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Insolvency 2021

Bermuda: Law & Practice
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BERMUDA

Law and Practice

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1. STATE OF THE RESTRUCTURING MARKET

1.1 Market Trends and Changes

The Bermuda restructuring market has continued to be extremely active over the last 12 months, largely as a result of tightening credit markets and ongoing unsettled economic conditions arising out of the COVID-19 crisis.

There has been a notable increase in creditor-driven petitions in which immediate winding-up orders are sought, particularly out of Asia. Creditors have seemed more willing to seek the liquidation of companies quickly, appearing less willing to engage in lengthy restructuring negotiations. Examples of such cases include two Hong Kong listed companies, Trinity Limited and Victory City International Holding Limited, which were both wound up on the petitions of major international financial institutions.

The amount of company-driven restructuring petitions has also remained steady. Bermuda has a "light-touch" provisional liquidation jurisdiction, which functionally mirrors the Chapter 11 regime in the United States and the Schedule B1 debtor-in-possession equivalent in the United Kingdom. "Light-touch" appointments permit the board and management of a company to remain in place, under the oversight of independent, professional liquidators, to enable a company to restructure its liabilities and return to solvency. The typical course of events is that a company incorporated in Bermuda will approach the Bermuda court for a "light-touch" appointment order, and then have that order recognised in the jurisdiction where it has its operations and/or listing status. This is particularly important for companies operating in jurisdictions such as Hong Kong, where no equivalent restructuring regime is available.

Restructuring activity in the Bermuda market is expected to remain high throughout 2022, as listed companies avail themselves of the flexibility of the "light-touch" provisional liquidation regime and as financial institutions seek early liquidations.

2. STATUTORY REGIMES GOVERNING RESTRUCTURINGS, REORGANISATIONS, INSOLVENCIES AND LIQUIDATIONS

2.1 Overview of Laws and Statutory Regimes

Bermuda's corporate insolvency regime is governed by Part XIII of the Companies Act 1981 (the Act) and the Companies (Winding Up) Rules 1982 (the Rules).

The Bankruptcy Act 1989, the Employment Act 2000, the Segregated Accounts Companies Act 2000 and the Insurance Act 1978 are other sources of law that have an impact upon financial restructurings, reorganisations and insolvencies.

Part XIII of the Act and the Rules are based on the Companies Act 1948 (UK) and the Companies (Winding Up) Rules 1949 (UK).

Part XIII of the Act applies to all local and exempted companies incorporated in Bermuda, and also to non-resident insurance companies and permit companies (except for those provisions relating to members' voluntary liquidation). Restructurings are governed by Part VII of the Act.

The Bermuda Supreme Court (the Court) is the court of first instance in Bermuda. In 2006, the Court introduced a Commercial Court division,

whose jurisdiction includes hearing matters arising under the Act, and therefore restructuring/insolvency-related proceedings.

Her Majesty's Privy Council remains Bermuda's highest court of appeal, and its decisions are binding upon the courts of Bermuda (to the extent that such decisions are not inconsistent with Bermuda statutory provisions).

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The primary types of proceedings available in Bermuda are:

- members' voluntary liquidation;
- creditors' voluntary liquidation;
- court-appointed provisional liquidation;
- court-appointed liquidation;
- schemes of arrangement; and
- receivership.

2.3 Obligation to Commence Formal Insolvency Proceedings

While there is no strict legal requirement for a company to commence formal insolvency proceedings when it is insolvent or in the zone of insolvency, insolvent trading that harms the interests of employees, creditors and shareholders will put company directors at risk of breaching their fiduciary duties. In fulfilling those duties, therefore, directors ought to consider whether commencing formal insolvency or restructuring proceedings is appropriate.

The exception to this general rule is that if, at any time during a members' voluntary winding-up process, the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in the directors' statutory declarations, he or she is obliged to call a meeting of creditors and lay before the meeting a statement of the company's assets and liabilities, otherwise he or she will be liable to a fine. Typically, the members' voluntary winding-up process will then convert to a creditors' voluntary liquidation.

2.4 Commencing Involuntary Proceedings

Compulsory liquidation is commenced in Bermuda upon the presentation of a petition to the Court. This can be done by a creditor (including contingent or prospective creditors), a contributory (provided he or she has held the shares for at least six months) or the company itself. If the company is a Bermuda insurance company, the Bermuda Monetary Authority (the BMA) may also petition for the company's winding-up, in circumstances where the insurer has failed to meet certain statutory obligations or is insolvent.

2.5 Requirement for Insolvency

Insolvency is not required in order to commence voluntary or involuntary proceedings. A voluntary proceeding is commenced by resolution of the shareholders, usually at the recommendation of the board.

An involuntary proceeding (presentation of a petition) can be based on a number of non-insolvency-related grounds, including the following:

- where the company has not commenced business within a year of its incorporation or has suspended trading for a whole year;
- where the company is engaged in any restricted or prohibited business as proscribed under Sections 4A and 4B of the Act; or
- where it is just and equitable to wind up the company.

Where a petition to wind up a company is based on insolvency, however, the petitioner must be able to demonstrate that the company is unable to pay its debts.

Pursuant to Section 162 of the Act, a company is deemed to be unable to pay its debts in the following circumstances:

- if a creditor to whom the company is indebted for a sum over BMD500 has served a statutory demand for payment and the company has failed to pay the sum demanded or secure for same within 21 days of service;
- if the execution of a court judgment over the company is returned unsatisfied; or
- if it is proved to the satisfaction of the Court that the company is unable to pay its debts. In making such determination, the Court will take contingent and prospective liabilities into account, and will look to the cash flow and the balance sheet tests for insolvency.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Insurance Companies

The provisions of the Insurance Act 1978 modify the winding-up provisions of the Act with respect to insurance companies.

A creditor of an insurance company may file a petition to wind up an insurance company in the normal way, but creditors holding only contingent or prospective claims may not petition to wind up an insurance company unless they are one of ten or more policy holders with an aggregate value of not less than BMD50,000; even then, they may do so only with the leave of the Court.

The BMA has authority to petition for the winding-up of an insurance company on the grounds of its failure to comply with statutory duties (ie, a failure to produce financial accounts), in addition to its insolvency.

Amendments to the Insurance Act 1978 came into force on 1 January 2019, providing priority for policy holder creditors over trade creditors.

Insurance companies that write long-term business must, upon a winding-up order being made, segregate the assets and liabilities of the company such that the assets of the long-term business fund are available to satisfy only the long-term business liabilities, and the assets of its other business are available to meet the liabilities of the other business.

Financial Market Firms

The Segregated Accounts Companies Act 2000 (the SACA) governs the insolvency of segregated accounts companies in Bermuda, together with the Act and any other applicable legislation. The key characteristic of such companies is that the assets and liabilities of the company itself are held in the company general account and separated from the assets and liabilities of each segregated account. Readers may be more familiar with the term “protected cell company” or SPC – a segregated account company is functionally equivalent.

Generally, the SACA provides for the liquidation of the company and the appointment of receivers over the segregated accounts.

The test for the solvency of the company will be whether the general account can pay its liabilities as they become due or, for a segregated account, whether it can pay the liabilities linked to that account as they become due.

Limited liability companies (LLCs) are a relatively new concept, introduced to Bermuda in 2016, and operate as a hybrid between a typical partnership and a corporation. An LLC is a separate legal entity and accordingly affords its members limited liability; however, the affairs of an LLC are governed by agreement, rather than statutory documents.

The Limited Liability Company Act 2016 governs the liquidation and dissolution of an LLC.

3. OUT-OF-COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

Restructuring Market Participants

Since Bermuda is an offshore jurisdiction, restructuring market participants are typically not based in the jurisdiction. Generally speaking, Bermuda companies will be involved in cross-border group restructurings where the parent company may be registered in Bermuda and group business operations are carried on in another jurisdiction – most commonly Singapore, Hong Kong, the PRC or the USA. As a result, restructuring market participants are usually based in the jurisdictions of the business operations of the group. Accordingly, their views and preferences vis-à-vis consensual restructuring will reflect their jurisdiction.

Bermuda's legislative insolvency regime does not impact the viability of informal/consensual out-of-court restructurings. However, if a company is seeking the protection of a stay of proceedings while negotiations take place, it will have to make an application to the Court for the appointment of provisional liquidators.

There is no requirement under Bermuda law for a company to engage in consensual restructuring negotiations before commencing a formal statutory process. As discussed in **2.3 Obligation to Commence Formal Insolvency Proceedings**, there is, likewise, no formal requirement for directors to commence a statutory process if the company is insolvent. However, whether the directors would be fulfilling their fiduciary obligations by engaging in a consensual process where the company is insolvent depends on the facts, and directors should take legal advice.

In any distressed scenario, the directors should be continually considering (and documenting) whether the proposed steps are in the best interests of, and maximise returns to, the creditors of the company, and how the outcome of what is being proposed compares with what the creditors would achieve if the company were to be placed into formal winding-up proceedings.

3.2 Consensual Restructuring and Workout Processes

As discussed in **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**, consensual restructuring and workout processes are generally conducted in the relevant onshore jurisdictions where the majority of the market participants are located and, as such, the process will be governed by those participants. Bermuda counsel will assist in ensuring that formal requirements to enable and facilitate such consensual restructurings are satisfied within the jurisdiction.

3.3 New Money

With respect to the priority afforded to new money, see **6.10 Priority New Money**. New money may be injected by existing lenders, creditors or a "white knight" investor, and it is common to see super-priority rights attached to new money investors.

3.4 Duties on Creditors

There are no specific laws in Bermuda that define or regulate consensual restructuring strategies. Save for any separate agreement between the parties, creditors do not owe any duties to each other. However, from a practical perspective, if a consensual out-of-court restructuring does not obtain the approval of 100% of the company's creditors, a disaffected creditor would be able to upset the restructuring.

Under Section 102 of the Act, where a contract or scheme involving the transfer of shares to

another company has been approved by not less than 90% of the relevant class of shareholders, the shares of dissenting shareholders may be compulsorily purchased by the transferee company.

3.5 Out-of-Court Financial Restructuring or Workout

There are no statutory provisions governing the cram-down of dissenting creditors or shareholders in consensual out-of-court restructurings; dissenting creditors or shareholders can only be crammed down under a scheme of arrangement, merger or amalgamation (each of which involves a court process) if the statutory majorities of relevant stakeholders are met (see **6.4 Claims of Dissenting Creditors**).

4. SECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

4.1 Liens/Security

Under Bermuda law, security is commonly taken over an asset (whether movable or immovable property) by the grant, transfer or assignment of a proprietary interest in the asset to secure the performance of an obligation or contractual duty or payment of a debt.

The following security is commonly taken over the following types of assets:

- real estate – mortgages and fixed charges;
- equity shares – share charges;
- movable property – mortgages, fixed charges, floating charges, pledges, liens and retention of title clauses in contracts;
- intellectual property and intangible property – mortgages, fixed charges or floating charges under a debenture covering all asset classes; and
- bank accounts – fixed or floating charges.

4.2 Rights and Remedies

Since secured creditors possess rights in rem, secured assets are generally considered to be outside of a company's estate, and are therefore excluded or exempted from the assets available to the general body of unsecured creditors in insolvency. As a result, a secured creditor does not need the permission of a liquidator or the Court to enforce its security, and may do so at any time, subject to the terms of the security document. The secured creditor will not participate in the waterfall of priority of debts, provided he or she has not surrendered his or her security and his or her debt is fully satisfied by the security. Secured creditors' rights, remedies and liens are not subject to any type of stay or deferral of enforcement in formal or informal proceedings.

However, the exercise of a secured creditor's rights would typically be subject to the applicable terms of any intercreditor agreement entered into by the secured creditor. Although the Act does not expressly provide that intercreditor agreements will survive a company's winding-up, as a matter of common law, the Court has recognised the efficacy of these arrangements.

Depending on the terms of a scheme of arrangement, secured creditors forming a distinct "class" of creditors for the purposes of the scheme may be able to block a restructuring if the relevant statutory majorities for each class of creditor under the scheme are not met. It is often vital to the success of a scheme of arrangement to keep the secured creditors on side, as typically the secured assets will be critical to the company's continued operation. In practice, a secured creditor may also disrupt a voluntary or involuntary process by exercising its right to enforce the security. Depending on the nature of the secured assets and their importance to the viability of the scheme, enforcement may cause a scheme of arrangement to fail.

The types of remedies available to a secured creditor will depend upon the terms of the creditor's security interest, and may include the right to appoint a receiver over the secured asset in the event of a debtor's default. A receiver will act under the powers set out in the security document and will usually realise the value of the secured asset to repay the secured creditor.

4.3 Special Procedural Protections and Rights

See **4.2 Rights and Remedies**.

5. UNSECURED CREDITOR RIGHTS, REMEDIES AND PRIORITIES

5.1 Differing Rights and Priorities

With respect to differing rights, see **4.2 Rights and Remedies**. With respect to priorities among the various classes of creditors, creditors' claims (not including secured creditors' claims that fall outside the waterfall) are ranked in the following order of priority in a liquidation:

- the costs and expenses of the liquidation proceedings;
- certain debts due to employees;
- certain other preferential payments – ie, taxes, rates, wages, holiday pay and pension contributions that are owing;
- debts secured by a floating charge;
- unsecured debts;
- debts due to shareholders; and
- shareholders' equity.

Each category of claims must be paid in full prior to the payment of creditors in the subsequent category of claims. Creditors in the same category rank equally.

A company can enter into an agreement with its creditors under which certain debts are contractually subordinated to other debts.

5.2 Unsecured Trade Creditors

The claims of unsecured trade creditors are typically treated as unsecured debts in a restructuring process. A retention of title clause is the primary mechanism used by trade creditors to secure their debts.

5.3 Rights and Remedies for Unsecured Creditors

In a compulsory liquidation, there will be a moratorium on proceedings commencing or continuing against the company without the leave of the Court once provisional liquidators have been appointed or a winding-up order has been made.

In the absence of a moratorium, an unsecured creditor may be able to disrupt a restructuring by enforcing judgment on its claim by means of a writ of execution, a writ of possession or a garnishee order. Alternatively, an unsecured creditor may file a winding-up petition against the company.

An unsecured creditor may apply to the Court for a stay of the winding-up proceedings either at any time after the presentation of a winding-up petition and before a winding-up order has been made, or at any time after an order for winding-up. In terms of the latter, the Court may make an order staying the proceedings (either altogether or for a limited time) on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed.

5.4 Pre-judgment Attachments

Pre-judgment attachments are not available to unsecured creditors. However, in certain circumstances, an unsecured creditor may be able to obtain injunctive relief prohibiting the company from disposing of assets pending judgment.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

See **5.1 Differing Rights and Priorities**. New money can be afforded "super priority" in appropriate circumstances.

6. STATUTORY RESTRUCTURING, REHABILITATION AND REORGANISATION PROCEEDINGS

6.1 Statutory Process for a Financial Restructuring/Reorganisation

Objective

The principal restructuring tool in Bermuda is the scheme of arrangement under Section 99 of the Act. Bermuda schemes are, in substance, very similar to schemes in the UK, although there are certain procedural differences.

The provisions of Section 99 allow for a "compromise" or "arrangement" between a company and its creditors. The most common use of Bermuda schemes is to facilitate the orderly reorganisation of a company's share capital, thereby avoiding an insolvent liquidation. Schemes are also used in anticipation of a liquidation in order to alter the distribution rights of creditors and/or shareholders.

Creditor Approval Threshold

A scheme becomes binding on the company and its creditors if a simple majority in number (ie, 50% or more) – representing 75% in value of those creditors attending and voting at the scheme meeting (in person or by proxy) – vote in favour.

Commencement

Scheme proceedings can be commenced by the company, by any creditor or shareholder of the company or by a liquidator in an insolvency context. Scheme proceedings commenced by a creditor or shareholder will require the company's support.

Scheme Procedure

Bringing a scheme into operation – with respect to either a solvent or an insolvent company – is a three-stage process, as follows:

- the commercial terms of the scheme are negotiated, funding is secured and communication is made with the company's creditors to confirm the prospects of the scheme being approved;
- a formal scheme document and explanatory statement is prepared, which explains the purpose and effect of the scheme and discloses any material interest the directors of the company may have in the scheme; and
- an application is then made to the Court seeking leave to convene a meeting to place the scheme before the creditors. Typically, directions will be sought as to how the scheme meeting is to be convened, how it is to be advertised, how the scheme document should be circulated to creditors and how the meeting itself will be conducted. If there are multiple classes of creditors, the person promoting the scheme will seek an order from the Court for the determination of the creditor classes.

Sanction

Court sanction of a scheme will be required before the scheme can become effective. The Court will not simply "rubber-stamp" a scheme, although it will recognise that a company's creditors are likely the best judge of what is to their commercial advantage.

In certain circumstances, the Court may decline to sanction a scheme. Such circumstances could include where the Court finds that the scheme is being used as a mechanism to oppress the

minority shareholders, where the Court finds that creditor classes have not been properly determined, or where it can be shown that the information provided to creditors was materially defective or the scheme itself was procured by fraud.

Solvent/Insolvent Schemes?

A scheme of arrangement may be proposed, voted upon and sanctioned regardless of the solvency status of the company. Solvent schemes will typically proceed under the oversight of a scheme administrator appointed within the terms of the scheme itself. Insolvent schemes are often progressed in the context of a "light-touch" provisional liquidation, where the powers of the joint provisional liquidators (JPLs) are limited to overseeing the company's board and management as the scheme is implemented. A scheme progressed in the context of a "light-touch" provisional liquidation has the benefit of a statutory moratorium on proceedings.

Timeline

Generally speaking, a Bermuda scheme can be completed within nine to 12 weeks from the date when the scheme originating summons is filed. Objections made by stakeholders regarding commercial terms or the propriety of the scheme process can significantly extend this period.

Confidentiality

Public court filings are required to bring a scheme into effect, and the petition seeking approval of the scheme meetings and ultimate sanction of the scheme are public documents. However, the key commercial and economic terms of the scheme will be disclosed in the scheme document and explanatory statement exhibited to the evidence filed in support of that petition, and those documents are not publicly accessible. While there is no formal requirement for public disclosure of the scheme documents, as a matter of practice this material will become available to the world at large if the company is publicly listed.

Conclusion of the Scheme

Once the Court has sanctioned the scheme and it is lodged with the Registrar of Companies, it is binding on the company and all of the affected creditors and shareholders, regardless of whether they voted on or were aware of the proposal. Once the scheme has been sanctioned and lodged with the Registrar of Companies, it is very difficult to challenge the scheme, other than in the case of a fraud that affected the result.

6.2 Position of the Company

No moratorium is available if a scheme of arrangement is initiated when a company is not in provisional liquidation. If a scheme is initiated for a company that is in provisional liquidation, then an automatic stay prohibits the commencement or continuance of any proceedings against the company without the leave of the Court.

A company will typically continue to operate its business during a restructuring process. In a solvent restructuring, the process will be controlled by existing management. In an insolvent restructuring, management will drive the restructuring under the supervision of provisional liquidators in a "light-touch" provisional liquidation.

A company can borrow money during a restructuring by way of a scheme of arrangement, although the sanction of the Court may be required in an insolvent restructuring where provisional liquidators have been appointed. In such circumstances, management would typically approach the Court for approval of the terms of any funding provided by existing creditors or third parties, and the provisional liquidators would provide the Court with their views on the proposed borrowing.

6.3 Roles of Creditors

The class composition of the creditors is a fundamental matter to be resolved at an early stage of scheme proceedings. The Act provides that a scheme should be between the company and its creditors, or "any class of creditors". Each class of creditors votes at a separate meeting, and each of those separate meetings must pass the scheme by the requisite majority in order for the scheme to be approved. See **6.1 Statutory Process for a Financial Restructuring/Reorganisation**.

The basic test is whether the members in each class have rights that are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. In the English Court of Appeal decision in Re Hawk Insurance Co Ltd [2001] EWCA Civ 241, Lord Justice Chadwick posited the test in the following terms: "Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements?"

In a restructuring, creditor committees are formed on an ad hoc basis and act in an advisory capacity regarding the provisional liquidators' proposed actions.

Creditors will receive copies of the scheme documents and explanatory statement, as a minimum, so that they may vote on the scheme in an informed manner. Creditors of a company in an insolvent restructuring will also be entitled to receive copies of all the documents on the court file, which may include any reports made by the provisional liquidators as to the progress and prospects of the restructuring, subject to any sealing orders made with respect to those reports.

6.4 Claims of Dissenting Creditors

Under a scheme of arrangement, which involves a court process, dissenting creditors can be crammed down if the statutory majorities of approving creditors are met.

6.5 Trading of Claims against a Company

There is no statutory prohibition on the trading of creditor claims. However, if claims against the company are to be assigned/novated, the company will need to be notified.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

A group restructuring may be effected by way of schemes of arrangement, although a separate scheme and separate scheme approval will be required for each company in the group. If a holistic approach to the restructuring is adopted, substantial efficiencies can be realised and the Court will play a proactive role in co-ordinating and streamlining the necessary hearings.

6.7 Restrictions on a Company's Use of Its Assets

If the scheme is implemented while the company is in provisional liquidation, the disposition of the company's assets will require the leave of the Court if the necessary power has not already been granted to the provisional liquidators.

In a solvent restructuring, there are no restrictions on the company's use or sale of its assets during the restructuring, save for any relevant provisions in the company's bylaws or shareholders' agreement (if applicable), or relevant contractual restrictions.

6.8 Asset Disposition and Related Procedures

In a solvent restructuring, the sale of assets will be conducted by duly authorised representatives of the company, who will generally be the

directors. In the case of an insolvent restructuring, the sale of assets will usually be conducted by management, overseen by the provisional liquidators.

Section 36A of the Conveyancing Act 1983 enables an eligible creditor to set aside every disposition made with the dominant intention of putting property beyond the reach of creditors (ie, a fraudulent conveyance). Recourse can be granted in relief of this, regardless of whether a winding-up order has been made. Such disposition must be a disposition at an undervalue. The relevant test is whether the dominant intention of the disposition was to put the property beyond the reach of other creditors.

Creditors may bid for assets and act as a stalking horse in a sale process. There are no defined rules that apply to such credit bids, although the provisional liquidators will ordinarily have to seek the Court's sanction for a sale of assets conducted in an insolvent restructuring.

Generally speaking, there is no impediment to effectuating during a restructuring proceeding sales and similar transactions that have been pre-negotiated prior to the restructuring proceeding, although a sale will typically require the approval of the provisional liquidators and ultimately the Court if the sale is being conducted in the context of an insolvent restructuring.

6.9 Secured Creditor Liens and Security Arrangements

Secured creditor liens and security arrangements can be released in a solvent or insolvent restructuring.

6.10 Priority New Money

While there is no statutory procedure for new money investments or loans, new money can be given priority by the company granting security to the lenders or by the subordination of existing creditors through the scheme itself. In the absence of any consensual subordination or release of their security, existing secured lenders will take priority over any new money security.

6.11 Determining the Value of Claims and Creditors

The adjudication of disputed or competing creditor claims can be dealt with in the scheme document.

6.12 Restructuring or Reorganisation Agreement

Court sanction of a scheme will be required before the scheme can become effective. The Court will not simply rubber-stamp a scheme, although it will recognise that a company's creditors are probably the best judge of what is to their commercial advantage. See **6.1 Statutory Process for a Financial Restructuring/Reorganisation**.

6.13 Non-debtor Parties

Subject to the law governing the underlying obligation, it is possible as part of a restructuring to release non-debtor parties from liabilities to the debtor.

6.14 Rights of Set-Off

In a solvent restructuring, creditors' rights of set-off or netting would need to be prescribed in the scheme document.

In an insolvent restructuring, the provisions of Section 235 of the Act, which imports Section 37 of the Bankruptcy Act 1989, would apply. Any contract purporting to limit or enhance the scope of set-off as prescribed therein will, generally, be void.

6.15 Failure to Observe the Terms of Agreements

An agreed scheme of arrangement, which has been sanctioned by the Court and lodged with

the Registrar of Companies, is a legally binding document and can be enforced as a matter of contract. Where the company or a creditor fails to abide by the terms of an agreed scheme, the assistance of the Court is typically sought to enforce the terms of the scheme.

6.16 Existing Equity Owners

Existing equity owners can receive/retain any ownership or other property on account of their ownership interests. The terms of the scheme will govern any equity retention.

7. STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDINGS

7.1 Types of Voluntary/Involuntary Proceedings

Liquidation procedures in Bermuda include both compulsory and voluntary liquidations. The purpose of these procedures is to realise assets, pay off creditors and distribute any remaining assets to the shareholders. Thereafter, the company can be dissolved and will cease to exist. Both of these liquidation procedures are available to all companies registered in Bermuda.

Voluntary Liquidation

A company may be wound up voluntarily when it resolves in a general meeting that it should be so wound up.

There are two types of voluntary liquidations in Bermuda:

- a creditors' voluntary liquidation (CVL), which is driven by creditors of a company and applies to insolvent companies; and
- a members' voluntary liquidation (MVL), which involves a solvent company being wound up under the control of its shareholders.

CVLs are uncommon in Bermuda but can relieve a company of mounting creditor pressure, without the need for the supervision of the Court.

Commencement

A CVL must be commenced pursuant to a resolution for the company's winding-up being passed at a general meeting of its shareholders, typically based on the recommendation of the board of directors.

Where it is proposed to wind up a company by an MVL, the majority of the directors of the company must file a statutory declaration to the effect that, in their opinion, the company will be able to pay its debts in full within a stated period not exceeding 12 months from the commencement of the winding-up.

Calculation and recognition of creditors' claims

The liquidator will inquire into and adjudicate upon all claims. All creditors must prove their debt, unless the Court gives directions otherwise.

A liquidator will notify creditors of the requirement to submit proof of their debt by advertising this in the appointed newspaper in Bermuda and by writing to all of the company's creditors that appear in the company's books and records.

If a liquidator rejects a proof of debt, the liquidator must state the grounds for doing so in writing to the creditor. If the claim is rejected, a creditor can appeal the liquidator's decision by applying to the Court within 21 days of receiving the rejection notice.

Creditors of contingent claims may submit proof of debt on the basis of a just estimate, provided that the contingent claim arises from enforceable obligations.

Length of procedure
The duration of a CVL depends on the complexity and nature of the company's affairs, debts and assets.

The duration of an MVL will typically be between eight and 12 weeks.

Trading claims
Subject to any contractual restrictions, a claim in a voluntary liquidation can be assigned by a creditor. The company will need to be notified of the assignment.

Moratorium
In relation to voluntary liquidations, no automatic stay of proceedings applies. However, the Court is able to consider an application by a liquidator to grant a stay of creditor action from the date of the shareholders' resolution, which is when the voluntary liquidation is deemed to commence.

Supervision and control
In voluntary liquidations, the liquidator takes over the management of the company from the directors, whose powers are displaced.

Liquidator's powers
The Act provides for the powers of liquidators in voluntary proceedings in Section 226, read in conjunction with Section 175.

Disclaimer of contracts
A liquidator may, with the leave of the Court, disclaim any property belonging to the company, including any right of action or right under a contract that in the liquidator's opinion is onerous for the company to hold or is otherwise unprofitable or unsaleable.

Prior to the granting of leave, the Court may require notice to be given to interested persons and may impose any conditions on the disclaimer as it thinks just.

Set-off
In liquidations, there is an automatic set-off where there are mutual credits, mutual debits or other mutual dealings between the insolvent company and a creditor. In respect of mutual dealings, account shall be taken of what is due from one party to the other, and the sum due from the one party shall be set off against any sum due from the other party.

It is not possible to temporarily suspend or terminate such set-off rights, as the requirements of Section 37 of the Act are mandatory.

Information rights
Meetings of creditors are generally convened in the following circumstances:

- on an annual basis to consider the liquidator's annual reports;
- to consider any extraordinary business, if required; and
- to approve the liquidator's final distribution account.

Creditors are generally entitled to be informed about the financial status of the company and to receive copies of reports prepared by the liquidator. Ad hoc updates may also be provided by the liquidator. Although creditors do not have a general right to access the books and records of the company, they may apply to the Court for an order granting access.

Conclusion
Once the liquidator has realised all the assets of the company, paid any amounts due in respect of preferential payments, made distributions to creditors and distributed any balance to the shareholders, the liquidator must comply with certain formalities, depending on the type of liquidation.

In the case of a CVL, the liquidator must convene the final meetings of the creditors and the shareholders. Within seven days of the meetings, the liquidator must notify the Registrar of Companies about the meetings and provide an account of the liquidation.

In the case of an MVL, following the final general meeting of the shareholders, the company is deemed dissolved. Within seven days of the final general meeting of the shareholders, the liquidator must notify the Registrar of Companies.

Involuntary/Compulsory Liquidation

Compulsory liquidation is a court-sanctioned insolvency proceeding and can be used whether a company is solvent or insolvent. This is the most commonly used type of liquidation proceeding in Bermuda, although a solvent compulsory liquidation is uncommon as a general proposition.

Commencement

Compulsory liquidation may be initiated by one of the following parties presenting a petition to the Court:

- the company itself, including the directors;
- any creditor(s), including contingent or prospective creditors;
- any contributory/contributories – ie, any person liable to contribute to the assets of the company in the event of its liquidation;
- the Registrar of Companies;
- the BMA in its capacity as the Supervisor of Insurance; or
- all of the above parties, together or separately.

A petition must be based on one or more of the grounds in Section 161 of the Act, including but not limited to the following:

- the company has agreed by resolution that it should be wound up by the Court;
- the company is unable to pay its debts; and
- the Court is of the opinion that it is just and equitable that the company should be wound up.

While it is typical for more than one ground to be included in a petition, the most common ground used is the company's inability to pay its debts. The Act provides certain circumstances under which a company is deemed to be unable to pay its debts, including the following:

- failure to pay a sum demanded in excess of BMD500 within three weeks of a demand;
- an unsatisfied judgment, decree or order of any court in favour of a creditor; or
- if it is proved to the Court's satisfaction that the company is unable to pay its debts (on a balance sheet and/or cash flow basis). In determining this, the Court shall take into account the contingent and prospective liabilities of the company.

Calculation and recognition of claims of creditors

See section under voluntary liquidation, above.

Length of procedure

The length of a compulsory liquidation depends on the complexity and nature of the company's affairs, debts and assets.

Trading claims

See section under voluntary liquidation, above.

Moratorium

In a compulsory liquidation, once a winding-up order is made or a provisional liquidator appointed, an automatic stay prohibits the commencement or continuance of actions against the company without the leave of the Court. However,

secured creditors remain entitled to enforce their security.

Supervision and control
At any time after a petition has been presented to the Court, the Court may appoint a provisional liquidator to protect the assets of the company pending the hearing of the petition. Upon a winding-up order being made, a provisional liquidator is appointed (or continues in office if already appointed) to conduct the liquidation pending the first meeting of creditors, at which the creditors will pass a resolution for the permanent appointment of a liquidator and, if required, a committee of inspection.

The power of directors to manage the company is displaced by the appointment of a liquidator, who, once in office, is empowered to sell the company's assets without the approval of the creditors or the Court. Should a committee of inspection be appointed, it will act with and assist the liquidator with the exercise of his or her duties. For circumstances under which a provisional liquidator may be appointed prior to the hearing of the winding-up petition, see **2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations**.

Liquidator's powers
The Act expressly provides general powers to liquidators under Section 175.

Disclaimer of contracts
See section under voluntary liquidation, above.

Set-off
See section under voluntary liquidation, above.

Information rights
See section under voluntary liquidation, above. In compulsory liquidations, the presentation of the petition must be advertised in a Bermuda newspaper (and, in practice, typically also in any other jurisdiction where the company has a majority of creditors) so that the petition is brought to the attention of interested stakeholders.

Conclusion
Once the liquidator has realised all the assets of the company, paid any amounts due in respect of preferential payments, made distributions to creditors and distributed any balance to the shareholders (unlikely in an insolvent liquidation), the liquidator must comply with certain formalities, including making an application to the Court for his or her release. The liquidator must then give 21 days' notice to creditors and shareholders of his or her intention to make the application, and provide an account of the liquidation with that notice.

7.2 Distressed Disposals

Within a liquidation, the sale of a company's assets or business is negotiated, authorised and effected by the liquidator. Consequently, any related contracts will need to be executed by the company acting through the liquidator. In the ordinary course of business, the sanction of the Court or the committee of inspection would typically be sought in order to protect the liquidator.

A purchaser would only acquire such title in any assets sold as the company holds. However, assuming that the company possesses title in any assets sold and either the Court or the committee of inspection sanctions such sale to give comfort to the liquidator, then assets purchased from a liquidator in these circumstances are considered "free and clear".

Creditors are generally permitted to make credit bids and act as a stalking horse. In terms of assessing the fairness of a credit bid, the Court will take into account special circumstances relating to the bid, and may seek to rely upon

an independent expert valuation. This applies in circumstances where the creditor is the original creditor or an assignee.

It is possible to effectuate pre-negotiated sales transactions following the commencement of a statutory procedure. However, the sanction of the Court would usually be sought in order to protect the liquidator.

7.3 Organisation of Creditors or Committees

A committee of inspection may be formed, consisting of creditors and contributories of the company. Typically, at the first meeting of creditors and contributories, members of the committee of inspection are appointed by resolution of the creditors and contributories, subject to the sanction of the Court.

The committee of inspection may sanction the liquidator to take the following actions:

- commencing or defending actions;
- carrying on the business of the company;
- appointing an attorney;
- paying classes of creditors in full;
- making any compromise or arrangement with the creditors of the company;
- making any compromise of calls and liabilities of contributories; and
- fixing the remuneration to be paid to the liquidator.

Members of the committee of inspection will be reimbursed out of the assets of the company for their reasonable expenses, including the reasonable cost of advisers.

8. INTERNATIONAL/ CROSS-BORDER ISSUES AND PROCESSES

8.1 Recognition or Relief in Connection with Overseas Proceedings

Although there is no statutory mechanism for the recognition of foreign restructuring or insolvency proceedings, there is substantial jurisprudence whereby the Court has exercised its common law powers to recognise foreign insolvency and restructuring proceedings and to co-operate with the Court in another country. In the recent case of Re North Mining Shares Company Limited [2020] SC (Bda) 7 Com (27 January 2020), one of the Court's commercial judges described the issuance of a Letter of Request to the Hong Kong Court seeking the recognition of "light-touch" JPLs in the following terms: "Since the HK Court does not have the powers to appoint soft touch JPLs, this Court agreed to assist in a creative but judicially known way. That is consistent, in my judgment, with the principles of Comity."

8.2 Co-ordination in Cross-Border Cases

Although there is no statutory protocol for the co-ordination of cross-border insolvency proceedings for the Court, the Supreme Court has issued two practice directives relating to cross-border insolvencies: the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, dated 1 October 2007, and the Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters, dated 9 March 2017.

8.3 Rules, Standards and Guidelines

There are no specific rules, standards or guidelines to determine which jurisdiction's decisions, rulings or laws govern or are paramount.

Generally, the court supervising the "secondary" proceeding will be guided by the approach of the court supervising the "main" proceeding. While the Bermuda Court is limited by its jurisdiction, it adopts a flexible approach to cross-border proceedings to ensure an orderly process under which the interests of creditors are protected.

8.4 Foreign Creditors

There is no distinction between foreign and local creditors in restructuring or insolvency proceedings.

8.5 Recognition and Enforcement of Foreign Judgments

Foreign judgments are recognised by the Supreme Court of Bermuda, either by virtue of statute or at common law.

Certain foreign judgments may be recognised pursuant to the Judgments (Reciprocal Enforcement) Act 1958. This statute applies to judgments obtained in particular foreign countries to which the statute applies, the most notable being judgments given in the superior courts of the United Kingdom. The subject foreign judgment must be final and conclusive between the parties thereto and there must be payable thereunder a sum of money, not in respect of taxes or a fine or penalty.

Foreign judgments are not enforceable pursuant to statute if they have been wholly satisfied or could not be enforced by execution in the relevant foreign country. Furthermore, the registration of such a judgment may be set aside in the following circumstances:

- if the foreign court had no jurisdiction in the circumstances of the case;
- if the foreign judgment debtor did not receive notice of the proceedings; or
- if the judgment was obtained by fraud.

Where the foreign judgment was obtained in a country that is not subject to the Judgments (Reciprocal Enforcement) Act 1958, recognition may take place by common law. A foreign judgment creditor cannot enforce by direct execution at common law; an action must be commenced in the Supreme Court of Bermuda. Typically, the foreign judgment creditor will immediately seek summary judgment on the claim, asserting that there is no defence to the action by virtue of the final foreign judgment.

The court may decline to enforce a foreign judgment at common law in the following circumstances:

- if the foreign court lacked jurisdiction;
- if the judgment was obtained by fraud;
- if the enforcement of the foreign judgment would be contrary to public policy; or
- if there was a breach of the rules of natural justice in the proceedings in which the judgment was obtained.

9. TRUSTEES/RECEIVERS/STATUTORY OFFICERS

9.1 Types of Statutory Officers

Liquidators are typically appointed in restructuring or insolvency proceedings.

Outside of the scope of insolvency proceedings, and while not a "statutory" officer as they are appointed by contract rather than statute, a receiver may be appointed to enforce secured obligations under the terms of the relevant security document(s).

In practice, receivers are often tasked with co-operating with a (provisional) liquidator, particularly where the secured asset is the primary asset in the estate.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Although appointments as liquidators/receivers are commonly accepted by chartered accountants who specialise in insolvency and are Bermuda residents, there are currently no prescribed qualifications or licensing requirements. Efforts are underway within the insolvency fraternity to introduce a comprehensive licensing/supervision regime.

The liquidator's primary duty is to realise the assets of the company and to declare a dividend for creditors. The liquidator must have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. The liquidator shall use his or her own discretion in the management of the estate and its distribution amongst the creditors subject to statute.

A liquidator is subject to the normal common law rules applicable to fiduciaries, including the following:

- the requirement not to allow his or her own interests to come into conflict with his or her duties;
- duties of skill and care;
- a duty to act impartially; and
- a general duty of care to the creditors and shareholders as a body (not individually).

Since the liquidator is an officer of the Court, he or she also owes a duty to the Court.

Section 175 of the Act sets out the powers of a liquidator, which are split into powers that may be exercised without sanction of the Court or Committee of Inspection, and those that do require such sanction.

A liquidator in a compulsory winding-up proceeding must periodically report to the Court regarding the conduct and status of the liquidation. Creditors are generally entitled to know the total assets and liabilities of the company and to receive copies of any reports submitted by the liquidator to the Court. At the end of the liquidation, the liquidator must send a copy of the statement of receipts and payments relating to the liquidation to all creditors and contributories, together with a final report and notice of their intention to apply for release from the Court.

9.3 Selection of Officers

Liquidators in a voluntary winding-up are appointed by a resolution of the shareholders of the company (and confirmed by a resolution of the creditors in a creditors' voluntary liquidation), whereas provisional liquidators in a compulsory liquidation are nominated by the petitioner and appointed by the Court, either upon making a winding-up order or pending the hearing of the winding-up petition, upon application by summons.

In the latter case, the Court must be satisfied that there is sufficient ground for the early appointment of a provisional liquidator (typically a risk of dissipation of assets/mismanagement of the company, or for the purposes of a restructuring), and will make the appointment upon such terms as are just and necessary in the Court's opinion.

Liquidators appointed by the Court may be removed by the Court, upon cause being shown. However, an applicant seeking such removal must demonstrate a legitimate interest in the relief sought (for example, a creditor's interest as a creditor will suffice).

10. DUTIES AND PERSONAL LIABILITY OF DIRECTORS AND OFFICERS OF FINANCIALLY TROUBLED COMPANIES

10.1 Duties of Directors

As a matter of Bermuda law, directors owe duties to the company rather than directly to individual shareholders. When a company is insolvent or in the zone of insolvency, however, a director's duties expand to include having regard to the interests of the general body of creditors. In such circumstances, a director must consider the interests of the creditors as paramount.

The case law does not prescribe any bright-line test that can be used to determine precisely when a company is "financially distressed"; in general, if a company is in dire financial straits, a court will likely find that the company is in the zone of insolvency. The closer the company is to irretrievable insolvency, the greater the extent to which the directors must take into account the interests of the general body of creditors.

Bermuda law does not have an equivalent to the civil wrong of "wrongful trading" as described in English insolvency legislation, or "insolvent trading" in Australian corporations legislation. However, directors can still be held to account following the commencement of winding-up proceedings if it can be shown that a director:

- procured or participated in activities of the company with the intent to defraud creditors;
- misapplied property of the company; or
- engaged in any misfeasance or breach of trust in relation to the company.

The Act also sets out a range of offences pursuant to which a director may be held liable subsequent to the winding-up of a company (Section 243).

While Bermuda has no direct equivalent to the English Company Directors Disqualification Act 1986, if the Court convicts any director of an offence relating to the affairs of a company (including those enumerated in Section 243), the Court has discretion to make an order that such director not be involved in the management of any company without leave of the Court.

10.2 Direct Fiduciary Breach Claims

Creditors may only assert direct fiduciary breach claims against a director if that director had voluntarily assumed a direct duty to that creditor, which would be highly unusual. Claims for breaches of directors' fiduciary duties following a winding-up order will be pursued by the company's liquidators in the name of the company. It is important to note that many Bermuda companies include in their by-laws an indemnity/exculpation provision that will seek to hold the directors blameless for any negligent conduct, provided such conduct was not fraudulent or dishonest.

11. TRANSFERS/TRANSACTIONS THAT MAY BE SET ASIDE

11.1 Historical Transactions

Historical transactions may be set aside/annulled in certain circumstances, as follows.

- Pursuant to Section 237(1) of the Act, any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within six months before the commencement of its winding-up is deemed a fraudulent preference and invalid if, firstly, it was done with the intention to fraudulently

prefer one or more of the company's creditors and, secondly, at the time the company was unable to pay its debts as they became due. An action for recovery of a "fraudulent preference" is functionally equivalent to actions in relation to what are termed unfair preferences, voidable preferences, reviewable transactions or antecedent transactions in other jurisdictions.
- A floating charge granted by a company within 12 months before the commencement of its winding-up is void unless it can be proved that the company was solvent immediately upon the granting of the charge, except to the amount of any cash paid to the company at the time of the creation of the charge.
- A liquidator may disclaim onerous contracts with court approval and upon admittance of a claim for the appropriate value of any contract disclaimed in the liquidation.
- Section 36A of the Conveyancing Act 1983 enables an eligible creditor to set aside every disposition made with the dominant intention of putting property beyond the reach of creditors (ie, a fraudulent conveyance).

11.2 Look-Back Period

In order to set aside a transaction alleged to be an unfair preference, the transfer or disposition must have been made within the six months prior to the commencement of the winding-up.

An application to set aside a transaction characterised as a fraudulent conveyance must be brought within six years of the relevant conveyance, although in certain, limited circumstances this period may be extended to eight years.

11.3 Claims to Set Aside or Annul Transactions

The proper plaintiff in an action to recover property on the basis of an alleged fraudulent preference is the company, acting through its liquidator.

Outside of a winding-up process, any aggrieved creditor may apply under the Conveyancing Act 1983 for a declaration that a disposition is void if it was made at an undervalue with the intention to defraud the company's creditors.

Fraudulent preference claims may only be brought in insolvency proceedings. Fraudulent conveyance claims can be brought regardless of whether the company has commenced restructuring or insolvency proceedings.

Walkers is a full-service international commercial law firm, practising the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Ireland and Jersey from offices in each of these jurisdictions as well as offices in Dubai, Hong Kong, London and Singapore. The Bermuda insolvency and dispute resolution department comprises three partners and two other senior attorneys, and provides advice on all aspects of Bermuda law, including contentious and non-contentious insolvency, schemes of arrangement, contentious estates and secured and unsecured debt recovery.

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