



# Restructuring and Insolvency

in 57 jurisdictions worldwide

Contributing editor: Bruce Leonard

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# New Zealand

## Murray Tingey

Bell Gully

### 1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

Bankruptcies and reorganisations are governed by:

- the Companies Act 1993 (the CA93);
- the Receivership Act 1993;
- the Corporations (Investigation and Management) Act 1989;
- the Mortgagors and Lessees Rehabilitation Act 1936;
- the Insolvency Act 2006;
- the Charitable Trusts Act 1957; and
- the Incorporated Societies Act 1908.

### 2 Excluded entities

What entities are excluded from bankruptcy proceedings and what legislation applies to them?

The insolvency of a trust is dealt with through its trustees.

### 3 Secured lending and credit (immovables)

What are the principal types of security devices that are taken on immovable (real) property?

The principal type of security device taken on an immovable property is a mortgage given by a mortgagor of land to a mortgagee for security.

### 4 Secured lending and credit (moveables)

What are the principal types of security devices that are taken on moveable (personal) property?

The principal types of security devices that are taken on moveable property are:

- general security agreements;
- retention of title clauses;
- specific security agreements;
- leases for over a term of a year; and
- common law liens.

### 5 Unsecured credit

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

Remedies generally require the creditor to first obtain judgment. The exception is a pre-judgment charging order, which is available where the debtor intends to defeat the creditor, or its other creditors, by making away with property, or is absent from, or about to quit, New Zealand. Obtaining a pre-judgment charging order can be difficult and time-consuming as an application to the court is necessary.

Post-judgment, the creditor may enforce a judgment through:

- a charging order;
- a writ of a sale;
- a writ of possession;
- a writ of arrest; or
- a writ of sequestration.

Obtaining these execution remedies is not difficult but can be time-consuming.

Judgments may also be enforced through liquidation or bankruptcy proceedings if insolvency is suspected. No special procedures apply to foreign creditors enforcing a New Zealand debt through a New Zealand court, provided the court has jurisdiction.

Judgments obtained in an overseas court may, in certain circumstances, be enforced in New Zealand under the Reciprocal Enforcement of Judgments Act 1934.

### 6 Courts

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

The High Court has sole jurisdiction to hear all matters brought in respect of liquidations under the CA93. The Court of Appeal and the Supreme Court deal with appeals brought from the High Court.

### 7 Voluntary liquidations

What are the requirements for a debtor to commence a voluntary liquidation of its business? What are the effects of the commencement of the liquidation?

A liquidator may be voluntarily appointed by shareholder resolution; or director resolution if provided for by the constitution.

If an involuntary application to the court to appoint a liquidator has been made, a liquidator may only be voluntarily appointed within 10 working days after service on the company of the application.

The effects of the commencement of liquidation are:

- the liquidator gains custody and control of the company's assets;
- the directors remain in office but lose their powers to act; and
- unless the liquidator agrees, or the court orders otherwise:
  - legal proceedings cannot be commenced or continued against the company;
  - no enforcement rights or remedies over or against company property can be exercised; and
  - shares cannot be transferred;
  - shareholders rights cannot be alienated; and
  - shareholders must not exercise any powers under, or alter, the constitution of the company.

This does not, subject to certain exceptions, affect the rights of a secured creditor.

### 8 Involuntary liquidations

What are the requirements for creditors to place a debtor in involuntary liquidation? What are the effects of the commencement of the liquidation?

A creditor may apply to place the company into involuntary liquidation by issuing a liquidation application. The court may appoint a liquidator if:

- the company is unable to pay its debts;
- the company (or board) have persistently or seriously failed to comply with the CA93;
- the company does not comply with the essential requirements of companies registered under the CA93; or
- it is just and equitable.

The commencement of an involuntary liquidation has the same effect as that of a voluntary liquidation, as discussed above.

### 9 Voluntary reorganisations

What are the requirements for a debtor to commence a financial reorganisation? What are the effects of the commencement of the reorganisation?

If there is any reason to believe a company is or will be unable to pay its debts, a creditor's compromise proposal may be made pursuant to part XIV of the CA93 by:

- the directors;
- a receiver appointed in relation to substantially the whole of the company's assets;
- a liquidator; or
- any creditor or shareholder of the company with leave of the court.

An approved compromise is binding on the company and all creditors receiving notice of proposal. Shareholders may, still pass a resolution to place the company into liquidation after approval. The court may then make orders as to the extent which the compromise will continue in effect.

An administrator may be appointed under the voluntary administration provisions of the CA93. Administration commences on appointment of an administrator, who may be appointed by the directors.

The effects of administration include:

- a moratorium on creditors taking action against the company, or any owners or lessors of property used by the company seeking to repossess the property, unless:
  - enforcement action has been commenced prior to the administration; or
  - the goods are perishable;
- that without administrator consent or a court order:
  - a secured creditor may not enforce a charge unless it holds a charge over substantially all of the company's property and enforcement action is taken within 10 working days of being notified of the administration;
  - a transaction or dealing affecting company's property is void;
  - a person may not commence or continue court proceedings;
  - the rights of shareholders cannot be changed; and
  - a lender cannot enforce a guarantee given by a director, their spouse or relative; and

- an investigation of the affairs of the company by the administrator.

If a deed of company arrangement (DOCA) is approved, it binds all unsecured creditors, secured creditors who voted for it, owners or lessors of property who voted for it, the company, its directors and shareholders, and the deed administrator. The deed administrator replaces the administrator, who then takes over the management of the company. While the DOCA is in force, no person bound by it may (without a court order) seek to:

- liquidate the company;
- issue or continue court proceedings; or
- commence or continue enforcement action.

### 10 Involuntary reorganisations

What are the requirements for creditors to commence an involuntary reorganisation? What are the effects of the commencement of the reorganisation?

A creditor may propose a part XIV compromise with the court.

Under the voluntary administration regime the court may appoint an administrator on the application of a creditor if:

- it is satisfied that the company is or may become insolvent and administration will likely result in a better return for creditors and shareholders than an immediate liquidation; or
- it is just and equitable to do so.

A secured creditor holding a charge over or substantially the whole of the company's property may also appoint an administrator.

Commencement of an involuntary creditor's proposal and the appointment of an administrator are the same as a voluntary appointment.

### 11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances (to avoid personal liability to directors and officers or otherwise)? In what circumstances must companies do so? If proceedings are not commenced, what liabilities can result?

There are no specified circumstances in which a company is required to commence insolvency proceedings. Continuing to trade where a company is insolvent may result in personal liability for directors.

### 12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

During voluntary administration, the administrator may carry on the company's business, subject to the objectives of the voluntary administration regime. Creditors may monitor decisions made through the creditors' committee, while the courts retain a supervisory role.

### 13 Rejection and disclaimer of contracts in reorganisations

Can a debtor in a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

It is not possible to reject or disclaim an unfavourable contract on voluntary administration. Within seven days after the commencement of a voluntary administration, however, an administrator may

issue a 'non-use notice' on the owner of any property used or rented by the company. The non-use notice enables the administrator to avoid the personal liability for rent due on company property that would otherwise arise.

#### 14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

No specific provisions apply. Sales of assets that result in a preference or are at an undervalue are impugnable by a liquidator if the company was insolvent at the time and the transaction occurred within the specified period. An administrator does not have the power to impugn transactions in the same way.

Where an asset is sold that is subject to a registered security interest, the purchaser who buys outside of the ordinary course of business will generally take that asset subject to the registered security interest. The main exception to this arises in relation to consumer goods valued at less than NZ\$2,000. Where land is sold without an existing mortgage being discharged, the purchaser takes the land subject to that mortgage on the basis that the vendor cannot pass better title to the purchaser than it had.

#### 15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by secured and unsecured creditors are imposed by legislation or court order in liquidations and reorganisations? In what circumstances may secured or unsecured creditors obtain relief from such prohibitions?

Legal proceedings against the company or in relation to its property cannot be commenced or continued, and a right or remedy over or against property of the company cannot be exercised.

An unsecured creditor may obtain a right of recourse against a company's assets with the leave of the court or permission of the liquidator. This will be rare.

Secured creditors retain their rights of enforcement in liquidation.

During administration a proceeding in a court against the company or in relation to any of its property or an enforcement process must not be begun or continued, except with administrator consent or permission of the court.

#### 16 Arbitration processes in bankruptcy

How frequently are arbitration procedures used in insolvency proceedings? What limitations are there on the availability of arbitration procedures in insolvency cases? In insolvency proceedings, will the court allow arbitration proceedings to continue after an insolvency case is opened?

Arbitration procedures are not commonly used. An application for leave to continue arbitration proceedings commenced prior to the liquidation, or to begin arbitration proceedings during the liquidation of the company, will require leave of the court, or liquidator consent.

#### 17 Set-off and netting

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

Where there have been mutual credits, mutual debts or other mutual dealings between a company and a person who seeks to have a claim admitted in the liquidation, the amount due from one party must be set off against the amount due from the other party and only the balance may be claimed in the liquidation or is payable to the company.

The benefit of insolvency set-off is not available to a creditor in relation to a transaction or assignment made during the specified period unless the creditor establishes that the creditor did not have reason to suspect that the company was unable to pay its due debts. This same prohibition does not apply to a company in administration.

If the company in liquidation is party to a netting agreement, any netted balance payable by or to the company must be calculated in accordance with the netting agreement.

#### 18 Intellectual property assets in insolvencies

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

Whether the licensor or owner of intellectual property may terminate the debtor's right to use it in the event of the appointment of a liquidator will be governed by the contract. The IP agreement may in certain circumstances be disclaimed as an onerous contract or cancelled under the terms of the contract.

#### 19 Post-filing credit

Does your country's insolvency system allow a debtor in a liquidation or reorganisation to obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A company in liquidation or administration may obtain either secured or unsecured loans. No super priority is given to any such loans unless it can be shown that the loan was an expense properly incurred by the liquidator or administrator in carrying out or exercising their duties.

#### 20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan create releases in favour of third parties, and, if so, in what circumstances?

A reorganisation plan can create a release of obligations in favour of third parties provided the rehabilitation plan providing for that release is approved by 50 per cent in number and 75 per cent in value of all creditors. However, a release cannot be granted in relation to any obligations arising pursuant to a security agreement without the consent of the secured party.

In voluntary administration, certain mandatory provisions must be included in all DOCAs, namely:

- who the deed administrator is;
- the property available to pay creditors;
- the nature of any moratorium period under the DOCA;
- the extent to which the company will be released from its debts;

- any conditions for the DOCA to come into and continue in operation;
- the circumstances in which the DOCA will terminate;
- the order which any proceeds of property realised will be distributed; and
- the day by which creditors' claims must have arisen if they are to be admissible.

The Companies (Voluntary Administration) Regulations 2007 also list a number of prescribed provisions deemed to be included in the DOCA unless expressly excluded.

Although the creditors must vote as to whether to execute a DOCA, the exact terms of the DOCA may be finalised at a later date, to be executed no later than 15 days. The Act allows for the exact terms of the DOCA to be finalised after the watershed meeting, circulated to creditors and then executed. A DOCA is executed when signed by both the company and the deed administrator.

The DOCA must be approved by 75 per cent of creditors in value and 50 per cent of creditors in number.

In respect of a part XIV compromise, the proponent must give to each known creditor, the company, any receiver or liquidator, and deliver to the Registrar of Companies for registration:

- a notice of the intention to hold a meeting;
- statement setting out the key features of the compromise; and
- a list of creditors.

The compromise is approved by a majority in number representing 75 per cent of creditors in value and 50 per cent of creditors.

## 21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

No.

## 22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What happens if there is default by the debtor in performing an approved plan?

Under voluntary administration, a proposed organisation may be defeated if:

- the time period for a creditors meeting to vote on a DOCA expires without a meeting taking place (or without a court-approved extension);
- the creditors vote against a DOCA;
- the time for executing a DOCA expires; or
- the court otherwise orders.

If there is a default by the debtor in performing the DOCA, the court may terminate the DOCA on application by a creditor, the administrator or any other interested person.

## 23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? What powers or responsibilities do these committees have? May creditors initiate proceedings to pursue remedies against third parties?

The liquidator must call a meeting of creditors to confirm his or her appointment. Written notice of this meeting must be given to every known creditor together with a report (containing a statement of the company's affairs, proposals for conducting the liquidation, and, if practicable, the estimated date of its completion), a notice explaining the right to require the liquidator to call a meeting of creditors and a list of every known creditor.

Public notice this meeting must be given not less than five working days before the date of the meeting. The meeting must generally then be held:

- in a voluntary liquidation, within 10 working days of the liquidator's appointment; or
- in a court-ordered liquidation, within 30 working days of the appointment.

A liquidator receiving a notice from a creditor requiring a meeting of creditors must hold this within 15 working days of receiving notice.

No meeting need be held where the board, in voluntarily liquidating the company, resolved that the company would, on the appointment of a liquidator, be able to pay its debts and a copy of the resolution is delivered to the Registrar.

A liquidator is not also required to call a meeting of creditors in certain circumstances. Creditors do not have standing to initiate proceedings against third parties. Derivative actions may only be brought by shareholders or directors.

Committees of creditors may be established in liquidations and administrations. The committees are aimed at facilitating the decision making process rather than to control the liquidator's or administrator's powers.

## 24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be combined into one pool for distribution purposes?

In insolvency proceedings involving a corporate group, the proceedings by the parent and its subsidiaries are separate and distinct. There is no scope for a single insolvency proceeding to be commenced.

A pooling order may be made by the court, if it is satisfied that it is just and equitable to do so, but these are rare.

In respect of voluntary administrations, the court may order that a company in administration that is related to the companies in an existing pool be added to the pool for the purposes of administration.

The application may be made by the administrator or any creditor of the company or the administrator or any creditors of the pool. However, the court must not make the order unless the pool administrator consents.

## 25 Modifying creditors' rights

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

No. Security may, however, be set aside if it is preferential. A charge is voidable by the liquidator if:

- the charge was given within the specified period; and
- immediately after the charge was given, the company was unable to pay its due debts.
- An exception to this applies where:
- the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith by the grantee of the charge; or
- the charge is in substitution for a charge given before the specified period.

The creditor may subrogate its priority or surrender its charge to the liquidator for the general benefit of creditors and claim in the liquidation as an unsecured creditor for the whole debt.

## 26 Enforcement of estate's rights

If the insolvency administrator is without assets to pursue a claim that is available to the estate, are there procedures by which the creditors can pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

With court approval, a liquidator may assign its right to sue under the CA93. Entitlement to the fruits of any action will be determined according to the terms of the assignment. If in the course of the liquidation a person who has taken part in the formation or promotion of the company, or a director, manager, administrator, liquidator, or receiver of the company, has misapplied, retained, or become liable or accountable for, money or property of the company or been guilty of negligence, default, or breach of duty or trust in relation to the company, the court may on the application of the creditor:

- inquire into the conduct of the promoter, director, manager, administrator, liquidator, or receiver; and
- order that person:
  - to repay or restore the money or property or any part of it with interest at a rate the court thinks just; or
  - to contribute such sum to the assets of the company by way of compensation as the court thinks just.

## 27 Claims and appeals

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does a creditor appeal a disallowance? Are there any provisions that deal with the purchase, sale or transfer of claims against the debtor?

A creditor's claim for an unsecured debt is submitted by lodging a proof of debt. The claim must be in the prescribed form, contain full particulars of the claim and identify any documents that evidence or substantiate the claim. Whether the claim is preferential, ordinary, or deferred must also be specified.

Unless otherwise ordered by the court, the liquidator may fix a certain day before which creditors are to make their claims, and to establish any priority their claims may have. Public notice must be given. If a creditor fails to make its claim before the day fixed, that creditor is excluded from the benefit of any distribution made before the claim is made. However, a creditor who makes a claim after the day fixed and whose claim is admitted can receive the benefit of any further distribution if any assets remain.

The liquidator must, as soon as practicable, either admit or reject a claim in whole or in part, giving notice of any rejection. This may be appealed by the creditor through the court with its leave.

## 28 Priority claims

What are the major governmental and non-governmental privileged and priority claims in liquidations and reorganisations? Which priority and privileged claims have priority over secured creditors?

Claims against the company are to be paid in the order of priority specified in schedule 7 of the CA93. The major categories of the statutory conferred preference are:

- expenses of liquidation or administration;
- employee claims; and
- certain government taxes, including:
  - goods and services tax;
  - PAYE – employee-related income tax; and
  - withholding tax.

## 29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive insolvency so that they are enforceable against the debtor after it has reorganised?

Under voluntary administration, a DOCA releases the company from a debt only insofar as the DOCA provides for the release and the creditor concerned is bound by the DOCA. A DOCA binds all creditors in respect of claims that arise on or before the day when creditors' claims must have arisen. Debts incurred during the administration of the company are not covered by the DOCA.

Liquidation of a company does not limit or affect the recovery of:

- a fine imposed on a company;
- a monetary penalty payable to the Crown imposed on a company by a court for the breach of any enactment; or
- costs ordered to be paid against the company in proceedings for an offence.

## 30 Distributions

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

A liquidator of a company, after paying the preferential claims, must apply the assets of the company in satisfaction of all other claims. These claims rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case payment shall abate rateably among all claims. After paying all the claims, the liquidator must distribute the company's surplus assets in accordance with the company's constitution, in accordance with the CA93.

Under voluntary administration, this will depend of the terms of the DOCA.

## 31 Transactions that may be annulled

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

The primary transactions that are voidable at the instance of the liquidator are:

- insolvent transactions;
- insolvent charges;
- transactions at an undervalue; and
- alienation of property with intent to defraud creditors.

The requirements of an insolvent charge are set out in greater detail in question 25. A transaction is an insolvent transaction if it:

- is entered into within a two-year period;
- is entered into when the company was unable to pay its due debts; and
- enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in liquidation.

The result of a transaction being set aside is that the court can order that the creditor repay some or all of the money or property advanced by the company. In respect of transactions at undervalue, the liquidator may only recover the difference in value that the other party to the transaction received from the company if it exceeded the value the company received from the other party pursuant to the transaction.

An alienation of property with intent to defraud creditors is voidable at the instance of the person prejudiced.

### 32 Proceedings to annul transactions

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

In respect of insolvent transactions, insolvent charges, and transaction at undervalue the restricted period is six months prior to bankruptcy. During this period, a statutory presumption exists that any dispositions made were made at a time that the company was unable to pay its due debts.

### 33 Directors and officers

Are corporate officers and directors liable for or can they be made to pay obligations owed by their corporations?

Directors owe duties to the company pursuant to sections 131 to 138 of the Companies Act 1993. These duties include:

- to act in good faith and in what the director believes to be the best interests of the company;
- to exercise powers for a proper purpose;
- not to act, or agree to the company acting, in contravention of the Act or Constitution;
- not to agree, cause, or allow the company's business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors;
- not to incur an obligation unless the director believes on reasonable grounds that the company will be able to perform the obligation when required; and
- to exercise the care, diligence and skill that a reasonable director would exercise.

### 34 Duties of directors to creditors prior to bankruptcy

Do corporate directors and officers have any liability for pre-bankruptcy actions by their companies? Can they be made subject to sanctions or penalties for other reasons?

Directors, and officers acting as directors, can be made liable for the pre-bankruptcy actions taken by their companies if the director allowed those actions to be undertaken in breach of the duties set out above.

### 35 Creditors' enforcement

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

Assets that are secured may be seized by a secured creditor, pursuant to the terms of the security agreement or part IX of the Personal Property Securities Act 1999.

### 36 Corporate procedures

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

The corporate procedures available for the liquidation of a company are dealt with in greater detail in question 7. As an alternative, a company may be removed from the Companies Register. The applicable grounds for removal are either:

- that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed

its surplus assets; or

- that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court for an order putting the company into liquidation.

The application to remove the company must be made by a shareholder or by the board of directors (or any other person, if the constitution of the company permits).

The request to remove the company from the Companies Register must be accompanied by written notice from the commissioner of the Inland Revenue stating that there is no objection to the company being so removed.

Public notice must be given before a company is removed from the Register, provided no objections to removal are received.

### 37 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

The liquidation of a company is completed when the liquidator:

- sends to every creditor whose claim has been admitted and every shareholder:
- a final report and statement of realisation and distribution; and
- a statement that all known assets have been disclaimed or realised or distributed without realisation; all proceeds of realisation have been distributed; and the company is ready to be removed from the New Zealand register; and
- a summary of the applicable grounds on which the creditor or shareholder may object to the removal of the company; and
- registers these documents with the Registrar of Companies.

The court may, on the application of a liquidator, exempt the liquidator from compliance with the reporting requirements or modify the extent to which the liquidator must comply with the above requirements.

### 38 UNCITRAL Model Law

Is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency under consideration in your country? If so, what is the present status of this consideration?

The UNCITRAL Model Law has been adopted in New Zealand and has been enacted in the Insolvency (Cross-border) Act 2006. The Act has yet to come into force. An order in council will be made in New Zealand once Australia passes its Cross-Border Insolvency Bill 2007 into law.

### 39 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The underlying principle in relation to recognising insolvency proceedings in a foreign country is that the liquidators appointed in the company's country of residence are recognised as having the right to administer the assets of the company. The courts actively assist the liquidators in carrying out such duties. However, there may be circumstances that indicate that another course may be preferred in such a case.

A New Zealand court will generally appoint a New Zealand liquidator in respect of the New Zealand assets of an overseas company if the court is not satisfied that the laws of the country of incorpora-

tion adequately protect New Zealand creditors.

There is no statutory bar on the appointment of an overseas liquidator in New Zealand, but the courts have indicated that this person should preferably be a New Zealand resident.

Foreign creditors are dealt with in the same manner as domestic creditors in respect of liquidations and reorganisations.

As set out in question 5, foreign judgments or orders are recognised where they conform with the Reciprocal Enforcement of Judgments Act 1934. Part 1 of the Act applies to certain money judgments from the superior courts in a number of countries. Part 1 has also been extended to money judgments of a number of inferior courts in Australia.

New Zealand is not a signatory to any treaties on international insolvency or recognition of foreign judgments.

#### 40 Cross-border insolvency protocols and joint court hearings

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

No.

#### 41 Pending legislation

Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

The introduction of the Insolvency (Cross-border) Act 2006 amends section 342 of the Companies Act by omitting the words 'the assets in New Zealand of'. This change gives a New Zealand court jurisdiction to order that an overseas company be placed into liquidation.

It is likely that a New Zealand court will follow the English position set out in *Re Real Estate Development Co* [1991] BCLC 210, which suggests that the presence of assets in the jurisdiction is not a necessary requirement for liquidation of a foreign company. A reasonable possibility of benefit accruing to the petitioning creditors if an order is made is a sufficient connection for an order to be made in the jurisdiction.

# BELL GULLY

**Murray Tingey**

**murray.tingey@bellgully.com**

Vero Centre  
48 Shortland Street  
Auckland City  
New Zealand

Tel: +64 9 916 8800  
Fax: +64 9 916 8801  
www.bellgully.com

|   |   |
|---|---|
| <b>New Zealand</b>  | <b>Applicable bankruptcy law, reorganisations: liquidations</b>   |
|   | Companies Act 1993; Receivership Act 1993; Corporations (Investigation and Management) Act 1989; Mortgagees and Lessees Rehabilitation Act 1936; Insolvency Act 1967; Insolvency Act 2006, Charitable Trusts Act 1957; Incorporated Societies Act 1908.   |
|   | <b>Customary kinds of security devices on immoveables</b>   |
|   | Mortgage over land.   |
|   | <b>Customary kinds of security devices on moveables</b>   |
|   | General and specific security agreements; retention of title clauses; leases or bailments for a term of a year or longer; liens.  |
|   | <b>Stays of proceedings in reorganisations/liquidations</b>   |
|   | Automatic stay of proceedings against company in liquidation. Consent of liquidator or leave of the court required before legal proceedings can be commenced or continued.  |
|   | <b>Duties of the insolvency administrator</b>   |
|   | The principal duty of the liquidator is to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors, and, if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in a reasonable and efficient manner. A liquidator also has duties to summon meetings of creditors, relation to accounts and final reports to have regard to views of creditors and shareholders, to act impartially, and not to profit from the office of liquidator. |
|   | <b>Set-off and post-filing credit</b>   |
|   | Mutual credits, mutual debts or other mutual dealings between a company and a person must be set off and only the balance may be claimed in the liquidation or is payable to the company.<br><br>Insolvency set-off is not available to a creditor in relation to a transaction or assignment made during the specified period unless the creditor establishes it did not have reason to suspect that the company was unable to pay its debts as become due. This prohibition does not apply to voluntary administration.   |
|   | <b>Filing claims and appeals</b>  |
|   | Creditor's claim for debt is submitted by lodging a proof of debt with the liquidator. Claim must be submitted by date fixed by liquidator. The liquidator must, admit or reject a claim in whole or in part. Creditor may appeal the decision through the court with its leave.  |
|   | <b>Priority claims</b>  |
|   | Three general categories of preferential claims: costs and expenses of administering the liquidation; employee claims and taxes. A secured party is, paid in preference to these claims.  |
|   | <b>Major kinds of voidable transactions</b>   |
| Voidable transactions; voidable charges; transactions at undervalue.  |   |
| <b>Operating and financing during reorganisations</b>   |   |
| A company in liquidation or administration may obtain either secured or unsecured loans. No super priority is given to such loans unless it can be shown that the loan was an expense properly incurred by the liquidator or administrator in carrying out or exercising their duties.  |   |
| <b>Requirements for approval of reorganisations</b>   |   |
| DOCA approved by 75% of creditors in value (which will frequently be comprised largely of secured creditors) and 50% of creditors in number.  |   |
| <b>Liabilities of directors and officers</b>  |   |
| A directors will be liable for a breach of a director's duty owed to the company. If a director breaches a duty the court may order the director to repay or restore money or property or any part of it with interest, or to contribute to the assets of the company by way of compensation, or where the application is made by a creditor, order the director to pay or transfer money or property and interest to the creditor. |   |
| <b>Pending legislation</b>  |   |
| Insolvency (Cross-border) Act 2006.   |   |



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