effect on management, unless the terms of the support require management to act in a different way. An important consideration for management is whether the company is insolvent, as to continue to incur debts under an informal process may see action later taken against those directors by a liquidator (Section 256).

### **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?**

##### **(a) Liquidation**

The court has a supervisory role in the process. It hears the application, makes the order appointing a liquidator and then has a reviewing role. Once appointed, the liquidator has extensive powers, as set out in Schedule 2 to the act, to take control of the assets, realise them, adjudicate on and meet creditors’ claims, and generally conduct the beneficial winding-up of the company.

##### **(b) Formal rescue**

The licensed insolvency practitioner runs the case management. Interested parties can apply to the court should they have concerns with how the matter is being handled.

There is also a statutory regulator, the Financial Services Commission, which supervises the conduct of the licensed insolvency practitioners.

##### **(c) Informal rescue**

In an informal rescue the board liaises with key stakeholders such as shareholders, financiers and perhaps the regulator.

#### **5.2 Who is responsible for preparing the restructuring plan in a formal or informal rescue?**

Under the formal rescue scenarios, the licensed

insolvency practitioner is responsible. However, in an administration and under a creditors’ arrangement, there will also be substantial input from the board.

Under an informal arrangement, the board generally deals with the negotiations for a restructuring plan. It generally takes advice from experienced lawyers or insolvency practitioners on the steps and issues surrounding such a plan and its execution.

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

A licensed insolvency practitioner can act in a number of different statutory roles, depending on the nature and circumstances of the appointment. The act sets out, in substantial detail, the powers and responsibilities of each type of appointee (eg, liquidator, administrator, receiver, supervisor).

The courts play a major role in the initiation and in the subsequent supervision of an administration – sometimes as an overview role – and can also have an active involvement such as in schemes of arrangement.

There is also the official receiver who can take on appointments in his own right.

Other key stakeholders include:

- the board;
- shareholders;
- secured creditors;
- priority creditors;
- unsecured creditors;
- suppliers; and
- guarantors.

These parties can all influence the outcome of an administration. As noted earlier, the board can have substantial responsibilities to assist an insolvency practitioner appointee.

### **6. What financial information is available to creditors?**

It is difficult for creditors to obtain information directly (as there is no such right of access), except through the office of the appointed insolvency practitioner acting as a liquidator or administrator. Company searches at the Registry of Corporate Affairs will usually allow only confirmation of the memorandum and articles, the registered agent, the existence of charges and whether the company is in good standing. Financial information is not generally available.

However, the processes of the act may assist creditors in obtaining a better understanding by:

- obtaining the liquidator's report, which covers the assets and liabilities of the company, details of its share capital, causes of failure and potential claims, and which is due 60 days after appointment;
- attending meetings called by the liquidator and presenting questions to them;
- serving on a creditors' committee and receiving reports of the office holder;
- attending a public examination; and
- applying for a court order to inspect specified books, records and documents.

## 7. Common questions

### 7.1 Funding and the 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?**

At the outset, there is nothing to prevent the provision of such funding. The difficulty is whether those funds can be recovered in full in the event of a collapse, as in such case the funder will find itself left with an unsecured claim alongside other creditors.

The act includes a number of provisions to prevent creditors (especially parties related to the company) from unfairly securing a greater priority over other creditors (see below) when a company is facing insolvency.

One consideration is lending funds direct to the appointee (eg, the liquidator, provisional liquidator or administrative receiver). Such funds could be seen as costs and expenses properly incurred in the liquidation, and would then be recoverable in priority to that of the remuneration of the liquidator and any preferential claims, and ahead of unsecured creditors. They could also rank higher than floating charged assets. The liquidator would need to review the circumstances to see whether such funding were appropriate as a way of enhancing the value of the assets of the company (eg, allowing a sale as a going concern).

The act prevents any set-off for additional credit where the creditor had notice of the insolvency.

Overall, therefore, unless fresh funds are advanced under a charge or alternatively loaned direct to the liquidator, it will be practically difficult for the insolvent company to secure funding.

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

The act does not expressly provide such a priority directly. However, such financing might attract priority through being characterised as an expense of the insolvency process.

The act does contemplate that a fresh floating charge may be enforceable where monies are advanced or paid. However, the act is designed to prevent existing creditors from unfairly enhancing their security position. It also prevents creditors from setting extortionate transaction terms which again could operate to place them in an unfair position with respect to other creditors.

### 7.2 Ranking of creditors

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

The act identifies three classes of creditor that rank above unsecured creditors. These include secured creditors as well as preferential creditors and prescribed priorities.

The ranking under the act and rules is as follows:

- Secured claims – these are met from the secured assets (although floating charged assets are subject to meeting priority claims).
- Costs and expenses incurred in the liquidation – these are paid according to the prescribed order of priority set out in the act and the rules.
- Preferential claims – these rank equally, so are paid rateably if there are insufficient funds:
  - claims due to a present or past employee capped to \$10,000 for wages and salary (due up to six months before) and accrued holiday pay;
  - BVI Social Security Board claims (no limit);
  - pension/medical fund contributions (due up to 12 months before) (\$5,000 cap);
  - sums owing to the BVI government (\$50,000 cap); and
  - sums due to commission for penalties or fee (\$20,000 cap).
- All admitted claims – these are paid rateably.
- Any interest payable is then settled.
- Finally, any surplus is paid to the members.

Should there be insufficient funds in the liquidation to meet the claims outlined in the first and second bullets above, then those items have priority over the charge of floating charged assets.

### **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?**

The act contains provisions whereby certain types of transaction are liable to be set aside in liquidation (or administration, were the provisions allowing for administration orders ever to be brought into force) if they were entered into by a company during a 'vulnerability period' prior to it going into liquidation and they were 'insolvency transactions' (ie, if the company was insolvent at the time of the transaction or it was rendered insolvent by the transaction). The relevant types of transaction are:

- unfair preferences;
- undervalue transactions;
- voidable floating charges; and
- extortionate credit transactions.

The vulnerability period and the burden of proof vary according to whether the transaction was with a connected person.

If the transaction is found to be a voidable transaction, the court has extremely wide powers. It may set aside the transaction or make such order as it thinks fit to restore the position to what it would have been had the company not entered into the transaction. The court's powers are not just restricted to the person that entered into the voidable transaction with the company: the court can also make orders against third parties unless they acted in good faith and for value.

### **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?**

Dissenting unsecured creditors are bound by a creditors' voluntary arrangement which has been

approved by the requisite majority of 75 per cent in value of the creditors present or represented at the meeting to vote in its favour. Dissenting creditors are bound even if they were not present or represented at the creditors' meeting, or indeed did not have notice of the meeting. However, a dissenting creditor may apply to the court for relief if an arrangement is unfairly prejudicial or if there was a material irregularity in relation to the meeting at which the arrangement was approved. The court can revoke or suspend any approval of an arrangement or any decision taken at a creditors' meeting, and can make directions for further meetings.

The rights of a secured creditor may not be affected by any provision in a creditors' voluntary arrangement, unless the secured creditor agrees to them in writing.

### **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?**

Pursuant to Section 273 of the act, any person aggrieved by an act, omission or decision of an office holder conducting the insolvency procedure may apply to the court and the court may confirm, reverse or modify the act, omission or decision of the office holder.