BANKRUPTCY

Bankruptcy continues to be an issue for many offshore companies, and onshore businesses held through offshore entities, despite many economies experiencing a period of recovery from the financial crash of 2008/2009. To find out more, Lawyer Monthly speaks to Guy Manning, Partner and Head of Campbells' Litigation, Insolvency & Restructuring Group. This group is widely acknowledged as a market leader in the Cayman Islands. Guy has been involved in many of the jurisdiction's highest profile insolvencies, restructurings and disputes over the last decade. The International Who's Who Legal names Guy as one of the leading Insolvency and Restructuring lawyers in Cayman. Chambers and Partners report that he is "a very considered and technical lawyer; he accommodates innovative thinking and applies the law commercially" (2015), and is a "a stupendously clever man… who has quickly established an impressive reputation in the Cayman Islands" (2014). According to Legal 500, Guy "provides sensible and practical legal strategies, excels in his preparation and is great on his feet" (2015).

As an expert in insolvency, what are the key pieces of advice you give your clients in order to avoid this path?

Clients obviously understand better than their lawyers the reasons for their financial difficulties, but this in itself can cause issues if it leads them to delay taking advice when trouble is looming. There can of course be any number of causes of financial problems, but the key to solving them is usually to act early. Take advice on your options, engage with your creditors before their debt matures or they otherwise have cause for serious concern, and have a back-up plan ready which you can act on quickly in case a consensual solution cannot be found.

You recently advised LDK Solar CO., Ltd and its provisional liquidators in connection with the restructuring of over USD$700 million of offshore debt across the LDK group. How complex did this case become?

LDK Solar was an extremely complex case, which resulted in the first judicially approved, multi-jurisdictional debt restructuring of its kind for a China-based entity. The group was one of the world's largest manufacturers of photo-voltaic solar panels and systems. The operating subsidiaries were largely based in the PRC, but there were also various subsidiaries and substantial operations elsewhere, including Europe and North America. The group was held by a Cayman Topco whose shares were listed on the New York Stock Exchange, and the offshore debt was principally governed by the laws of New York and Hong Kong. A stay on proceedings in Cayman was obtained through the appointment of provisional liquidators by the Cayman Court. Potential creditor action in the United States was prevented by obtaining recognition of the Cayman provisional liquidation from the Delaware Bankruptcy Court under Chapter 15 of the United States Bankruptcy Code. Although no parallel liquidation proceedings were opened in Hong Kong, the Hong Kong Court did stay litigation brought by a creditor in Hong Kong while the Cayman provisional liquidators promoted parallel schemes of arrangement for the Topco and certain subsidiaries in both Cayman and Hong Kong. The subsequent sanction of those schemes by the Cayman and Hong Kong courts effectively compromised creditors' claims as a matter of Cayman and Hong Kong law, and the Delaware court recognised the effect of that compromise under the Cayman scheme so as to give it effect as a matter of New York law. Certain US subsidiaries were also restructured through pre-packaged Chapter 11 plans. This solution provided an effective compromise of all the claims which were subject to the schemes in all the requisite jurisdictions, and required a substantial amount of co-ordination and co-operation between the Courts and advisers in the various jurisdictions.

How complex are the rules that govern restructuring in the Cayman Islands? What 'quirks' does it possess that make it unique?

Restructurings of Cayman Islands companies are generally achieved through the provisional liquidation procedure, at least when an automatic stay on creditor action is required. The provisional liquidators, or management, will promote a scheme of arrangement or some other form of compromise or arrangement, either in Cayman alone or, more typically, in both Cayman and the onshore jurisdiction(s) where the assets are held and/or whose laws govern the company's debts.

The procedural rules applicable to Cayman restructurings are actually fairly simple, and it is that simplicity which gives the Court and parties a significant degree of flexibility to develop and implement effective solutions on a case by case basis. Although it is not a feature which is unique to Cayman, the broad discretion available to the Court in deciding what powers should be made available to provisional liquidators is an extremely effective tool which can significantly influence both the complexion and outcome of a restructuring.

At one end of the spectrum, the Court can appoint provisional liquidators who displace the directors' authority entirely for the duration of the restructuring, and who are given very broad powers (the exercise of which can be subject to varying degrees of control by the Court) to promote and implement a restructuring. LDK Solar, discussed above, is one example of such a case. The Cayman provisional liquidators of LDK controlled the process, and the various steps taken in the Courts of Hong Kong and Delaware to implement the restructuring proposals tended to follow from, and be dependent to some extent upon, decisions of the Cayman Court as the principal court in the process.

At the other end of the spectrum are the so called "light touch" provisional liquidations, where management retain all or substantially of their powers, with the provisional liquidators being given only those powers necessary to monitor and oversee the directors' conduct of the restructuring. An example of this type of process was the Arcapita restructuring. In Arcapita, the Cayman Islands holding company filed both Chapter 11 proceedings in New York and provisional liquidation proceedings in Cayman in order (among other things) to obtain an automatic stay in both jurisdictions. United States bankruptcy law required the management to retain in control in order for the process to constitute debtor in possession proceedings, and this was achieved by appointing "light touch" provisional liquidators in Cayman. A Chapter 11 plan was ultimately approved which involved the Cayman company's assets being transferred to a Newco in exchange for shares in the Newco with those shares then being transferred to the creditors. The Cayman Court made a "validation order" authorising the disposal of the assets and the shares, before winding up and dissolving the empty shell of the company which remained. In doing so the Cayman Court demonstrated a substantial degree of deference to the United States Bankruptcy Court as a matter of judicial comity, notwithstanding that this was a Cayman Islands company subject to its own court's process.

In February 2015, Cayman-based Caledonian Bank filed for bankruptcy protection in the US Bankruptcy Court of New York. Why did choose a US court? What was the outcome?

The demise of Caledonian Bank was extremely unfortunate and should never have happened. It began with the SEC naming the Bank as a defendant in proceedings commenced in the Southern District of New York. The SEC alleged that the Bank (among others) had sold unrestricted, unregistered shares to the public which were allegedly part of a penny stock "pump and dump" fraud. At the same time, the SEC obtained an ex parte injunction freezing the Bank's assets in the United States. The value of assets frozen was subsequently reduced by agreement with the Bank's US lawyers to US$76 million, despite the fact that the Bank's net equity was only US$25 million. Every dollar frozen above US$25 million was therefore effectively (if not legally) depositors' money. This inevitably led to the proverbial "run on the bank". The Cayman Islands Monetary Authority appointed controllers over the Bank, who filed for Chapter 15 protection in the United States. The Controllers were subsequently appointed as official liquidators by the Cayman Court and the Bank was wound up, because the damage which had been caused was irreversible. In further proceedings before the US Court, the SEC admitted that the Bank's collapse had been caused by the SEC's actions. The Judge described it as "incredible government overreach" and told the Bank's US lawyers that "you bear as much responsibility for what happened as the SEC did in this foolhardy exercise". **LM**

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