



Legal Briefings

Insolvent Liquidations in the British Virgin Islands

July 2024

Introduction

Liquidations in the British Virgin Islands (“**BVI**”) can be either:

- 1) an insolvent liquidation and therefore governed by the Insolvency Act 2003 (as amended) (“**Insolvency Act**”); or
- 2) a solvent liquidation and therefore governed by the BVI Business Companies Act (as amended) (“**Companies Act**”). The Companies Act was amended by the BVI Business Companies (Amendment) Act 2022 and BVI Business Companies (Amendment) Regulations 2022.

This Briefing Note sets out some of the key points in relation to insolvent liquidations in the BVI. A separate Briefing Note covers the issues relating to voluntary (solvent) liquidations in the BVI.

Purpose of Insolvent Liquidation

Insolvent liquidations in the BVI do not have a rescue function. The purpose of the procedure is to bring the company’s affairs to an orderly end by settling the company’s debts and other affairs as well as taking possession of the company’s assets (if any) and distributing them. The liquidator appointed can also bring claims to set aside certain transactions entered into by the insolvent company before it went into liquidation.

Meaning of Insolvent

Under the Insolvency Act, a company will be considered insolvent in the BVI if the:

- 1) company fails to comply with the requirements of a statutory demand (which has not been set aside);
- 2) company fails to satisfy (either wholly or partly) execution or other process issued on a judgment, decree or order of the BVI court in favour of a creditor;
- 3) value of the liabilities of the company exceeds its assets (i.e. balance sheet insolvent); or

- 4) company is unable to pay its debts as they fall due. It is sufficient evidence of insolvency if there is an inability to pay a debt that is due and such debt is not disputed (*Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114).

Procedure

In the BVI, the appointment of a liquidator over an insolvent company under the Insolvency Act can be achieved by way of:

- 1) qualifying members' resolution; or
- 2) application to the BVI court.

1. Qualifying Members' Resolution

The members of a company may, by a qualifying resolution, appoint an "eligible insolvency practitioner" as liquidator of the company. The resolution will be a "qualifying resolution" if it is passed at a properly constituted meeting of the company by a majority of 75% (or if a higher majority is required by the memorandum of association or articles of association, by that higher majority) of the votes of those members who are present at the meeting and entitled to vote on the resolution.

The members of a company that is a regulated person may not appoint a liquidator unless at least five (5) business days written notice has been given to the Virgin Islands Deposit Insurance Corporation ("**VIDIC**") (in the case of a bank) or the Financial Services Commission ("**Commission**") (in the case of any other regulated person). The VIDIC or Commission may agree in writing on a shorter notice period.

Where the members resolve to appoint a liquidator, the company shall (as soon as practicable) give the liquidator notice of his/her appointment.

It should be noted that there are restrictions on the powers of a liquidator who is appointed by the members of the company. During the period before the holding of the first creditors' meeting, the powers of the liquidator are limited to:

- 1) taking into his/her custody and control all the assets to which the company is or appears to be entitled;
- 2) disposing of perishable goods and other assets the value of which is likely to diminish if they are not immediately disposed of;
- 3) doing all such things as may be necessary to protect the company's assets; and
- 4) exercising such other of the powers conferred on a liquidator as the court may, on the application, sanction.

2. Court Appointment

The court may appoint a liquidator of a company if the company is insolvent. The court may also appoint a liquidator if it is of the opinion that it is just and equitable or in the public interest to do so.

An application can be made by the company, a creditor and the Commission (amongst others). An application for the appointment of a liquidator shall be determined within six (6) months after it is filed (the court can extend this timeframe for a period not exceeding three (3) months if it considers this is justified).

[Interim Relief – Provisional Liquidator](#)

If an application for the liquidator's appointment has been filed but not yet determined by the court (or not withdrawn), the court may, on application by (i) the applicant for the appointment of a liquidator, (ii) the company, (iii) a creditor, (iv) a shareholder, or (v) the Commission (amongst others), appoint the Official Receiver or an eligible insolvency practitioner as provisional liquidator of the company.

Such interim relief can be utilised where, for example, there is an urgent need to preserve the company's assets. The court may appoint a provisional liquidator if either:

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

If a provisional liquidator is appointed, he/she will have 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/she was appointed. The court may limit the powers of a provisional liquidator in such manner and at such times as it considers fit.

Effect of Liquidation

Some of the effects of the liquidation (from the commencement of the liquidation) are as follows:

- 1) the liquidator has custody and control of the company's assets;
- 2) the company's directors and other officers remain in office, but they cease to have any powers, functions or duties (other than those required or permitted or authorised by the liquidator); and
- 3) unless the court otherwise orders, no person may:
 - a) commence or proceed with any action or proceeding against the company or in relation to its assets; or
 - b) exercise or enforce, or continue to exercise or enforce any right or remedy over or against assets of the company.

Duties of Liquidator

The principal duties of a company's liquidator are:

- 1) to take possession of, protect and realise the company's assets;
- 2) to distribute the assets or the proceeds of realisation of the assets; and
- 3) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets.

The liquidators shall use their own discretion in undertaking their duties.

If it appears to the liquidators that the BVI company they were appointed over has carried on unlicensed financial services business, they shall as soon as reasonably practicable report the matter to the Commission. Where the liquidators make such a report to the Commission, they shall:

- 1) send to the Commission a copy of every notice or other document that they are required to send to a creditor or the court; and

- 2) notify the Commission of any application made to the court in or in connection with the liquidation.

Further, the liquidators also have the other duties imposed by Insolvency Act and the Insolvency Rules and such duties as may be imposed by the court.

Notice of Appointment

The liquidators shall provide notice of their appointment and shall, within 14 days of the date of their appointment:

- 1) advertise their appointment;
- 2) file notice of their appointment with the Registrar of Corporate Affairs ("**Registrar**");
- 3) serve notice of their appointment on the company; and
- 4) if they have been appointed in respect of a company that is or has been a regulated person, serve notice of their appointment on the Commission.

A liquidator who contravenes these requirements commits an offence.

General Powers of Liquidator

Liquidators of a BVI company have the powers necessary to carry out the functions and duties of a liquidator and the powers conferred on them by the Insolvency Act. The liquidators will have the powers specified in Schedule 2 of the Insolvency Act which include the power to pay any class of creditors in full and the power to commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the company.

The court may provide that certain powers may only be exercised with the approval of the court:

- 1) where the liquidators are appointed by the court, on their appointment or subsequently; or
- 2) where the liquidators are appointed by the members, at any time.

Termination of Liquidation

The liquidation of a company terminates on the first occurring of:

- 1) the making by the court of an order terminating the liquidation, or such later date as may be specified in the court order;
- 2) the filing by the liquidators of a certificate of compliance, as required by the Insolvency Act, if appropriate; or
- 3) the making by the court of an order exempting the liquidators from filing a certificate of compliance.

An application can be made to the court terminating the liquidation. This may be made by the liquidator, a creditor and a director (amongst others). The court may, at any time after the appointment of the liquidator of a company, make an order terminating the liquidation if it is satisfied that it is just and equitable to do so.

The liquidators will have certain statutory administrative tasks after completing their duties in relation to the liquidation of the company. The liquidators shall, *inter alia*:

- 1) prepare and send to every creditor of the company whose claim has been admitted and to every member of the company their final report and a summary of the grounds upon which a creditor or member may object to the striking of the company from the Register of Companies (“**Register**”); and
- 2) file with the Registrar a copy of the final report and the statement of realisations and distributions sent to the creditors and members of the company.

The liquidators’ final report shall contain a statement that all known assets of the company have been disclaimed, realised or distributed without realization and that all proceeds of realisation have been distributed. The final report shall also state that there is no reason why, in their opinion, the company should not be struck from the Register, and dissolved. It should be noted that once the final report has been filed with the Registrar, the Registrar shall publish notice in the Gazette that the liquidation is completed and of the intention to strike-off the company (within a period of not less than 7 days from the date of publication). The Registrar shall specify the date on which the Registrar intends to remove or strike off the name of the company from the Register. The company is dissolved after the expiry of the date specified by the Registrar in the Gazette.

A person who ceases to be the liquidator (or provisional liquidator as the case may be), of a BVI company may apply to the court for his/her release and the court may grant the release unconditionally or upon such conditions as it considers fit (or it may withhold it). Where the liquidator is released, he/she is discharged from all liability in respect of any act or default in relation to his/her administration of the company. A liquidator who obtains his/her release shall file a notice in the prescribed form with the Registrar.

Conclusion

Insolvent liquidations are complex given that there are various stakeholders involved and liabilities that need to be settled (as well as potential assets that need to be dealt with and distributed). As can be seen from above, there are also certain statutory administrative tasks that need to be completed within certain timeframes. The team at Loeb Smith has a wealth of experience dealing with insolvent liquidations in the BVI. Please contact a member of our team who will be able to discuss further with you.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on BVI liquidations (insolvent or voluntary), please contact your usual Loeb Smith attorney or any of the following:

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