



# **INSOL International**

## **Small Practices and Consumer Debt Issues**

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## Small Practices and Consumer Debt Issues

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## **Acknowledgement**

INSOL International is pleased to present a country study on British Virgin Islands under its “Small Practices and Consumer Debt Issues Technical Papers Series.” The paper was prepared by Mr. Mark J. Forte (Partner) and Mr. Murray Laing (Associate) of Conyers Dill & Pearman, BVI.

This paper is based on a standard template of questions that the INSOL Technical Research Committee and the Small Practice Issues Committee have jointly developed. We hope our members find the information about BVI on this topic useful.

INSOL International sincerely thanks Mr Forte and Mr Laing for preparing this paper.

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## Small Practices and Consumer Debt Issues

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### 1. What are the consumer bankruptcy / restructuring processes available in your country?

The BVI has a population of about 25,000 individuals and bankruptcy proceedings for individuals are extremely rare. The bankruptcy provisions are therefore largely untested. In contrast, the BVI has over 400,000 active companies, and company insolvency proceedings are common and well documented.

In the BVI the processes available to an individual are governed by Part XII of the Insolvency Act, 2003.

Section 294 of the Act provides that an application to the Court for a bankruptcy order in respect of a debtor may be made by:

- (i) the debtor himself;
- (ii) by a creditor of the debtor (or by one or more of his creditors jointly); or
- (iii) by the supervisor of an arrangement by a creditor of the debtor.

#### ***Application by Debtor (s. 295)***

A debtor may make an application to the Court and the Court may make a bankruptcy order if it is satisfied that the debtor is unable to pay the debts as they fall due; that the debtor's unsecured liabilities exceed the prescribed minimum (US\$2,000.00) and that if a bankruptcy order is made, the value of the debtor's assets available for distribution to the unsecured creditors will exceed the prescribed minimum. In order to make the application the debtor will also need to file a verified statement of the assets and liabilities.

#### ***Application by a Creditor (s. 296)***

A creditor's application for a bankruptcy order can be made in respect of a liability (or liabilities) where, at the time of the application:

- (i) The amount of the liabilities exceed the prescribed minimum of \$2,000.00; and
- (ii) The liabilities are for a liquidated sum payable to the applicant creditor immediately.

An application under this section may not be made in respect of a liability incurred outside the BVI unless that liability is payable by the debtor to the creditor by virtue of a judgment or award enforceable in the BVI.

Where the applicant is a secured creditor such a creditor must state in the application that the creditor is either willing (in the event of a bankruptcy order being made) to give up the security for the benefit of the other creditors, or give an estimate of the value of the security interest and make the application for the full amount of the liability less the estimated value of the security interest.

The bankruptcy application must be determined within 3 months after the application has been filed.

#### 1.1 Which is the competent court or other authority to apply for consumer insolvency proceedings?

Depending on the value of the claim, applications for bankruptcy will be filed in either the High Court of Justice, British Virgin Islands, or the Magistrates Court. The Commercial Court will deal with claims in excess of \$500,000.



## **1.2 Who is the 'boss' in consumer insolvency proceedings (judge or administrator)?**

Where the Court makes a bankruptcy order it will appoint either the Official Receiver or an eligible insolvency practitioner to be the bankruptcy trustee. The bankruptcy trustee is in the same position as a receiver of the assets appointed by the Court in relation to acquiring or retaining possession of the assets of the bankrupt. Following the making of a bankruptcy order, the trustee will take possession of all documents which relate to the bankrupt's estate or affairs, as well as taking possession of all of the assets of the bankrupt.

## **1.3 What legal and maybe actual requirements are there to enter into consumer insolvency?**

The minimum threshold for an application in bankruptcy is \$2,000.00 in debts which cannot be paid as they fall due.

## **1.4 Costs and timelines of available procedures**

The person directed to take control of a debtor's assets is entitled to be paid such remuneration as the Court may order and this will generally be fixed by reference to the time spent by that person and the staff in carrying out the duties. The insolvency practitioner may also request that the remuneration will be fixed in whole, or in part, as a percentage value of the assets realised and the value of the assets distributed (or as a percentage of either).

In fixing the remuneration of the insolvency practitioner, the creditors' committee or the Court will take into account the following factors:

- (i) The need for the remuneration to be fair and reasonable;
- (ii) The time spent carrying out the duties;
- (iii) The complexity of the proceedings;
- (iv) The effectiveness with which the insolvency practitioner has carried out his duties;
- (v) The value and nature of the assets;
- (vi) The hourly rates charged by other insolvency practitioners undertaking similar work;
- (vii) Whether any expenses were properly incurred.

The creditors' committee or the Court may also take into account the time spent outside the BVI and the commercial and personal risks accepted by the insolvency practitioner.

A bankrupt is automatically discharged from bankruptcy after 3 years from the date of the bankruptcy order unless he has been convicted of a bankruptcy offence, or has been an undischarged bankrupt at any time in the ten years prior to the date of the bankruptcy order.

## **2. Means testing for insolvent individuals**

### **2.1 What is means testing and how is it applied in bankruptcy proceedings?**

No means testing is required prior to an application for a bankruptcy order. Where a bankruptcy order has been made against an individual otherwise than on his / her own application, the bankrupt must submit a verified statement of the assets and liabilities to the trustee within 21 days of the date of the bankruptcy order.

### **2.2 Exemptions and allowances and the notion of fairness**

The bankrupt's estate comprises all assets belonging to or vested in the bankrupt at the date of the bankruptcy order, although this will not apply to the following:

- (i) Assets held by the bankrupt on trust for any other person;



- (ii) Tools, books, vehicles and any other items of equipment and provisions which are considered necessary for the bankrupt to use in the course of the bankrupt's business or employment;
- (iii) Bedding, clothing, furniture, household equipment and provisions which are necessary for satisfying the basic domestic needs of the bankrupt and his / her family,
- (iv) Any asset of the bankrupt which is excluded from the estate under any other enactment.

In addition, the Court may (on the application of the trustee) make an income payments order, although the amount of income received by the bankrupt must not fall below what appears to the Court to be necessary for meeting the reasonable domestic needs of the bankrupt.

### **3. Priority of secured and preferential claims**

#### **3.1 How are the various claims treated?**

It should be noted at the outset that every bankruptcy is under the general control of the court and the court has full power to decide all questions of priorities, and all other questions (whether of law or fact) arising in any bankruptcy.

A secured creditor may either value the assets subject to the security interest and claim in the bankruptcy as an unsecured creditor for the balance of the debt, or surrender his / her security interest to the trustee for the general benefit of creditors and claim in the bankruptcy as an unsecured creditor for the whole of the debt - but is not obliged to do either.

A secured creditor may also apply to the trustee at any time to amend the value that is placed on the security interest in the claim and the trustee will permit the amendment if such creditor is satisfied that the value was an estimate made in good faith on a mistaken basis, or where the value of the security interest has subsequently changed.

### **4. Consumer credit counselling**

#### **4.1 Is "credit counselling" available in your country and is it provided for in the legislation?**

Credit counselling is not provided for in the Insolvency Act, nor does the BVI government provide any credit counselling services, however, it may be available privately through financial advisors.