RESTRUCTURING

Mark Goodman, Partner and Michael Popkin, Senior Associate at Campbells' Litigation, Insolvency & Restructuring Group

Here *Lawyer Monthly* interviews Mark Goodman, a Partner in Campbells' Litigation, Insolvency & Restructuring Group, as he talks about this legal business in the Cayman Islands.

Mark advises clients on issues arising out of complex, cross-border insolvency, restructuring and investment fund litigation. Campbells provides comprehensive corporate and litigation services to clients worldwide from their offices in the Cayman Islands, BVI and Hong Kong.

Senior Associate Michael Popkin also contributed to Mark's interview.

Has insolvency and restructuring increased since the global recession? What impact has it had on Cayman Islands based businesses?

The number of winding up petitions filed against Cayman Islands based entities over the past several years has been rising rapidly, with the most current figures showing a year on year increase of 71% between 2014 and 2015.

This trend reflects the fact that in the immediate wake of the global financial crisis the market was so volatile that investors were prepared to be more flexible in the way they realised their investments in Cayman Islands-based hedge funds. Illiquid assets were distributed in specie, either directly to investors or into new special purpose vehicles with a mandate to liquidate investments over time. Hedge funds entered so-called "soft" wind downs under the control of existing management rather than as a result of a court process. As the market recovered, investors were more inclined to push for the court-supervised liquidation of these "zombie" funds.

Another factor which has impacted on the number of winding up petitions filed in the Cayman Islands is the slowdown in the Chinese economy. As a significant number of Chinese trading companies listed on stock exchanges in the US are structured through the Cayman Islands, this has resulted in a marked increase in the number of restructuring cases coming before the Grand Court of the Cayman Islands. This trend led to Campbells opening a Hong Kong office in January 2016.

What would you advise companies who are unable to reconcile their debts, are there any preventive steps they can put into place?

A company which cannot reconcile its debts should proactively seek to engage with creditors. Consensual arrangements, such as negotiated extensions of maturity dates, often produce better outcomes for both the company and its creditors than a court process.

If a consensual solution cannot be negotiated promptly, the prudent course is to take steps to ensure some level of protection from creditors while negotiations continue. In Cayman, protection from creditors can be achieved by the company, with the approval of its shareholders, presenting a petition for its own liquidation coupled with an application for the appointment of provisional liquidators. The provisional liquidators are appointed with a mandate to present a compromise or arrangement to creditors and their appointment brings about a moratorium on claims which gives the company an opportunity to engage with creditors and attempt to develop a restructuring plan. Where there are dissenting minority creditors the restructuring plan will usually be implemented by way of a Court-approved scheme of arrangement.

What sort of approach has the Cayman government taken vis-à-vis companies that are unable to pay their debts?

Other than actively ensuring that the legislative regime is fit for purpose in dealing with distressed entities, the Cayman Islands Government has a light touch approach in creditor driven liquidations which do not involve "local" fraud, money laundering or regulatory issues. As most of the trading companies in the Cayman Islands conduct their business activities predominantly outside of the Cayman Islands there is a limited public policy incentive for government intervention.

What are the typical errors you see committed by companies involved in restructuring?

The common errors that we typically see made by companies involved in restructuring tend to emanate from the company's management of its relationship with its creditors. Often, companies in financial distress refuse to face the reality of their financial circumstances and delay taking critical steps that could potentially give them the breathing room necessary to reach a negotiated outcome with their creditors. Far too often, by the time that a company starts to engage in any serious restructuring planning, they have allowed their situation to deteriorate to a point where their cash flow and finance options are limited. By this stage, creditors are starting to press for payment and may be less willing to negotiate. Companies, particularly listed companies, will often also be extremely reluctant to enter into a formal restructuring process, such as a provisional liquidation, due to the stigma that they perceive comes from that process but, by failing to secure the protection that a formal procedure provides, the company may be exposed to the threat that one or more aggressive creditors bring their own proceedings which then jeopardizes the prospects of a successful restructuring.

Once the company has taken steps to address its financial problems, another common mistake is seeking to negotiate an arrangement with one or two major creditors to the exclusion of creditors holding smaller, but still significant, claims. Smaller creditors are far less likely to object to a compromise or arrangement where they have been involved in the negotiations. Seeking to present them with a fait accompli that has been negotiated solely with major creditors is more likely to result in an objection. Finally, once negotiations are on foot with all creditors, ensuring that accurate and adequate information is provided to the creditors to ensure that they fully understand the gravity of the company's situation and the relative benefits of the proposed compromise or arrangement will significantly enhance the chances of a successful restructuring. **LM**

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