



Legal Updates

Facilitating Corporate restructurings in the Cayman Islands – The new “Restructuring Officer”

April 2021

Introduction

The proposed introduction of a corporate restructuring regime in the Cayman Islands is a welcome development and is considered by many to be long overdue. Presently, Cayman Islands law does not provide for any formal corporate restructuring process; a position which can be contrasted with, for example, the United Kingdom and the United States whose respective “administration” and “Chapter 11 bankruptcy” processes have been available for many years.

Current Cayman Islands law

Absent such a process, the only means by which a company is currently able to undertake a restructuring process in the Cayman Islands, is following the presentation of a winding up petition against that company whereupon the hearing of that petition, the Cayman Court has the ability (but not the obligation) to give directions which will enable a restructuring to take place.

In order to get to that stage, a winding up petition must therefore be brought and those who can do so are (1) the company (provided a special resolution of the members approving it has been passed); (2) a creditor of the company; (3) any “contributory” of the company;¹ (4) the directors of the company (without first requiring shareholder consent where the articles of association of the company provide as such); and (4) in certain circumstances, the Cayman Islands Monetary Authority (**CIMA**).²

However, even if the Cayman Court is minded to exercise its discretion to permit a restructuring to take place, the company will still need to have a liquidator appointed (and will therefore need to bear the cost of doing so) if it is to have the benefit of a moratorium or stay on any claims from other third parties whilst the restructuring is undertaken.

Further, whilst the current procedure for undertaking a restructuring in the Cayman Islands is a 'well trodden path', there can be unintended consequences for companies that follow this process. As a result, the process can be viewed as somewhat parochial by jurisdictions with more refined restructuring processes. For example, the requirement to have a winding up petition presented and a liquidator appointed can have reputational consequences for the company (which may well be a perfectly viable business after the restructuring) whilst "termination events" or "events of default" clauses may be triggered in agreements (e.g. such as finance agreements) to which the company is a party as a result of these steps being taken.

The current process is therefore viewed as inefficient, unnecessarily costly and in need of reform in order to make it fit for purpose and to bring it into line with similar processes offered by other jurisdictions.

The proposed reforms

In order to address the above shortcomings in the current law, the Companies (Amendment) Bill, 2021³(the "**Amendment Bill**") intends to make certain amendments to the Companies Act (2022 Revision) in the Cayman Islands.

Part V of the Companies Act (2022 Revision) will be amended to introduce the role of a "restructuring officer" who will be able to be appointed without the need for a winding up petition to be presented against the relevant company. A "restructuring officer" will be required to be a qualified insolvency practitioner and will be an officer of the Cayman Court.⁴

Further, upon an application being filed for the appointment of a restructuring officer, this will automatically create an immediate moratorium in respect of the subject company. Whilst the moratorium is in place, no resolutions or petitions for winding up the company may be passed or presented and no "suit, action or other proceedings, including criminal proceedings" (including those of an international nature) can be commenced against the relevant company without the leave of the Cayman Court.⁵ However, an important exception to this moratorium is that any creditors who have security over all or part of the company's assets will nonetheless be able to enforce their security against the company without the leave of the Cayman Court and, crucially, without reference to the restructuring officer.⁶ This is an interesting exception which can be distinguished from the equivalent moratorium in the UK which does prevent the enforcement of security against the company's assets whilst the moratorium subsists. Given the purpose of a moratorium is, generally speaking, to give the company 'room to breathe' whilst it formulates a restructuring plan, it seems a contradictory step to give secured creditors the ability to take control of assets which might be crucial to the continuation of the business. Indeed, if security is enforced against key assets, this might have the unintended consequence of frustrating any proposed restructuring as the absence of those assets might render the company unable to trade.

Who appoints a Restructuring Officer?

For added flexibility, the Amendment Bill provides for an *interim* restructuring officer to be appointed “where it is in the interests of the company to do so”.⁷

An application for an *interim* restructuring officer is to be made on an *ex parte* basis and can be brought by the directors of the company without the need for a shareholder resolution approving the same and regardless of whether such a power exists in the company’s articles of association.⁸

The Amendment Bill will also make some helpful changes as regards who can apply to Court for the appointment of a restructuring officer. A company acting by its directors (and without first requiring shareholder approval) may petition for the appointment of a restructuring officer in respect of itself where:

- i. it is or is likely to become unable to pay its debts; and
- ii. intends to present a compromise or arrangement to its creditors (or classes thereof) by way of a consensual restructuring.⁹

This therefore removes the requirement for a winding up petition to be brought against a company that wishes to undergo a restructuring.

The amendments to the Companies Act (2022 Revision) stop short of granting restructuring officers a list of general powers or defining their role that will apply in all cases. Instead, this will be decided on a case-by-case basis as the restructuring officer will have only the powers and the ability to carry out such functions as the Cayman Court may confer in the court order by which the restructuring officer is appointed¹⁰. Such order can be amended subsequently by an application to be made by the relevant company (again acting by its directors and without the need for shareholder sanction), the restructuring officer, a creditor or contributory of the company or (where applicable) CIMA.¹

Whilst we will have to wait and see how practice develops, this certainly has the potential to provide for a more tailored restructuring process that is appropriate to the company in question; although perhaps more likely is that the form of court order and the listed powers and responsibilities for restructurings will simply become standardized as practice develops.

Conclusion

The changes proposed by the Amendment Bill and the introduction of the restructuring regime in the Cayman Islands are a welcome development in Cayman Islands law. Streamlining the process by removing bureaucratic burdens associated with the current position and replacing it with a regime which is

comparable with other major common law jurisdictions seeks to not only assist with avoiding delays but also seeks to reduce the cost of such processes.

As the premier offshore jurisdiction for global M&A and investment funds, it is anticipated that the new restructuring regime will enhance Cayman's reputation for international corporate restructurings.

¹ Section 94(1) of the Companies Act (2022 Revision)

² Section 94(2) of the Companies Act (2022 Revision)

³ Supplement No.1 published with Legislation Gazette No.58 dated 21 October 2021

⁴ S.91D(1) and (3) as set out in the Amendment Bill.

⁵ S.91G as set out in the Amendment Bill.

⁶ S.91H as set out in the Amendment Bill.

⁷ S.91C as set out in the Amendment Bill.

⁸ S.91C(2) as set out in the Amendment Bill.

⁹ S.91B(1) as set out in the Amendment Bill.

¹⁰ S.91B(4) as set out in the Amendment Bill.

¹¹ S.91B(5) and s.91E as set out in the Amendment Bill.

This publication is intended to merely provide a brief overview and general guidance only and is not intended to be a substitute for specific legal advice or a legal opinion.

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