Cayman Restructuring – a proposal for a formal restructuring regime in the Cayman Islands

Following years of discussion, the bill for the long awaited proposed amendments to the Cayman Islands Companies Act (the "**Act**"), providing for a standalone restructuring regime for companies, was gazetted last week. The proposed amendments will allow a Cayman company to restructure under the supervision of a "restructuring officer" and provide for a stay on creditor action in the restructuring period. The proposed amendments should operate in a way similar (although not identical to) the administration procedure in England or Chapter 11 proceedings in the United States and are certainly welcomed in the Cayman Islands, particularly in light of the uncertainty surrounding the global economy amidst the Covid 19 pandemic.

The Current Regime

Restructuring is, of course, not new to the Cayman Islands and Campbells has had a lead or major role in most of the significant restructuring cases in the Cayman Islands in the last decade. However, an amendment to the regime has been sought for some time given it has been necessary under the current regime for companies to go into "provisional liquidation" to trigger the statutory moratorium in the absence of a specific legislative framework to facilitate the restructuring of an insolvent company. Further, under the current regime, it is only possible to seek the appointment of a provisional liquidator *after* the presentation of a winding-up petition on the basis that a company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors. This protects the company from creditors and gives it breathing space to restructure its business under the supervision of the Court. However, it is a step that companies have been reluctant to take given the connotations associated with the term "liquidation" and the perception of stakeholders.

A further difficulty with the current regime is that (on a strict reading of the Act as it currently stands, although this has been subject to some debate[1]) directors have no authority to present a winding-up petition absent a resolution of the shareholders of the company, or an express provision in the articles of association. This has created difficulties in practice, which has led to conflicting decisions of the Grand Court of the Cayman Islands (the "**Court**") and which the proposed amendments seek to resolve.

The Proposed Amendments

The proposed amendments to the Act provide that a petition (a "**Restructuring Petition**") may be presented *by a company acting by its directors, without a resolution of its members or an express power in its articles of association* for the appointment of a "restructuring officer"[2] on the grounds that the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors. The powers

of the restructuring officer are such as the Court may confer, which is much the same under the current regime on the appointment of "light touch" provisional liquidators, save that the proposed amendments now specifically require the Court to set out in the order appointing the restructuring officer the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors.

At any time after the presentation of a Restructuring Petition, the statutory moratorium is triggered and no other suit, action or proceedings can be commenced or continued against the Company. This applies to foreign proceedings and other court supervised insolvency and restructuring proceedings against the Company, but does not affect a secured creditor who is entitled to enforce its security without the leave of the Court and without reference to the restructuring officer. Further, after the presentation of a Restructuring Petition, no resolution shall be passed for the company to be wound up and *no winding up petition may be presented against the Company* (except with the leave of the Court and subject to such terms as the Court may impose). Therefore, if a Company files a Restructuring Petition first in time and before a creditor presents a winding up petition, the creditor will be precluded from presenting a petition and the Court will be precluded from making a winding up order until such time as the Restructuring Petition is withdrawn or dismissed, or the order appointing the restructuring officer has been discharged.

On hearing a Restructuring Petition, the Court may only make one of the following orders: (i) an order appointing a restructuring officer; (ii) an order adjourning the hearing conditionally or unconditionally; (ii) an order dismissing the petition; or (iv) any other order as the Court thinks fit. However, the Court *cannot* make an order placing the company into official liquidation, which order can only be made if a winding up petition has been presented in accordance with the Act.

The proposed amendments empower an appointed restructuring officer to promote a scheme of arrangement. Interestingly, the Bill proposes that the majority in number requirement is removed for a shareholder scheme, but is retained for a creditor scheme. This means that, for a scheme of arrangement with shareholders, it would only be necessary under the new regime to obtain approval from 75{92e447aa5ae4509d19f58c4a2ed7ec0dbb286610ae15b33d823e9409689b2d4a} in value of the voting shareholder class (regardless of the headcount) for a scheme to be approved.

The Bill also proposes to amend section 94 of the Act by giving the directors of a company (incorporated after the commencement of the amendments) the ability to present a winding up petition on behalf of the company on the grounds that the company is unable to pay its debts or for the appointment of provisional liquidators where a winding up petition has already been presented. The articles of association may expressly remove or modify the directors' authority to present a winding up petition or apply for the appointment of provisional liquidators on the company's behalf. Applications for the appointment of a provisional liquidator can also still be made by a creditor, contributory or the Authority where the appointment is necessary to (i) prevent the dissipation or misuse of the company's assets; (ii) prevent the oppression of minority shareholders; or (iii) prevent mismanagement or misconduct on the part of the company's directors.

Other important proposed amendments include:

- The Court may appoint a restructuring officer on an interim basis on such terms as it thinks fit;

- The directors, the restructuring officer, any creditor, contributory or the Authority may at any time, apply for the discharge or variation of the order appointing the restructuring officer or for the determination of any question arising in the course of carrying out the restructuring officer's functions;
- A restructuring officer may be removed from office and replaced by an alternative restructuring officer by order of the Court made on the application of the company (acting by its directors), a creditor, a contributory or the Authority;
- The restructuring officer's remuneration and expenses will be paid out of the assets of the company in priority to all other claims and in such proportions as the Court may direct;
- The Court may make provisions for facilitating schemes for the reconstruction and amalgamation of companies;
- The offences of fraud set out in the Act will apply to restructuring officers.

Other Restructuring Regimes

Whilst the new regime will operate in a way similar to the administration procedure in England or Chapter 11 proceedings in the US, we have identified some key differences.

Key differences to the US Bankruptcy Code – Chapter 11, Reorganisation ("**Chapter 11**"):

- In Chapter 11, the company continues to operate its business in the ordinary course as the "debtor in possession", although the US bankruptcy court can appoint a trustee to take over operations if it finds sufficient cause (section 1104, chapter 11). Whereas, the Bill requires the appointment of a restructuring officer in every case and the Court must specify which powers are to be conferred on the restructuring officer and which are to remain with the directors of the company.
- In Chapter 11, all key issues are brought before the bankruptcy court and all major decisions are made by the bankruptcy court such as the sale of assets, financing arrangements and retaining attorneys and other professionals. Whilst that does not appear in the Bill and the restructuring officer is likely to be given more leeway and powers to make decisions, we anticipate the Court will ultimately require restructuring officers to seek sanction from the Court for major decisions and restructuring officers are likely to do that as best practice in any event, as is currently the case in provisional and official liquidations.
- A company which files for Chapter 11 has an exclusivity period of 120 days (which can be extended to up to 18 months if good cause is shown) to propose a reorganisation plan. Once that period expires, other interested parties can propose competing reorganisation plans (section 1121, chapter 11). There is no exclusivity period in the Bill, nor the ability for other interested parties to propose restructuring plans. The responsibility will be with the restructuring officer.
- Once Chapter 11 is filed, the automatic stay also applies to the enforcement of security without leave of the court (section 362, chapter 11). Whereas the Bill specifically provides that secured creditors can enforce their security without leave of the court and without reference to the restructuring officer.

Key differences to administration in England – Schedule B1 of the Insolvency Act, 1986 ("**Administration**"):

- In England, administrators can be appointed out of court by the holder of a qualifying floating charge or by the company or the directors (section 2, Schedule B1). There is no "out of court" option for the appointment of

restructuring officers in the Bill.

- In Administration, an administrator must perform his functions with the primary objective of rescuing the company as a going concern. Only if he thinks that it is not reasonably practicable can he seek to achieve the secondary objectives, which are (i) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or (ii) realising property in order to make a distribution to one or more secured or preferential creditors (section 3, Schedule B1). There is no such primary objective in the Bill and the restructuring officer will be able to consider any options.
- In Administration, a moratorium applies to secured creditors and no step may be taken to enforce security over the company's property except with the consent of the administrator or with the permission of the court (section 43, Schedule B1). However, the administrator cannot make any proposal which affects the rights of a secured creditor of the company to enforce his security (section 73, Schedule B1). The Bill specifically provides that secured creditors can enforce their security without leave of the court and without reference to the restructuring officer.
- In Administration, the appointment of an administrator automatically ceases to have effect at the end of one year after the administrator was appointed (section 76, Schedule B1) (although the court can extend this timeframe, which is usually the norm in England, rather than the exception). There is no time period stipulated for restructuring in the Bill. However, it is expected that the order appointing the restructuring officer will contain regular reporting timelines to the court, as is currently the practice in provisional liquidations.

Conclusions

As can be seen from the above, what is proposed is not a sea change from the previous regime and differs in a number of respects from the US and UK. It could be said that the biggest difference is one of perception – the terminology of "restructuring" and "restructuring officer" is clearly preferable from a stakeholder perspective to the language of provisional liquidation in a restructuring situation. However, the flexibility and bespoke nature of the Cayman provisional liquidation is retained. The petitioner can tailor the remedies sought and Cayman judges are well versed in restructuring and often take a hands-on approach. Those factors along with detailed rules which will be issued in due course should balance the fact that this regime is less prescriptive than many others.

The proposed amendments are also a welcome addition to the Act, in that they give standing to directors to petition the court when they are facing financial difficulties and take advantage of the automatic stay free of creditor pressure to try and restructure the company's debts. The Bill provides a clear statutory footing to enable them to do so without needing to seek approval from the shareholders or find a "friendly" creditor to petition for the winding-up of the company before they can apply for the appointment of light-touch provisional liquidators. Given the uncertain economic times, it is likely many businesses may need to consider and utilise the new company restructuring provisions in the very near future. We are therefore hopeful that the Bill will be considered and passed at the earliest.

Please do not hesitate to contact the authors should you have any questions. This note is intended to provide general guidance only and specific advice should be sought when required by reference to the circumstances of your case.

[1] Campbells' note concerning the debate on when a Cayman Islands company can seek the appointment of restructuring provisional liquidators can be accessed here.

[2] A restructuring officer is defined in the Bill as a qualified insolvency practitioner, which means an insolvency practitioner resident and licensed to practice in the Cayman Islands. However the Court can also make a joint appointment with a foreign practitioner provided the foreign practitioner appointed shall not act as the sole restructuring officer. A restructuring officer is an officer of the Court.

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