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Restructuring and Insolvency guide – Q&A

Cayman Islands

CAREY OLSEN

Contents

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BIGGER PICTURE

1. Legal framework

1.1 What domestic legislation governs restructuring and insolvency matters in your jurisdiction?

Restructuring and insolvency in the Cayman Islands is primarily governed by:

- the Companies Act (2022 Revision);
- the Companies Winding up Rules, 2018; and
- with respect to exempted limited partnerships, the Exempted Limited Partnership Act (2021 Revision).

1.2 What international / cross-border instruments relating to restructuring and insolvency have effect in your jurisdiction?

The Cayman Islands has not enacted the UNCITRAL Model Law on Cross-Border Insolvency and is not a signatory to any international treaties relating to bankruptcy. It has enacted its own international cooperation legislation and also applies common law and comity principles in providing assistance to foreign insolvency proceedings.

In addition, the Cayman Islands courts adopted:

- the Judicial Insolvency Network (JIN) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Cases on 31 May 2018; and
- the JIN Modalities of Court-to-Court Communication on 31 July 2019.

1.3 Do any special regimes apply in specific sectors?

No. However, additional considerations arise with respect to entities carrying on licensed and regulated business. The Cayman Islands Monetary Authority has certain powers with respect to those entities. In appropriate circumstances these powers include the ability to appoint a controller to take control of the entity's affairs and to present a winding-up petition.

1.4 Is the restructuring and insolvency regime in your jurisdiction perceived to be more creditor friendly or debtor friendly?

The restructuring and insolvency regime in the Cayman Islands is generally regarded as being creditor friendly. In particular, there is no restructuring or insolvency regime that imposes a moratorium on secured creditors enforcing their security.

1.5 How well established is the legal regime and infrastructure relevant to restructuring and insolvency in your jurisdiction (e.g. extent of recent legislative changes, availability of specialist judges / courts / advisers)?

The Cayman Islands restructuring and insolvency regime is well established and globally recognised. It is regularly reviewed, updated and amended following consultation between the legislature and the industry (including most recently with the introduction of the restructuring officer regime discussed below), and is supported by a significant body of case law.

The Cayman Islands court system is globally recognised and a significant contributor to the Cayman Islands' status as a leading international offshore banking and financial centre. The judges of the Financial Services Division of the Grand Court are experienced in dealing with high-value and complex restructuring and insolvency cases; and where circumstances demand, proceedings can be brought and dealt with urgently.

2. Security

2.1 What principal forms of security interest are taken over assets in your jurisdiction?

The main types of security interests taken over assets in the Cayman Islands are legal and equitable mortgages and fixed and floating charges.

Mortgages: A legal mortgage involves legal title to the secured asset transferring to the secured party, with an obligation to re-transfer the asset upon discharge of the secured obligations. An equitable mortgage is created where an asset is the subject of a mortgage but legal title is not transferred to the secured party. An equitable mortgage can be overriden by a bona fide purchaser of the asset which does not have notice of the secured party's interest; whereas a legal mortgage is not susceptible to such subsequent interests.

Charges: A charge may be either fixed or floating. Charges do not require a transfer of title to the secured asset. A fixed charge attaches to specific assets and requires that the security provider hold those assets to the order of the secured party. In contrast, a floating charge usually allows the security provider to deal with the assets in the ordinary course of its business. A floating charge 'hovers' over a shifting pool of assets (eg, cash, trading stock and inventory) generally until an event of default occurs, at which point it crystallises into a fixed charge over the relevant pool of assets held by the security provider at that time.

There are also other types of security which apply where the secured party is in possession of the secured asset (eg, liens and pledges).

2.2 How can those security interests be enforced (and what factors could complicate or prevent this process)?

Under Cayman Islands law, a secured creditor can generally enforce security without the need for court involvement. This remains the case even if the security provider is subject to insolvency proceedings in the Cayman Islands (except for enforcement over the shares of a Cayman Islands company after the commencement of a winding-up proceeding in respect of that company).

Enforcement options depend on the nature of the security and the provisions of the security document, but generally include the appointment of a receiver and the power of sale.

Receivership: A secured creditor may enforce its security by appointing a receiver over the specific secured asset(s) in accordance with the terms of the security document. Following the appointment, the receiver will have the powers specified in the security document which are usually quite broad, including the power:

- to collect any income from the asset(s);
- to exercise any rights attached to the asset(s) (eg, voting rights attached to shares); and
- ultimately, to sell the asset(s).

Power of sale: The power of sale permits a secured creditor to sell the secured asset(s) and use the proceeds to settle the secured liabilities. A receiver or creditor selling secured assets is obliged to get the best price reasonably obtainable in the circumstances, but there is generally no requirement that the sale be carried out in any particular method (eg, by public auction) or within a set timeframe.

Foreclosure: Foreclosure is possible if security is taken by way of legal or equitable mortgage but requires an application to the court. This enforcement method is rarely used in practice in the Cayman Islands.

3. Restructuring

3.1 Are informal workouts available in your jurisdiction? If so, what forms do they typically take, and what are the benefits and drawbacks as compared to formal restructuring proceedings?

Informal workouts are available in the Cayman Islands. Due to the nature of the jurisdiction, the form that an informal workout tends to take largely reflects the preferred approach in the other jurisdiction(s) involved in a particular case.

Informal workouts are overall less common in the Cayman Islands than in some jurisdictions due to the availability of a moratorium through the commencement of a 'light-touch' provisional liquidation. A new restructuring officer regime came into force in the Cayman Islands in mid-2022, which provides many of the benefits of the light-touch provisional liquidation without the need to commence liquidation proceedings and may make informal workouts even less common. The appointment of a restructuring officer or the appointment of a provisional liquidator for the purposes of pursuing a restructuring generally requires some evidence that the company's affairs are capable of being restructured. Evidence of having already conducted some consensual restructuring negotiations will usually be helpful in this respect, but is not necessarily a prerequisite.

If a company is insolvent or in the 'zone of insolvency', the directors must assess in the specific circumstances whether their duty to act in the best interests of the company would be best discharged by commencing formal proceedings or pursuing an informal workout.

3.2 What formal restructuring proceedings are available in your jurisdiction, and what are the benefits and drawbacks of each?

The leading restructuring tool in the Cayman Islands is the scheme of arrangement under Section 86 of the Companies Act. A Cayman Islands scheme of arrangement is a very flexible, versatile tool which has been effectively used to implement a variety of restructurings, including:

- debt-for-equity swaps;
- amendments and extensions; and
- other comprehensive reorganisations.

A key benefit of a scheme is the ability to bind dissenting creditors (see question 3.8). Schemes allow the company to target a particular group or groups of creditors, rather than approaching all creditors generally, and may compromise the claims of secured and/or unsecured creditors.

A scheme of arrangement is not an insolvency proceeding and there is no requirement that a company be insolvent or in financial distress. However, when used in those scenarios, it has been common in the Cayman Islands for 'light-touch' provisional liquidators to be appointed prior to a scheme being proposed. The Cayman Islands' new restructuring officer regime was designed largely to improve upon this option and it is anticipated that it will become very common for a restructuring officer to be appointed prior to a scheme being proposed.

A significant benefit to the appointment of a restructuring officer or provisional liquidator is that a moratorium on claims is put in place to give the company breathing space to pursue a restructuring. Additionally, the company's directors can remain in control of the business, while an experienced independent professional is brought in with a mandate to explore and facilitate a restructuring.

The main drawback of the light-touch provisional liquidation option historically has been that it can only be commenced once a winding-up petition has been presented. While this option has been effective in practice, filing a winding-up petition and commencing liquidation proceedings in order to restructure (and avoid actual liquidation) is counterintuitive and can be seen as unpalatable. The new restructuring officer regime avoids these concerns.

3.3 How, by whom and on what grounds are formal restructuring proceedings initiated? What are the main preconditions for success?

A scheme of arrangement is initiated by an application to court for an order summoning a meeting or meetings of the relevant class or classes of creditors on the grounds that a compromise or arrangement is being proposed. There is no requirement that the company be insolvent or in financial distress.

The application can be made by the debtor or, if appointed in advance, the debtor's provisional liquidator or restructuring officer. It is also possible for a scheme to be initiated by a creditor; however, this is very rare in practice as the debtor's support is required.

In order for a scheme to succeed:

- a majority in number representing 75% in value of the creditors of each affected class of creditors must vote in favour of the scheme; and
- the scheme must be sanctioned by the court.

The appointment of a restructuring officer is initiated by the debtor presenting a petition to the court on the grounds that the company is or is likely to become insolvent and intends to present a compromise or arrangement to its creditors (or classes thereof). The intended compromise or arrangement could be a Cayman Islands scheme of arrangement or a restructuring proceeding in another jurisdiction.

3.4 What are the effects of the commencement of formal restructuring proceedings, both for the debtor and for creditors?

The commencement of a scheme of arrangement itself has no formal effect on the debtor or its creditors. The debtor's management remains in control and there is no moratorium. The event may trigger a variety of contractual events of default and termination rights. Prior to launching a scheme, it is common for a debtor to enter into a lock-up or restructuring agreement with a number of its creditors, which typically includes related waivers and/or forbearances.

Prior to launching a Cayman Islands scheme of arrangement, it has been common for provisional liquidators to be appointed; and following recent legislative changes in the Cayman Islands, it is expected to become common for restructuring officers to be appointed. Upon the appointment of either type of officer, a moratorium will apply (see question 3.5). The provisional liquidators or restructuring officers will have certain limited powers related to pursuing a restructuring, but the debtor's directors and their powers will generally remain in place.

3.5 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

There is no moratorium or stay of proceedings available in relation to a scheme of arrangement unless provisional liquidators or restructuring officers are appointed.

Upon the appointment of provisional liquidators or restructuring officers, an automatic moratorium will apply. The moratorium prohibits the commencement or continuation of any suit, action or other proceeding against the company without the court's permission. The moratorium does not apply to the enforcement of security and secured creditors may generally enforce their security without any court involvement. The moratorium also does not affect the exercise of contractual rights (unless legal proceedings are required to exercise those rights).

Under the new restructuring officer regime, the moratorium comes into place automatically upon the filing of court papers seeking the appointment of a restructuring officer, prior to any court hearing. The moratorium is intended to have global effect; however, it remains to been seen to what extent the courts of other jurisdictions will recognise and enforce it.

3.6 What process do restructuring proceedings typically follow (including likely length of process and key milestones)?

A scheme of arrangement generally takes 10 to 12 weeks from commencement of the formal process until the scheme is sanctioned. Prior to commencement of the formal process, there is usually a period during which the scheme terms are negotiated with the affected creditors and the scheme documents are prepared and agreed. The length of this pre-launch negotiation period varies but typically a scheme is launched only once a significant proportion of the affected creditors have agreed to vote in favour of the scheme.

The scheme process involves three key milestones:

- **Convening hearing:** The first court hearing involves seeking an order that a meeting of each relevant class of creditors be convened.
- **Scheme meetings:** A meeting of each relevant class of creditors is then convened in accordance with the court order. The affected creditors vote on the scheme either in person at the meeting(s) or by proxy.
- **Sanction hearing:** If the scheme has been approved by the requisite majority of creditors, a second court hearing is held in order to obtain the court's sanction of the scheme. If the court sanctions the scheme, the scheme will become effective and bind all affected creditors when the court order is filed.

3.7 What are the roles, rights and responsibilities of the following stakeholders in restructuring proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Employees, (g) Pension creditors, (h) Insolvency officeholder (if any), (i) Court.

A debtor typically initiates a restructuring proceeding by seeking the appointment of a restructuring officer and/or proposing a scheme of arrangement. Directors will generally remain in control of the business during a restructuring. Depending on whether a restructuring officer is appointed and its powers, directors may also be responsible for negotiating the restructuring, including managing conflicts of interest and competing stakeholder interests.

A scheme can bind secured and unsecured creditors, provided that all relevant class(es) of creditors approve the scheme and it is sanctioned by the court. If a moratorium is in place, creditors will be prevented from commencing legal action to recover their debts, but secured creditors may enforce their security and creditors may exercise other contractual rights.

If a restructuring officer is appointed, its powers will be set out in the appointment order. In general, the restructuring officer will act as an independent party in restructuring negotiations to assist the company and its creditors in agreeing a restructuring.

In the Cayman Islands, the court is actively involved in determining whether a restructuring officer should be appointed and what powers it should have. The court can also be involved in the restructuring process as it progresses, depending on the circumstances and issues arising. If a scheme of arrangement is proposed, there are two court hearings and ultimately the court will determine whether the scheme should be sanctioned.

3.8 Can restructuring proceedings be used to "cram down" and bind dissentient creditors to a transaction supported by other creditors? Are creditors separated into classes for the purposes of voting in the proceedings? What are the relevant voting thresholds? Is "cross-class cramdown" available?

A scheme of arrangement can be and is regularly used to 'cram down' dissentient creditors within a class of supportive creditors. Cross-class cramdown is not available in restructuring proceedings in the Cayman Islands.

Class constitution: Creditors affected by a scheme of arrangement are separated into classes for the purposes of voting on the scheme. If there are material differences in the legal rights of affected creditors, either before the scheme or as modified by the scheme (such that the creditors cannot consult together with a view to their common interests), they are likely to be required to vote in separate classes. Differences in the interests (rather than legal rights) of affected creditors are unlikely to 'fracture' a class, but can lead to fairness challenges at the sanction hearing stage.

Voting thresholds: A Cayman Islands scheme of arrangement will be approved where, in respect of each class of affected creditors, at least 75% of the creditors within that class by value and more than 50% by number (present and voting, either in person or by proxy) vote in favour of the scheme. If approved by all classes, the scheme will bind all of the affected creditors (whether they voted for or against, or did not vote on, the scheme).

3.9 Can restructuring proceedings be used to compromise secured debt?

A scheme of arrangement can compromise secured debt provided that all relevant class(es) of creditors approve the scheme and it is sanctioned by the court. Secured creditors will often be in a separate class for purposes of voting on a scheme and will therefore have significant influence and possibly a veto on the scheme being approved.

3.10 Can contracts / leases be disclaimed or otherwise addressed through restructuring proceedings?

There is no specific power to disclaim contracts or leases in restructuring proceedings. However, a Cayman Islands scheme of arrangement can be used to compromise claims under a contract or lease (subject to all relevant classes of creditors approving the scheme and it being sanctioned by the court).

3.11 Can liabilities of third parties (e.g. guarantors) be released through restructuring proceedings?

In certain circumstances, the liabilities of third parties can be released as part of a scheme of arrangement. This can include claims against directors, employees and advisers, as well as guarantors.

3.12 Is any protection and/or priority afforded to the providers of new money in the context of restructuring proceedings (i.e. is "DIP financing" available)?

There is no express provision for super-priority financing in restructuring proceedings in Cayman Islands legislation which is analogous to the DIP financing regime under the US Bankruptcy Code.

If a company is in a formal restructuring process (with restructuring officers or provisional liquidators appointed), new financing can be obtained and security may be granted with the prior approval of the court. However, the security will not have priority over any existing security over the same assets. New unsecured financing may be given priority over the company's unsecured creditors by virtue of being classified as an expense of the office holder.

3.13 How do restructuring proceedings conclude?

If a scheme of arrangement is sanctioned by the court, the scheme will become binding on all affected creditors when a copy of the order sanctioning the scheme is filed with the local registrar and any conditions precedent are satisfied.

If a restructuring officer was appointed and the restructuring is complete, the debtor or the restructuring officer will apply to the court for an order discharging the restructuring officer.

4. Insolvency

4.1 What types of insolvency proceeding are available in your jurisdiction, and what are the benefits and drawbacks of each?

The primary insolvency proceeding in the Cayman Islands is official liquidation, in which official liquidators are appointed to wind up the company and distribute its assets to its creditors and shareholders in accordance with the statutory order of priorities. The official liquidators, who must be licensed insolvency practitioners, will also investigate the company's affairs and the causes of its insolvency, and consider whether to pursue any claims on behalf of the company.

Provisional liquidators may also be appointed on a provisional basis between the presentation and hearing of a winding up petition. Provisional liquidation is a flexible procedure that may be used to implement a restructuring; but provisional liquidators may also be appointed to prevent any mismanagement, misconduct, misappropriation of assets or fraud on minority shareholders prior to the hearing of the petition and the appointment of official liquidators.

A company may also be placed into voluntary liquidation upon a special resolution of its shareholders. However, this is not an appropriate procedure for insolvent companies. If the company's directors are not prepared to swear a statutory declaration of solvency, the liquidator must apply to have the liquidation brought under the supervision of the court (akin to official liquidation).

4.2 How, by whom and on what grounds are insolvency proceedings initiated? Can the instigating party (or any other parties) select the identity of the relevant insolvency officeholder?

A petition to wind up a company can be presented by:

- the company itself;
- any creditor (including a contingent or prospective creditor);
- any contributory; or
- the Cayman Islands Monetary Authority (in certain circumstances).

The grounds on which a company may be wound up include the following:

- It is unable to pay its debts;
- It is just and equitable for the company to be wound up;
- It has not commenced business for a year;
- The period fixed in its articles has expired; or
- It has passed a special resolution for its winding up.

The inability to pay debts is determined on a cash-flow test, but this is not confined to consideration of debts that are immediately due and payable. Debts that are payable in the reasonably near future may be considered. If a statutory demand is not satisfied within 21 days, the company is deemed to be unable to pay its debts.

4.3 What are the effects of the commencement of insolvency proceedings, both for the debtor and for creditors?

The official liquidation of a company is deemed to commence on the date of the presentation of the winding up petition. Any dispositions of property and any transfer of shares or alteration in the status of the company's members that took place after that date are automatically void upon the making of a winding-up order, unless the court orders otherwise.

Once the winding-up order is made, the powers of the directors cease and the official liquidators take control of the company.

4.4 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

On the making of a winding-up order, there is an automatic stay on the commencement or continuing of all suits, actions and other proceedings (but the stay does not prevent secured creditors from enforcing their security). The automatic stay also applies on the appointment of provisional liquidators. Leave of the court is required to lift the stay.

After the presentation of the winding-up petition, but before the making of a winding-up order, the company or any creditor or shareholder may apply to stay any proceeding against the company taking place in a Cayman Islands court or for an injunction to restrain further proceedings against the company in a foreign court.

4.5 What process do insolvency proceedings typically follow (including likely length of process and key milestones)?

The official liquidators must convene a first meeting of creditors within 28 days of the making of a winding-up order (unless the court orders otherwise). Thereafter, the steps taken and the duration of the liquidation will depend on the nature of the assets and complexity of the issues.

4.6 What are the respective roles, rights and responsibilities of the following stakeholders during the insolvency proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Administrator, (g) Employees, (h) Pension creditors, (i) Insolvency officeholder, (j) Court.

(a) Debtor

Upon the making of a winding-up order, the debtor's affairs will be wound up by the official liquidator (although the official liquidator may elect to continue to trade the debtor's business for a period, with the sanction of the court).

(b) Directors of the debtor

Upon the making of a winding-up order, the directors' powers to manage the debtor cease. Directors have duties to cooperate with the official liquidators and may be compelled to produce documents and attend for examination.

(c) Shareholders of the debtor

Shareholders have little role in the official liquidation of an insolvent company. In general terms, it is the creditors that are entitled to attend meetings and vote on certain matters (although this will differ where the official liquidators have determined that the debtor is solvent or of doubtful solvency).

(d) Secured creditors

Neither the presentation of a winding-up petition nor the appointment of a restructuring officer or a provisional or official liquidator prevents a secured creditor from enforcing its security. However, a secured creditor may only prove in a liquidation to the extent that any portion of its debt is unsecured. If it chooses to do so, a secured creditor can release its security and participate in the liquidation as an unsecured creditor.

(e) Unsecured creditors
Where official liquidators have determined that the company in official liquidation is insolvent, they will call a meeting of its unsecured creditors. At the meeting, the unsecured creditors will vote to appoint a liquidation committee consisting of three to five creditors. The liquidation committee will:

- represent the body of creditors at liquidation committee meetings with the liquidators; and
- receive notice of certain applications that the official liquidators wish to make.

The wider body of unsecured creditors will:

- receive copies of the official liquidators' reports to court on the progress of the liquidation; and
- submit proofs of debt in order to participate in any distributions to creditors.

(f) Administrator
There is no office of administrator in Cayman Islands insolvency law.

(g) Employees
Employment contracts are terminated on the making of a winding-up order. Certain sums that accrued to employees are payable as a preferential debt, but an employee will be an unsecured creditor with respect to all other amounts owed by the debtor.

(h) Pension creditors
Any sum that is due and payable by the debtor on behalf of an employee in respect of pension contributions is payable as a preferential debt.

(i) Insolvency officeholder
On making a winding-up order, the court will appoint one or more official liquidators to conduct the winding up. Official liquidators (and provisional liquidators) must be licensed insolvency practitioners, and at least one of the official liquidators must be resident in the Cayman Islands.

The official liquidators displace the debtor's directors and control its affairs, subject to the supervision of the court. The official liquidators' powers, some of which may only be exercised with the sanction of the court, are set out in the Companies Act. The official liquidators are remunerated out of the assets of the debtor, subject to the approval of the court after consultation with the liquidation committee.

(j) Court
The Grand Court has discretion to make a winding-up order on the presentation of a winding-up petition. Once the debtor is in official liquidation, the court performs a supervisory role.

Certain of the official liquidators' powers are exercisable only with the sanction of the court and official liquidators may also apply to court for directions concerning any aspect of the liquidation. Creditors and contributories may apply to court for an order directing the official liquidators to take (or not take) certain action.

The court may also be involved in the adjudication of a creditor's proof of debt if:

- the official liquidators' decision to reject the proof in whole or in part is appealed by the creditor; or
- a different creditor or contributory applies to expunge admission of the proof.

The official liquidators' remuneration must be approved by the court, although official liquidators can advance 80% of their reported fees in advance of obtaining approval (but must return any overpayment to the debtor's estate).

4.7 What is the process for filing claims in the insolvency proceedings?

In an insolvent liquidation, creditors submit claims by lodging a 'proof of debt' with the official liquidators. A proof of debt is a form containing details of the creditor and a description of the claim.

The official liquidators adjudicate claims against the debtor in a quasi-judicial capacity and will notify the creditor whether the claims have been accepted or rejected (in part or in full). They will typically adjudicate claims for voting purposes at the first meeting of creditors, but may not adjudicate claims for the purpose of making distributions unless and until there are assets to distribute.

A creditor that is dissatisfied with the official liquidators' adjudication has the right to appeal to the Grand Court. In addition, all creditors:

- have the right to inspect other creditors' proofs of debt; and
- may apply to expunge a proof if they believe it should not have been admitted.

There is no 'bar date' for the submission of proofs of debt, but official liquidators will give notice to creditors of their intention to pay a dividend and past dividends will not be disturbed to accommodate creditors that did not submit their proof of debt on time.

4.8 How are claims ranked in the insolvency proceedings? Do any claims have "super priority" and is there scope for subordination by operation of law (e.g. equitable subordination)?

The collection and distribution of assets are without prejudice to the rights of secured creditors. Secured creditors can therefore enforce their security or enforce any right to be paid as a priority out of secured assets (which do not strictly form part of the liquidation estate).

Liquidation expenses (including the remuneration and expenses of the official liquidators and any provisional liquidators, and the costs of the petition allowed by the court) are paid first out of realised assets. Thereafter, the order of priority among stakeholders is as follows:

- the following categories of preferential debts:
  - certain sums due to or payable on behalf of employees;
  - certain taxes due to the Cayman Islands government; and
  - for certain Cayman Islands banks, certain sums due to depositors;
- all unsecured debts (other than those which are subject to subordination or deferral agreements;
- amounts due to any preferred shareholders under the company's articles of association;
- debts incurred by the company in respect of the redemption or purchase of its own shares; and
- any surplus remaining after payment of the above amounts is returned to the shareholders of the company in accordance with its articles of association or any shareholders' agreement.

Any contractual arrangements between the company and a creditor regarding set-off (or non-set-off) will be enforced. In the absence of such an agreement, sums due between the company and a creditor with respect to their mutual dealings may be offset.

4.9 What is the effect of insolvency proceedings on existing contracts? Is the counterparty free to terminate? Can they be disclaimed?

Liquidators have no power to disclaim any contracts. However, if the liquidator does not cause the company to perform its existing contractual obligations, the counterparty is unlikely to have any remedy other than the right to prove in the liquidation for damages as a result of the breach.

4.10 Can transactions entered into by the debtor prior to be insolvency be challenged and set aside? What are the relevant grounds / look-back periods / defences?

Pre-insolvency transactions can be challenged if they constitute:

- a voidable preference;
- a disposition at an undervalue;
- fraudulent trading; or
- a fraudulent disposition.

Property dispositions and transfers of shares made after the presentation of a winding-up petition will also be void if the court makes a winding-up order, unless the court orders otherwise.

Voidable preferences: Voidable preferences arise where a company has, within the six months immediately preceding the commencement of liquidation and at a time when it was unable to pay its debts, made a transfer of property, granted a charge or made payment to a creditor, if the transaction is made with a view to preferring that creditor over other creditors. The liquidator of the company may seek an order from the court to declare the transaction void and to order that the property be returned to the company.

Where the recipient of the property is a related party to the company, the transaction is deemed to have the requisite intention to prefer.

Transactions at an undervalue: A transaction will constitute a disposition at an undervalue where a company has disposed of property at an undervalue with the intent to defraud its creditors (which requires an intention to wilfully defeat an obligation owed to a creditor). Any disposition at an undervalue made by the company in the six years prior to the commencement of the liquidation with an intent to defraud its creditors shall be voidable at the instance of the liquidator.

The liquidator may seek an order from the court to declare the transaction void and for restitution. If the recipient can satisfy the court that it did not act in bad faith in respect of the transaction:

- the recipient will have a first-ranking charge over the property of an amount equal to the costs properly incurred by the recipient in defending any proceedings challenging the relevant disposition; and
- the disposition will be set aside subject to the proper costs, pre-existing rights, claims and interests of the recipient.

Fraudulent trading: If the company's business was carried on with the intent to defraud its creditors or for any fraudulent purpose, the liquidator may apply to court for a declaration that any persons who were knowingly parties to the fraudulent trading shall contribute to the company's assets in the amount that the court thinks proper.

Fraudulent dispositions: If any of the company's property has been disposed of with an intent to defraud and at an undervalue, any creditor prejudiced by the disposition can seek an order from the court that the transaction is void. Any such claim must be brought within six years of the relevant transaction.

Avoidance of property dispositions and transfers of shares: When a winding-up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's shareholders made after the commencement of the winding up (which usually deemed to be at the time of the presentation of the winding-up petition) is void, unless the court orders otherwise. The liquidator can seek appropriate relief from the court for the property to be returned to the company.

4.11 How do the insolvency proceedings conclude? Can any liabilities survive the insolvency proceedings?

When the official liquidators determine that the company's affairs have been wound up, they will apply to court for an order for the dissolution of the company. A company that has been dissolved cannot be restored.

5. Cross-border / Groups

5.1 Can foreign debtors avail of the restructuring and insolvency regime in your jurisdiction?

The Cayman Islands courts have jurisdiction to wind up a foreign company (and to appoint a provisional liquidator or a restructuring officer to, or sanction a scheme of arrangement of, a foreign company) if it:

- has property located in the Cayman Islands;
- is carrying on business in the Cayman Islands;
- is the general partner of a limited partnership registered in the Cayman Islands; or
- is registered as a foreign company under Part IX of the Companies Act.

5.2 Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

The Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, but it has enacted its own international cooperation legislation and also applies common law and comity principles in providing assistance to foreign insolvency proceedings.

5.3 Under what conditions will the courts in your jurisdiction recognise and/or give effect to foreign insolvency or restructuring proceedings or otherwise grant assistance in the context of such proceedings?

Section 241 of the Companies Act allows 'foreign representatives' (ie, liquidators, trustees or other insolvency practitioners appointed over foreign companies and legal entities) to apply to the Cayman Court for orders ancillary to the foreign insolvency proceeding. The orders that may be granted include:

- recognising the right of the foreign representative to act on behalf of the foreign debtor within the Cayman Islands;
- staying legal proceedings or the enforcement of judgments against the debtor;
- requiring persons with information relating to the business or affairs of the debtor to be examined and/or produce documents; and
- ordering the turnover of property to the foreign representative.

Section 241 of the Companies Act does not apply to foreign insolvency proceedings in respect of Cayman Islands companies, and therefore any recognition and assistance must be granted under common law principles. The circumstances in which the Cayman Court has been willing to recognise the rights of a foreign officeholder appointed over a Cayman Islands company to act on behalf of the company in the Cayman Islands are very limited. It is therefore usually necessary for parallel insolvency proceedings to be commenced in the Cayman Islands in order to obtain the benefits of any insolvency protection.

5.4 To what extent will the courts cooperate with their counterparts in other jurisdictions in the case of cross-border insolvency or restructuring proceedings?

The Cayman Islands courts are willing to cooperate and coordinate with foreign courts and officeholders in order to effect an orderly restructuring or winding up. For example, the Grand Court frequently appoints Cayman Islands provisional liquidators on a 'light-touch' basis in order to support foreign restructuring proceedings. Additionally, the Cayman Islands has enacted legislation to provide for Cayman liquidators to enter into protocols with foreign officeholders for the purpose of:

- promoting the orderly administration of the estate; and
- avoiding duplication and conflict between the foreign and Cayman officeholders.

The legislation provides that Cayman liquidators have a duty to consider whether it is appropriate to enter into such a protocol.

5.5 How are corporate groups treated in the context of restructuring and insolvency proceedings? If there is no concept of a group proceeding (or consolidation), is there any regime through which insolvency officeholders must / may cooperate?

In the absence of any material conflicts of interest between the estates and where appropriate to do so, the Cayman court may appoint the same liquidators to different companies within the same group. However, this does not result in a consolidation of the estates and the assets of each will not be pooled, but will be separately distributed among the creditors with claims against each estate. An additional 'conflict' liquidator may be appointed over one of the estates to deal with any issues of conflict between the estates.

Where different liquidators have been appointed to companies within the same group, stakeholders and the court will expect a degree of cooperation between the estates on matters of common interest, but there is no legislative framework for cooperation.

5.6 Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

There are no current plans to adopt the UNCITRAL Model Law on Enterprise Group Insolvency.

5.7 How is the debtor's centre of main interests determined in your jurisdiction?

The Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and a debtor's centre of main interests is not applicable to any restructuring or insolvency proceeding in the Cayman Islands.

5.8 How are foreign creditors treated in restructuring and insolvency proceedings in your jurisdiction?

Foreign and domestic creditors are treated equally.

6. Liability risk

6.1 What duties do the directors of the debtor have when the company is in the "zone of insolvency" (or actually insolvent)? Do they have an obligation to commence insolvency proceedings at any particular time?

The directors of a Cayman Islands company have a duty at all times to act in the best interests of the company. When a company is financially healthy, this duty generally means acting in a way that is most likely to promote the success of the company for the benefit of its shareholders. When a company is insolvent or is in the 'zone of insolvency', this duty shifts such that directors must have regard to the interests of the company's creditors.

There is no obligation for directors to commence insolvency proceedings at any particular time; however, a failure to do so when appropriate can result in liability for directors.

6.2 Are there any circumstances in which the directors could incur personal liability in the context of a debtor's insolvency?

Directors can be personally liable for losses caused to the company if they have acted in breach of their duties. In respect of the duty to act in the best interests of the company, when the company is insolvent or in the 'zone of insolvency', it might not be in the best interests of creditors for the company to continue trading as usual. Accordingly, directors who cause the company to do so may be in breach of their duties and personal liability could arise – for example, in causing additional liabilities to be incurred by the company when the directors knew, or should have known, that there was no reasonable prospect of the company being able to pay those liabilities or to avoid insolvent liquidation.

There is also potential for personal liability (as well as criminal sanction) for a variety of actions if carried on with an intent to defraud the company's creditors or for other fraudulent purposes in the year prior to the commencement of a winding up or in the course of a winding up. These include actions such as:

- concealing or removing company property;
- concealing company debts; and
- destroying or falsifying company documents.

6.3 Is there any scope for any other party to incur liability in the context of a debtor's insolvency (e.g. lender or shareholder liability)?

Directors' duties (and the potential consequences for breach thereof) can apply to shadow directors. The Cayman Islands Companies Act defines 'shadow directors' as any person in accordance with whose directions or instructions the directors of the company are accustomed to act; but a person is not deemed to be a shadow director by reason only that the directors act on advice given by that person in a professional capacity.

In the context of dealing with a company in financial distress, lenders and shareholders should be careful not to take any action which could result in them being characterised as a shadow director.

Outside of the shadow director concern, shareholder liability in the context of an insolvency of a Cayman Islands company is rare, as the court will 'pierce the corporate veil' only in exceptional circumstances.

7. The Covid-19 pandemic

7.1 Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what is their effect and are they temporary or permanent?

No changes to the Cayman Islands restructuring and insolvency laws were implemented in response to the COVID-19 pandemic. However, the courts adopted their procedures to allow greater use of remote hearings via videoconference.

8. Other

8.1 Is it possible to effect a "pre-pack" sale of assets, and is it possible to sell the assets free and clear of security, in restructuring and insolvency proceedings in your jurisdiction?

There is no prescribed marketing process for the sale of assets in liquidation, but the liquidator has a duty to take reasonable care to obtain the best price available in the circumstances. There is no provision of Cayman Islands insolvency law which enables the buyer to acquire the assets 'free and clear', and the liquidators will usually provide only very limited representations as to title. Liquidators also cannot release any security without the consent of the secured creditor.

Where a sale is being conducted in official or provisional liquidation (as will often be the case where the company's business is being sold as part of a restructuring), the provisional liquidator will need the sanction of the Cayman court to conduct the sale. The court's sanction will also be required in official liquidation if the buyer is a related party. In either case, in determining whether to sanction the sale, the court will consider the sales process and the efforts by the liquidators to obtain the best price for the assets that is available in the circumstances.

Pre-packaged sales are permissible, but will usually attract more scrutiny from the court when the provisional liquidator applies for sanction of the sale.

8.2 Is "credit bidding" permitted?

Credit bidding is permitted; but if the sale is happening in the context of a provisional or official liquidation, the liquidators will need to consider whether the bid represents the best available to the estate in the circumstances (and the sale will need to be approved by the Grand Court, which will have regard to the same considerations).

9. Trends and predictions

9.1 How would you describe the current restructuring and insolvency landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

There has been an increased flow of insolvency and restructuring work in recent years, and this trend is expected to continue as a result of global economic conditions. The Cayman Islands is expected to continue to be used as an attractive and internationally recognised restructuring jurisdiction.

10. Tips and traps

10.1 What are your top tips for a smooth restructuring and what potential sticking points would you highlight?

Whenever a company faces financial distress, obtaining specialist advice and engaging with stakeholders earlier in the process will markedly improve its prospects. In situations with a cross-border element (which is invariably the case where Cayman Islands companies are involved), it is all the more important that those in charge of the company understand the landscape and can plan appropriately.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

About Carey Olsen

Carey Olsen is a leading offshore law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey from a network of nine international offices.

We provide legal services in relation to all aspects of corporate and finance, trusts and private wealth, investment funds, insolvency, restructuring and dispute resolution.

Our clients include global financial institutions, investment funds, private equity and real estate houses, multinational corporations, public organisations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

We work with leading onshore legal advisers on international transactions and cases involving our jurisdictions.

In the face of opportunities and challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with consistently high levels of client service, technical excellence and commercial insight.

Our Restructuring and Insolvency practice

Our restructuring and insolvency lawyers apply their knowledge of insolvency, corporate and banking law, regulatory guidance and litigation to the full spectrum of cross-border restructuring, recovery and insolvency matters involving our offshore jurisdictions.

We work in partnership with the world's leading insolvency practitioners, onshore law firms, accountancy and forensic practices, advising the whole spectrum of stakeholders, including liquidators, receivers, creditors, investors, directors and professional service providers. Our institutional client base includes private equity, venture capital, banking, real estate, financial services, corporate and private trusts and investment managers.

Our lawyers have been involved in a very significant number of the major formal insolvency proceedings in recent years in the jurisdictions in which we practice, and have played a key role in the development of the law in many key areas. They have a practical and deep technical understanding of the issues that can arise in restructuring situations, whether around merger, acquisition, reorganisation, workout or recapitalisation activities. They focus their advice on furthering our clients' commercial aims; typically preserving the assets of a business or the value of an investment, and building a viable restructuring transaction, exit strategy or litigation plan.

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