

Restructuring & Insolvency

Contributing editor
Bruce Leonard



2016

GETTING THE
DEAL THROUGH 

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Restructuring & Insolvency 2016

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Companies Act 1981 governs insolvencies and reorganisations in Bermuda. The solvency tests include a 'cash-flow' test requiring a company to be able to pay its undisputed liabilities as they fall due and a 'balance-sheet' test requiring a company's assets to exceed its liabilities. An unsatisfied judgment or statutory demand in respect of an undisputed debt exceeding 500 Bermudian dollars will justify the making of a winding-up order at the instance of a creditor. Prospective or contingent creditors may petition on giving security and showing a prima facie case that the company is insolvent. The insolvency regime of Companies Act 1981 is based largely on the English Companies Act 1948, with some minor modifications.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The Supreme Court of Bermuda is the court of superior record with unlimited jurisdiction over insolvencies and reorganisations.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

The Bankruptcy Act 1989 applies to personal insolvencies. Assets that have been validly assigned or charged to secure indebtedness are excluded from the insolvency proceeding (unless the security is surrendered) and assets that are held in trust by the insolvent are excluded from the estate.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There are no specific procedures that apply to government-owned enterprises, and in the case of a statutory corporation, or QUANGO, or other entity that has legal personality, it can be sued in the normal way. It is an implied principle of public law that a government-owned entity will honour its obligations, and there are no cases in which the court has had to consider the possibility of winding up a government-owned entity.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

No.

Secured lending and credit (immovables)

6 What principal types of security are taken on immovable (real) property?

Legal mortgages and equitable mortgages by deposits of title deeds are the most usual types of security taken on real property.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

Fixed and floating charges, debentures, chattel mortgages, liens, pledges and retention of title clauses by contract are all available as security over personal property.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

A judgment creditor may examine a judgment debtor upon his or her means to pay the debt and the court may make instalment orders, remedied by orders of contempt in default. Principally, the means of enforcement of judgments are writs of execution, writs of possession and garnishee proceedings. Pre-judgment attachment is not available, although injunction relief pending judgment is available in appropriate circumstances. A judgment attaches to the real property owned by a judgment debtor until payment. Foreign creditors may have to provide security for costs when commencing an action to recover a debt from a Bermuda entity or person.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Members' voluntary liquidations are solvent liquidations and are not conducted under the supervision of the court, and no formal liquidation proceeding is required. A members' voluntary liquidation must be concluded within 12 months of its commencement. Once appointed, the liquidator has full control of the liquidation and the directors' powers cease.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

A company that is insolvent (ie, cash-flow or balance-sheet insolvent) must cease trading and commence a liquidation proceeding. A creditor can present a winding-up petition based on the insolvency of the company. Prospective and contingent creditors must prove a prima facie case for winding up and provide security for costs. Policyholders of insurance companies with solely contingent claims are under some restrictions in their ability to commence involuntary liquidation proceedings.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

A voluntary reorganisation can be achieved by a scheme of arrangement between the company and its creditors or members (or any class of them) if the arrangement is approved by a majority in number and three-quarters in value of each class voting on the scheme.

Involuntary reorganisations
12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Creditors may seek to invoke the liquidators' support in a scheme of arrangement, but otherwise cannot commence an involuntary reorganisation. A liquidator has power to sell the whole (or part) of the undertaking of the company under section 101 of the Companies Act in conjunction with an approved scheme of arrangement.

Mandatory commencement of insolvency proceedings
13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

Directors must not allow a company to continue to trade when the company is insolvent and may incur personal liability for debts incurred if it continues to trade while insolvent. Directors are not obliged to commence insolvency proceedings, but will usually either resign or file a petition on behalf of the company if a creditor does not do so. Directors' liabilities are often limited under the by-laws of the company to exonerate them from liability except for personal fraud or dishonesty.

Doing business in reorganisations
14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

In provisional liquidation, the provisional liquidator (or the directors if authorised by the court) may continue to carry on business during a reorganisation. Expenses incurred by the liquidator as expenses of the liquidation will be treated as preferred claims and court authorisation is required to meet new obligations incurred after a filing out of the assets of the company and in priority to other unsecured creditors. Directors can continue to operate the company and manage its affairs until a winding-up order is made, after which directors' powers cease. Directors have residual powers to appeal against the making of a winding-up order on behalf of the company. After a provisional liquidator is appointed, the directors' powers cease but in certain cases they may be allowed to continue to manage the company subject to limitations set out in the order of appointment of the provisional liquidator (eg, as in a 'soft touch' provisional liquidation).

Stays of proceedings and moratoria
15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Upon the appointment of a provisional liquidator, or the making of a winding-up order, there is an automatic stay of all proceedings by or against the company, unless the court orders otherwise.

Post-filing credit
16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Generally not. In cases where a funding agreement has been approved by the court, a creditor funding necessary liquidation expenses may be granted priority over unsecured creditors to the extent of the additional credit provided or expenses incurred in the liquidation.

Set-off and netting
17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Automatic set-off applies upon the making of a compulsory winding up order. Creditors cannot be deprived of mandatory set-off.

Sale of assets
18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Generally, a liquidator can sell specific assets in the ordinary course of business, usually with the sanction of the court or the committee of inspection. Assets purchased from a liquidator in these circumstances are 'free and clear'. Creditors can bid in sales and stalking horse bids are permissible. The court will take into account the fairness of the bid, and may require a fairness opinion or valuation to support the bid. This applies where the credit bidder is the original creditor or an assignee, subject to the general public policy restrictions on creditors trafficking in debt.

Intellectual property assets in insolvencies
19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Generally, an IP licensor cannot terminate the debtor's right to use it unless this is a specific term of the licensing agreement and, if so, the liquidator can negotiate terms of use after insolvency.

Rejection and disclaimer of contracts in reorganisations
20 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

A permanent liquidator may disclaim an onerous contract or one that is unprofitable or unsaleable and the disclaimer operates from the date of service of notice disclaiming the contract, following the grant of leave to disclaim by the court. The court may also make a vesting order or award compensation to the party whose contract has been disclaimed. If the debtor company breaches a contract after the filing of a petition, a claim for breach of contract may still be made provided that the damages can be the subject of a liquidated claim. Usually a liquidator is appointed within a short period after the filing of the petition for compulsory winding up, and the making of a winding-up order will have the effect of terminating the contract.

Arbitration processes in insolvency cases
21 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

Generally, a liquidator will be subject to the same rights and restrictions as the company was subject, including its contractual rights of arbitration. However, creditors with disputed proofs of debt are required to appeal against a rejected proof of debt, irrespective of arbitration. Where no liquidated or quantified liability is established, then an arbitration clause will

operate normally, subject to the leave of the court to prosecute the claim against the company being given to the creditor. The court does not mandate arbitration but will allow it where the parties agree to it. Insolvency disputes (ie, those arising out of the conduct of the liquidation as a result of the liquidator's appointment) are not arbitrated but are dealt with by the court exercising its powers of supervision over the liquidation.

Successful reorganisations

22 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Creditors must be separated into classes with similar interest so that they can reasonably consult and vote on a resolution in favour or against a proposal for reorganisation. Classes are determined as a preliminary step in the proposal for a scheme and the initial order to convene the relevant meetings to consider the plan of reorganisation by a scheme of arrangement.

Expedited reorganisations

23 Do procedures exist for expedited reorganisations?

There are no pre-packaged reorganisation provisions in the Companies Act.

Unsuccessful reorganisations

24 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

The ordinary winding-up process will continue if the reorganisation proposal is not carried by the necessary majorities (ie, a majority number and three-quarters in value) and the sanction of the court to the scheme.

Insolvency processes

25 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The first meeting of creditors is convened to approve the appointment of a permanent liquidator and (if approved) a committee of inspection at an early stage. Thereafter, there are annual meetings and reports and special meetings may be called to consider extraordinary business. The information usually available to creditors are the total assets and total liabilities of the estate and the formal report to the court. Members of the creditors' committee will usually have access to greater information but will be restricted as to its use. Generally, creditors cannot pursue independent claims against third parties, but (subject to restrictions in the by-laws) may make claims of misfeasance on the part of directors (although this is rarely if ever done) and may make claims against former officers for fraudulent trading. A reorganisation plan cannot provide for the release of liabilities owed by third parties who are not otherwise also subject to a scheme of arrangement that makes provision for the compromise of those claims, and is subject to appropriate safeguards approved by the court for the rights of dissenting creditors.

Enforcement of estate's rights

26 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Generally not. In principle it is possible to assign a claim of the company to a creditor for value or to enter a funding agreement to enable a claim to be pursued in right of the company subject to payment of expenses in priority, but the proceeds of the successful claim enure to the whole estate after payment of expenses to the funding creditor.

Creditor representation

27 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

The committee of inspection can sanction the liquidator taking actions to further the administration of the liquidation and prosecute claims, sell assets and make compromises. The committee has no independent powers and will usually audit the receipts and payments of the liquidator and submit an await report to the court. Members of the committee are unpaid (except for reimbursement of expenses). Members are appointed by resolution of the creditors and contributories at the first meeting, and are then approved by the court.

Insolvency of corporate groups

28 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

No. Only in extreme circumstances can the court 'pool' assets of a group, that is, only where it is impossible to determine which asset belongs to which company. The juridical basis for the approach is unreliable and it is not generally possible to disregard the formal independent legal personality of group companies.

Claims and appeals

29 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

A creditor must lodge a proof of debt within the time stated by the liquidator. If disallowed, a creditor must appeal to the court within 21 days of receiving the notice of rejection. Creditors must usually value their contingent unliquidated claims at a present day value and support the valuation by evidence. A claim in a liquidation may be assigned, and can be the subject of a proof of debt for the full amount. However, there are public policy restrictions that prevent creditors from 'trafficking' in debt (eg, to obtain the benefit of mandatory set-off relief).

Modifying creditors' rights

30 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

There is no power to change an unsecured creditor's claim as to priority, except for post-liquidation claims for expenses or services rendered to the liquidator, which will rank ahead of preferred claims.

Priority claims

31 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Secured creditors have priority (as their claims fall outside the liquidation process). Government taxes, workers' compensation liabilities, pension contributions and employee wages are the principal categories of preferred claims.

Employment-related liabilities in restructurings

32 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Termination of employment may give rise to claims for compensation or redundancy payment, or both, under the Employment Act 2000, but the value of these claims is limited to a claim not exceeding 2,500 Bermudian

dollars per employee, unless the terms of employment provide for a lump sum or gratuity at the end of employment, where the full amount is recoverable, assuming there are assets with which to pay it. Redundancy and severance claims are treated as unsecured claims with no priority. The winding up of the company will cause the contract of employment to terminate automatically one month from the date of the winding-up order.

Pension claims

33 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Generally, there are no claims available against employers for actuarial deficiencies and in the majority of cases, pensions are contributory schemes. Directors may be personally liable for employment taxes deducted but not paid in respect of an employee's account.

Environmental problems and liabilities

34 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There are no special rules for environmental problems or liabilities under Bermuda law.

Liabilities that survive insolvency proceedings

35 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Generally not, but only where specifically provided in the plan of reorganisation. In the case of personal bankruptcies, awards of damages against a bankrupt are not discharged on the discharge of a bankrupt.

Distributions

36 How and when are distributions made to creditors in liquidations and reorganisations?

The liquidator may make interim dividends at any time to those creditors whose proofs of debt have been admitted to proof and will make a final dividend once all assets have been collected.

Transactions that may be annulled

37 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Fraudulent conveyances and transactions at an undervalue within six years, floating charges within one year and voidable preferences within six months of the commencement of the liquidation can be annulled or set aside in liquidations and reorganisations.

Proceedings to annul transactions

38 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

A floating charge may be set aside within one year if the company was not solvent at the time it was granted and payments with intent to prefer one or more creditors over others made within six months of the liquidation may be recovered from the payee.

Directors and officers

39 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Directors may be liable for employment tax not paid in respect of an employee of the company.

Groups of companies

40 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Generally this is not possible. A court is not able to order a distribution of assets pro rata without regard to the rules of separate corporate personality, in the absence of a scheme of arrangement which is binding on all members of the group.

Insider claims

41 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

There is no concept of a 'non-arm's length creditor', but creditors who are related to the debtor may have more difficulty defending claims for voidable preference within six months of the liquidation.

Creditors' enforcement

42 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

No. Secured assets do not fall within the estate.

Corporate procedures

43 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The rules for personal bankruptcy differ in a number of respects, but the rules for the admission or proofs, priority of claims, contingent and future claims are the same.

Conclusion of case

44 How are liquidation and reorganisation cases formally concluded?

The liquidator will convene a final meeting, lay the accounts for approval by the creditors, make the final dividend and seek a release from the court.

International cases

45 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Foreign liquidators are normally recognised in Bermuda and where assets exist in Bermuda belonging to a foreign company in liquidation, an ancillary proceeding may be commenced in Bermuda. Recognition of foreign judgment is limited to the United Kingdom and certain named Commonwealth jurisdictions. The UNCITRAL Model Law on Cross Border Insolvency has not been adopted in Bermuda.

COMI

46 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

There are no special rules to determine COMI. If the debtor is registered in Bermuda, or has a place of business in Bermuda, or has assets within Bermuda, the court may exercise its jurisdiction to wind up the company's affairs in Bermuda.

Cross-border cooperation

47 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Generally, the Bermuda court will assist foreign liquidators where possible, but usually an ancillary liquidation proceeding will be required in Bermuda if substantive legal action has to be taken within the jurisdiction by a foreign liquidator. The Privy Council has ruled that although a Bermuda court has power to recognise the request of foreign liquidators, the power to give assistance is limited by the scope of the court's own powers under the Companies Act, or its common law powers. The scope of the extent to which common law powers can be used to assist a foreign liquidator is still developing.

Cross-border insolvency protocols and joint court hearings

48 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

No.



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