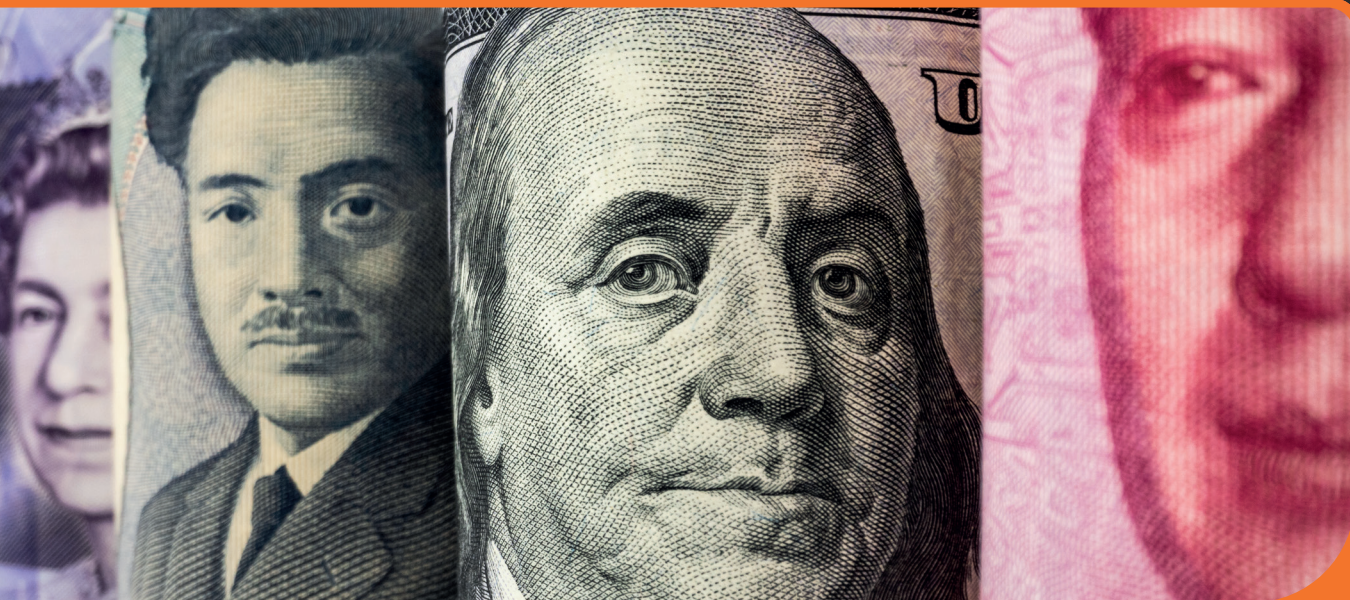


# International Comparative Legal Guides



Practical cross-border insights into lending and secured finance

## Lending & Secured Finance 2022

10<sup>th</sup> Edition

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# British Virgin Islands

Maples Group



Michael Gagie



Matthew Gilbert

## 1 Overview

### 1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

The British Virgin Islands (“**BVI**”) continues to be a jurisdiction of choice for corporate vehicles entering into secured finance transactions. The British Virgin Islands’ creditor-friendly and innovative legislation has proven adaptable to the needs of its international clients while remaining fully compliant with international regulations and policies. In particular, the BVI’s modern and flexible legislation has enabled business, transactions and entities to be managed effectively during COVID-19 and beyond, from digital incorporation and know-your-client (“**KYC**”) regimes to virtual meetings and electronic closings. The recent introduction of rules on economic substance for companies and limited partnerships does not impact third-party lenders and counterparties.

### 1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

BVI obligors continue to feature prominently in financed holding structures and joint ventures, notably: in the oil and gas and mining sectors; in development finance and infrastructure projects throughout Africa, Asia and Eastern Europe, CIS, Latin America and elsewhere; in high-end property developments in London and elsewhere; and in shipping, drillships and other asset finance facilities.

## 2 Guarantees

### 2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

The giving of a guarantee by a BVI company is governed by the key corporate legislation, the BVI Business Companies Act (As Revised) (the “**Act**”), and the company’s memorandum and articles of association. Subject to its memorandum and articles of association, the powers of a company include (among other things) the power to guarantee a liability or obligation of any person and secure any obligations by mortgage, pledge or other charge of any of its assets for that purpose.

### 2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Under the Act, and subject to its memorandum and articles of association, a company has, irrespective of corporate benefit, full capacity to carry on or undertake any business or activity, do any act or enter any transaction and, for those purposes, full rights, powers and privileges.

The directors of a company have fiduciary and statutory duties to act honestly and in good faith and in the best interests of the company. A director who is in breach of his duties may be liable to the company for the resulting loss to the company.

In the event that there is a disproportionately small (or no) benefit to the company, the transaction may be open to challenge; for example, as a transaction at an undervalue, in the event of the insolvency of the company (see below).

### 2.3 Is lack of corporate power an issue?

Under the Act, no act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

It should be noted that members’ remedies have been codified in the Act, and, for example, if a company or a director of a company engages in, proposes to engage in, or has engaged in conduct that contravenes the Act or the memorandum or articles of the company, the BVI court may, on the application of a member or a director of the company, make an order directing the company or director to comply with, or restraining the company or director from engaging in conduct that contravenes the Act or the memorandum or articles.

### 2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

It is not necessary to ensure the legality, validity, enforceability or admissibility in evidence of a guarantee that any document be filed, recorded or enrolled with any governmental authority or agency or any official body in the BVI. Shareholder approval would be required only in the event the company’s memorandum and articles of association require it.

### 2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

To the extent that, under the applicable governing law, the guarantee is characterised as a debt incurred on behalf of a member of the company, it may be deemed to be a distribution and accordingly be subject to the requirement of the directors to determine that the company will pass the basic solvency test immediately after the deemed distribution. Under the solvency test, the company's assets must exceed its liabilities and the company must be able to pay its debts as they fall due. For former International Business Companies that still have a share capital, the requirements for satisfying the solvency test differ.

### 2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There is no exchange control legislation under BVI law and accordingly there are no exchange control regulations imposed under BVI law.

## 3 Collateral Security

### 3.1 What types of collateral are available to secure lending obligations?

There are no limits under BVI law on the types of collateral that a company may give.

### 3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

A company may enter into a general security agreement such as a debenture.

### 3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

It should be noted that assets would typically be held outside the BVI and collateral instruments would typically be governed by a governing law relevant to the jurisdiction in which the asset is sited. In the event that the company holds an interest in real estate or other assets physically located in the BVI, there are certain licensing, registration and stamp duty considerations.

### 3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

BVI law does not make statutory provision for an assignment by way of security. An assignment of receivables governed by BVI law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only.

### 3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A company may give security over cash held in its bank accounts

in any jurisdiction. BVI law does not make statutory provision for collateral security over cash deposited in bank accounts located in the BVI, and the cooperation of the account holding branch would be required.

### 3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Collateral security may be taken over shares in companies incorporated in the BVI and this is a popular and frequently used type of security. Such security can validly be granted under a foreign law-governed document, and New York or English law-governed security is common. In the case of an English law-governed document, the application of the Financial Collateral Arrangements (No 2) Regulations 2003 to shares in a BVI company has been confirmed by the Privy Council in *Cukurova Finance International Limited and Cukurova Holdings A.S (Appellants) v Alfa Telecom Turkey Ltd (Respondent)* [2013] UKPC 2. Shares are in registered form and share security is typically taken by way of an equitable mortgage. The Act provides a mechanism for particulars of a charge over shares to be noted on the register of members, a copy of which the company may file publicly at the Registry of Corporate Affairs in order for a person carrying out a company search to be on notice of the equitable security. The Act enables a chargee to enforce immediately upon an event of default. The Act also provides for the powers of the chargee or a receiver, which may be modified or supplemented by the security instrument.

### 3.7 Can security be taken over inventory? Briefly, what is the procedure?

A company may give security over inventory. The applicable procedure would be driven by the jurisdiction in which the inventory is located.

### 3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Subject to its memorandum and articles of association, a company may grant a security interest to secure its obligations as a borrower, or the obligations of others.

### 3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

No steps are required as a matter of BVI law to perfect a security interest where assets are not located in the BVI. It is a requirement of the Act that a company keep a register of all relevant charges created by the company, either at the company's registered office, or at the office of the company's registered agent. For the purposes of priority, an application may be made to the Registrar to register the charges created, providing an advantage to secured creditors that is not available in some offshore jurisdictions. Subject to such registration, and any prior security interests registered on the applicable register, the security interest will, as a matter of BVI law, have priority over

any claims by third parties (other than those preferred by law) including any liquidator or a creditor of the company, subject in the case of a winding up of the company in a jurisdiction other than the BVI to any provisions of the laws of that jurisdiction as to priority of claims in a winding up. A floating charge will rank behind a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the company to create any future security interest ranking ahead in priority to or equally with the floating charge.

No taxes, fees or charges (including stamp duty) are payable (either by direct assessment or withholding) to the government or other taxing authority in the BVI under the laws of the BVI in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the BVI, there are certain perfection, licensing, registration and stamp duty considerations.

**3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

The Registry of Corporate Affairs fee for registering a register of charges is US\$200. A small amount of time will be required for the preparation of the particulars of the registration.

**3.11 Are any regulatory or similar consents required with respect to the creation of security?**

No, they are not.

**3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?**

No, there are not.

**3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?**

No, there are not.

## 4 Financial Assistance

**4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?**

- (a) Shares of the company  
Subject to its memorandum or articles, the powers of a company include the power to give financial assistance to any person in connection with the acquisition of its own shares.
- (b) Shares of any company which directly or indirectly owns shares in the company  
There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares of any company which directly or indirectly owns shares in the company.

- (c) Shares in a sister subsidiary  
There are no restrictions on the giving of financial assistance to any person in connection with the acquisition of shares in a sister subsidiary.

## 5 Syndicated Lending/Agency/Trustee/Transfers

**5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

The BVI courts will recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders, where that is provided for pursuant to the provisions of the applicable security documentation.

**5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not necessary in the BVI.

**5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

This would be dependent on the applicable governing laws of the loan and the assignment documentation. BVI law does not make statutory provision for the assignment of intangibles. An assignment of receivables governed by BVI law would require the written agreement of the debtor in order to take effect as a legal assignment, failing which the assignee would likely take an equitable assignment only. A deed of novation would more typically be used to transfer a loan governed by BVI law.

## 6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

**6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

No taxes are required to be deducted or withheld under the laws of the BVI from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security. The BVI complies with the EU Taxation of Savings Directive through the automatic exchange of information on savings income with tax authorities in EU Member States.

**6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

No taxes are payable to the government or other taxing authority in the BVI under the laws of the BVI in respect of the execution or delivery, or the enforcement, of security documentation. In the event that the company holds an interest in real estate or other assets physically located in the BVI, there are certain perfection, licensing, registration and stamp duty considerations.

**6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?**

No income of a foreign lender will become taxable in the BVI solely because of a loan to, or guarantee and/or grant of security from, a company in the BVI.

**6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

There are no significant costs, such as notarial fees, that would be incurred by foreign lenders in a loan to, or guarantee and/or grant of security from, a company in the BVI.

**6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

No, there are not.

## 7 Judicial Enforcement

**7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?**

The BVI courts will recognise a governing law that is the law of another jurisdiction, subject to the considerations applicable generally to choice of law provisions.

The BVI courts may decline to exercise jurisdiction in relation to substantive proceedings brought under or in relation to a contract that has a foreign governing law in matters where they determine that such proceedings may be tried in a more appropriate forum.

**7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?**

Any final and conclusive monetary judgment obtained against a company in the courts of England and Wales, for a definite sum, may be registered and enforced as a judgment of the BVI court

if application is made for registration of the judgment within 12 months or such longer period as the court may allow, and if the BVI court considers it just and convenient that the judgment be so enforced. Alternatively, the judgment may be treated as a cause of action in itself so that no retrial of the issues would be necessary. In either case, it will be necessary that, in respect of the foreign judgment:

- (a) the foreign court issuing the judgment had jurisdiction in the matter and the judgment debtor either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;
- (b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;
- (c) in obtaining judgment there was no fraud on the part of the person in whose favour judgment was given, or on the part of the foreign court;
- (d) recognition or enforcement of the judgment in the BVI would not be contrary to public policy;
- (e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice; and
- (f) the judgment given by the foreign court is not the subject of an appeal.

Any final and conclusive monetary judgment obtained against a company in the courts of New York, for a definite sum, may be treated by the BVI courts as a cause of action in itself so that no retrial of the issues would be necessary, provided that in respect of the foreign judgment:

- (a) the foreign court issuing the judgment had jurisdiction in the matter and the company either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process;
- (b) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations of the company;
- (c) there was no fraud on the part of the person in whose favour judgment was given or on the part of the court, in obtaining judgment;
- (d) recognition or enforcement of the judgment in the BVI would not be contrary to public policy; and
- (e) the proceedings pursuant to which judgment was obtained were not contrary to natural justice.

**7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?**

There is no set timetable for such proceedings, and the time involved will depend on the nature of the enforcement proceedings (for example, an application to appoint liquidators on the ground of insolvency may be quicker than an action of judgment on the debt claim). If there is no defence to the claim and it is unopposed, judgment may be obtained in proceedings against a BVI company in approximately one month from the commencement of proceedings. If the proceedings are defended, then the time involved will depend upon the facts and circumstances of the case. Broadly, the same considerations apply to an application to enforce a foreign judgment in the BVI.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

No, there are not.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

There are no restrictions applicable to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The appointment of liquidators against a company under the BVI Insolvency Act (As Revised) (the “**Insolvency Act**”) brings about a moratorium on claims against the company, but this does not prevent the enforcement of security.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Under the Arbitration Act (As Revised), the United Kingdom and BVI arbitral awards will now be treated in the BVI as New York Convention awards. The BVI is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “**Convention**”). A court in the BVI is required by law to enforce, without re-examination of the merits of the case or re-litigation of the matters arbitrated upon, a Convention award. However, enforcement of a Convention award may be refused if the person against whom it is invoked proves:

- (a) that a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, with the law of the country where the arbitration took place; or
- (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration under the laws of the BVI, or if it would be contrary to public policy to enforce the award.

A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

## 8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Security over the assets of a company in liquidation may be enforced by the chargee directly over those assets, which fall outside the custody and control of the liquidator.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In the event of the insolvency of a company, there are four types of voidable transaction provided for in the Insolvency Act:

- (1) **Unfair Preferences:** Under section 245 of the Insolvency Act, a transaction entered into by a company, if it is entered into within the hardening period (see below) at a time when the company is insolvent, or it causes the company to become insolvent (an “**insolvency transaction**”), and which has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position it would have been in if the transaction had not been entered into, will be deemed an unfair preference. A transaction is not an unfair preference if the transaction took place in the ordinary course of business. It should be noted that this provision applies regardless of whether the payment or transfer is made for value or at an undervalue.
- (2) **Undervalue Transactions:** Under section 246 of the Insolvency Act, the making of a gift or the entering into of a transaction on terms that the company is to receive no consideration, or where the value of the consideration for the transaction, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company will (if it is an insolvency transaction entered into within the hardening period) be deemed an undervalue transaction. A company does not enter into a transaction at an undervalue if it is entered into in good faith and for the purposes of its business and, at the time the transaction was entered into, there were reasonable grounds for believing the transaction would benefit the company.
- (3) **Voidable Floating Charges:** Under section 247 of the Insolvency Act, a floating charge created by a company is voidable if it is an insolvency transaction created within the hardening period. A floating charge is not voidable to the extent that it secures:
  - (a) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;
  - (b) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;
  - (c) the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and
  - (d) the interest, if any, payable on the amount referred to in (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.



4. **Extortionate Credit Transactions:** Under section 248 of the Insolvency Act, an insolvency transaction entered into by a company for, or involving the provision of, credit to the company, may be regarded as an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit, the terms of the transaction are or were such to require grossly exorbitant payments to be made in respect of the provision of the credit, or the transaction otherwise grossly contravenes ordinary principles of fair trading and such transaction takes place within the hardening period.

The hardening period (known in the Insolvency Act as the vulnerability period) in respect of each voidable transaction provision set out above is as follows:

- (a) for the purposes of sections 245, 246 and 247 of the Insolvency Act, the period differs depending on whether the person(s) that the transaction is entered into with, or the preference is given to, are connected persons of the company within the meaning of the Insolvency Act. In the case of connected persons, the hardening period is the period beginning two years prior to the onset of insolvency (see below) and ending on the appointment of a liquidator of the company. In the case of any other person, the hardening period is the period beginning six months prior to the onset of insolvency and ending on the appointment of a liquidator of the company; and
- (b) for the purposes of section 248 of the Insolvency Act, the hardening period is the period beginning five years prior to the onset of insolvency and ending on the appointment of a liquidator of the company regardless of whether the person(s) that the transaction is entered into with is a connected person.

The onset of insolvency for these purposes is the date on which an application for the appointment of a liquidator was filed (if the liquidator was appointed by the Court) or the date of the appointment of the liquidator (where the liquidator was appointed by the members).

A conveyance made by a person with intent to defraud creditors is voidable at the instance of the person thereby prejudiced. There is no requirement that the relevant transaction was entered into at a time when one party was insolvent or became insolvent as a result of the transaction, and there is no requirement that the transferring party subsequently went into liquidation. However, no conveyance entered into for valuable consideration and in good faith to a person who did not have notice of the intention to defraud may be impugned.

There are limited preferential creditors under BVI law.

### 8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Certain sovereign entities and treaty-based organisations are protected. For example, the State Immunity (Overseas Territories) Order 1979 extended the State Immunity Act 1978 to the BVI, and the International Finance Corporation Order 1955 extends to the BVI.

### 8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Enforcement of a charge over the shares in a BVI company could be effected without recourse to the courts, where the necessary

documentation has been provided by the chargor, the issuer company and the registered agent prior to the date of enforcement. As stated above, the remedy of appropriation that may be contained in an English law-governed share charge has been upheld by the Privy Council as applicable to shares in a BVI company.

## 9 Jurisdiction and Waiver of Immunity

### 9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

The BVI courts will recognise that a foreign jurisdiction may be the more appropriate forum for enforcement.

### 9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

A relevant entity may waive immunity pursuant to the State Immunity Act 1978.

## 10 Licensing

### 10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

Assuming that the lender is not doing business in the BVI, it will not be caught by the regulatory legislation, or requirements for licensing, in the jurisdiction. Significantly, business is not carried on "in the BVI" by a lender by reason only of it being carried on with a company or limited partnership incorporated or registered in the BVI.

A "foreign" lender, which does not carry on business in the BVI, would not be required to be licensed in order to lend to a BVI company.

There is no distinction between a lender that is a bank *versus* a lender that is a non-bank.

In the unlikely event that, based on the facts of a specific scenario, a foreign lender is found to be carrying on business in the BVI without holding the requisite licence, the loan may be unenforceable by the lender.

As above, assuming that the agent is not conducting business in the BVI, there are no licensing and eligibility requirements for an agent under a syndicated facility.

## 11 LIBOR Replacement

### 11.1 Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

Assuming that the lender is not doing business in the BVI, there are no regulatory rules that impact the transition from LIBOR.

In terms of market practice, a borrower incorporated or registered in the BVI will tend to enter into an amendment and restatement agreement to effect the required commercial changes to the terms of the facility. These will be a matter for the governing law of the facility agreement.

Lenders will tend to require the usual local law enforceability opinion with respect to the entry by the BVI borrower, or other obligors incorporated or registered in the BVI, into the amendment and restatement of the facility.

No registrations are likely to be required in the BVI as the registered particulars of any underlying security documentation are unlikely to be amended as a result of the transition from LIBOR.

## 12 Other Matters

**12.1 How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2021 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020/2021 due to COVID-19 to continue into 2022 and beyond?**

Electronic closings have long been the norm in BVI transactions, and the jurisdiction was quick to legislate for certainty around electronic execution of contracts and deeds after the *Mercury* decision.

The use of electronic signatures has become extremely relevant and common during COVID-19 (particularly where there has been a lockdown in place). To supplement the common law position, the BVI had already enacted legislation that recognises the use of electronic signatures for most types of transactions and has put electronic records on the same footing as paper records. The parties will still need to check that all of the key elements for contract formation are present in the electronic communication or contracting process used, but BVI law removes the obstacle of signing by way of using an alternative electronic signature, these not being temporary relaxations only. There are some documents that may not be allowed to be executed by way of an electronic signature, such as a will or testament, enduring power of attorney or conveyance of real property (in the BVI). Some closings will still require original documents to be delivered, such as an original share certificate being handed over for security purposes. There is no requirement in the BVI to execute documents before a notary public or to legalise or apostille documents for the legality, validity or admissibility in evidence of such documents.

**12.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?**

The BVI is a dependable common law jurisdiction, and other attractions for lenders not mentioned above include, for example, the statutory recognition of netting, set-off and subordination arrangements, and the ability for a creditor to restore a dissolved company where it is just to do so.



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