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Contents

Campbells advises on Cayman Islands and British Virgin Islands Law, and has offices in Cayman (head office), the BVI and Hong Kong. The group acts for local and overseas insolvency professionals, creditors, investors, directors and other professional service providers in connection with all aspects of the restructuring and winding up of companies, investment funds, limited partnerships and structured finance entities. Lawyers have specific experience of coordinating cross-border appointments, obtaining injunctions, assisting with gathering evidence and obtaining recognition and assistance from overseas courts. The team is involved in many of the jurisdiction's most high-profile disputes, liquidations and restructurings.

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1. Market Trends and Developments

1.1 State of the Restructuring Market

In 2018, a total of nine restructuring petitions were filed in the Grand Court of the Cayman Islands. Of these, six related to share capital reductions and three related to schemes of arrangement. This compares to a total of 17 restructuring petitions filed in 2017 and 24 restructuring petitions filed in 2016 which demonstrates a slow-down in financial restructurings over the last three years.

In addition, 56 insolvency petitions were filed in 2018, of which 32 sought winding-up orders and the other 24 sought orders bringing voluntary liquidations under the supervision of the court. This compares to a total of 40 insolvency petitions filed in 2017. Sixteen of the insolvency petitions filed in 2018 did not proceed, whilst winding-up/supervision orders were made on 40 of the 56 petitions filed.

While the number of restructuring filings fell in 2018, petitions for winding-up or orders that a company be placed under court supervision were close to record levels. It is not clear whether that uptick is set to continue in 2019 as filings in the first half of the year have been down from 2018 levels. Legislative reforms have been proposed with a view to making it easier for directors of distressed Cayman companies to commence restructuring proceedings, under the protection of a statutory moratorium, without first having to obtain shareholder approval. If and when those changes are enacted, it is generally anticipated that there will be an

increase in the number of court restructurings in Cayman, particularly in respect of groups with operating subsidiaries in the PRC which are carrying unprecedented levels of debt.

1.2 Changes to the Restructuring and Insolvency Market

There have been no notable changes or new trends in this market over the last 12 months.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

Corporate insolvency in the Cayman Islands is governed by Part V of the Companies Law, 2018 revision (the Companies Law) and the Companies Winding Up Rules, 2018 (the CWR). Those provisions apply both to the winding-up of companies – including certain foreign companies – as defined by the Companies Law and, pursuant to Section 36 of the Exempted Limited Partnership Law (2018 revision), to the winding-up of exempted limited partnerships in the Cayman Islands.

The Cayman Islands insolvency regime is based on many of the same underlying principles as the corresponding regime in England and Wales and the regimes in certain other Commonwealth countries, although there are some fundamental differences. These include the test for insolvency, which is assessed, on a winding-up petition, solely by reference to cash flow insolvency.

The principal tool used for financial restructurings is the scheme of arrangement under Part IV of the Companies Law. Order 102, rule 20 of the Grand Court Rules (GCR) and Practice Direction 2/2010 govern the procedure for obtaining approval of a scheme of arrangement.

The doctrine of judicial precedent applies in the Cayman Islands, so case law is also relevant and important. Cayman Islands case law is developing but remains comparatively small in scope. Where there is no applicable Cayman Islands case law, the Cayman courts will look to English authorities. Decisions of English courts are not binding, but as a general rule they will be followed to the extent that they are not inconsistent with Cayman statutory provisions or authorities, and to the extent that they do not relate to English statutory provisions which have no equivalent in Cayman. Decisions from courts in other Commonwealth jurisdictions are similarly of persuasive, but not binding, authority.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The key insolvency and restructuring procedures available in respect of corporate entities in the Cayman Islands are:

- voluntary liquidation;
- provisional liquidation;
- official liquidation; and
- schemes of arrangement.

It is also possible for receivers to be appointed over Cayman Islands companies, either by the Grand Court or by a creditor of the company with suitable security.

2.3 Obligation to Commence Formal Insolvency Proceedings

If a Cayman company is insolvent or of doubtful solvency, its directors have a fiduciary duty to act with regard to the interests of its creditors. Therefore, in these circumstances they must have regard to whether it is in creditors' interests for insolvency proceedings to be instigated.

Directors also have a duty to commence insolvency proceedings if directed to do so by a resolution of the shareholders or a provision within the company's articles. Failure to commence insolvency proceedings could expose the directors to a liability in damages for losses suffered by the company as a result of their breach of duty.

The only statutory obligation to commence insolvency proceedings arises when a company goes into voluntary liquidation and directors have not unanimously sworn declarations to the company's solvency within 28 days. In these circumstances, the voluntary liquidators are required to petition the Grand Court within 35 days of the commencement of the voluntary liquidation to bring the liquidation under the court's supervision.

While the Companies Law does not impose a penalty on a voluntary liquidator for failure to file a petition, it does impose a penalty of up to USD10,000 and imprisonment for up to two years on directors who make a declaration of solvency without reasonable grounds.

2.4 Procedural Options

If the directors' fiduciary duties require them to instigate insolvency proceedings, the appropriate process will depend on all the facts and circumstances, including whether they believe that the company should be restructured or wound up.

In restructuring cases, the principal option open to directors is a scheme of arrangement. This can be coupled with provisional liquidation proceedings if a moratorium on creditor claims is needed, although, as noted below, there may be

issues regarding the power of the directors to commence the provisional liquidation process.

In winding-up cases, directors do not have the power to petition for a winding-up order in their own names. They may be able to do so in the name of the company, but only if authorised to do so by a shareholders' resolution or (in certain cases) by the articles of association. The same problem can arise when provisional liquidation proceedings are required in connection with a restructuring. This can create difficulties in practice, and legislative reform has been proposed to resolve this issue.

Other procedural options may include inviting the shareholders to resolve to wind up the company voluntarily or by inviting a "friendly" creditor to present a winding-up petition.

2.5 Commencing Involuntary Proceedings

Provisional Liquidation

Initiation – provisional liquidation is available to companies liable to be wound up under the Companies Law, following the presentation of a winding-up petition. Winding-up petitions and provisional liquidation applications may be presented against:

- companies incorporated and registered under the Companies Law (or which existed prior to the enactment of the Companies Law);
- bodies incorporated under any other law; and
- foreign companies which carry on business or have property located in the Cayman Islands, are the general partner of a limited partnership registered in the Cayman Islands, or are registered as foreign companies under Part IX of the Companies Law.

A creditor, shareholder, the company itself or (in respect of regulated businesses) the Cayman Islands Monetary Authority (CIMA) can apply for the appointment of provisional liquidators between the presentation and the hearing of the winding-up petition.

Substantive Test – a creditor, shareholder or (in respect of a regulated business) CIMA may apply (usually ex parte) if there is a prima facie case for making a winding-up order, and the appointment of a provisional liquidator is necessary to prevent:

- the dissipation or misuse of the company's assets;
- the oppression of minority shareholders; or
- mismanagement or misconduct on the part of the company's directors.

Furthermore, the company may, if properly authorised, apply for the appointment of provisional liquidators if the company is, or is likely to become, unable to pay its debts and intends to present a compromise or arrangement to its creditors.

Official Liquidation

Initiation – official liquidation is available in respect of all the types of company identified above. The company (if properly authorised), any creditor (including a contingent or prospective creditor), any shareholder or (in respect of a regulated business) CIMA may present a winding-up petition to the Grand Court at any time.

The right of creditors and shareholders to present a winding-up petition is, however, subject to any contractually binding non-petition clauses. In addition, shareholders must be registered in the company's register of members and have either inherited, been allotted the shares, or been registered as their holder for at least six months.

Substantive Test – a company may be wound up by the Grand Court if:

- the company passes a special resolution requiring it to be wound up by the court;
- the company does not commence business within a year of incorporation;
- the company suspends its business for a whole year;
- the period (if any) fixed by the company's articles for the company's duration expires, or an event occurs which, under the articles, triggers the company's winding-up;
- the company is unable to pay its debts (see **2.6 Requirement for Insolvency**);
- the Grand Court decides that it is just and equitable for the company to be wound up; or
- the company is carrying on a regulated business in the Cayman Islands and it is not duly licensed or registered to do so, or for any other reason provided under the regulatory or other laws.

2.6 Requirement for Insolvency

Insolvency is not required to commence voluntary/involuntary proceedings. A voluntary liquidation is commenced simply by the passing of a shareholders' resolution. A winding-up order can be made on any of the (non-insolvency) grounds set out in **2.5 Commencing Involuntary Proceedings**.

If a winding-up petition is presented on the grounds of insolvency, the petitioner must demonstrate that the company is unable to pay its debts. A company is deemed to be unable to pay its debts if:

- a creditor serves a valid statutory demand and the company fails to pay the debt or settle with the creditor within 21 days;

- the execution of any judgment or order by the court, made in favour of a creditor against the company, is unsatisfied in whole or in part; or
- the creditor proves to the court that the company is unable to pay its debts; this is a cash-flow test of insolvency.

In Conway and Walker (as joint official liquidators of Weavering Macro Fixed Income Fund Limited) v SEB [2016 (2) CILR 514], the Court of Appeal stated that "the cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future". Although the Court of Appeal's comments were technically obiter, they are likely to be followed by the Grand Court and a company may be liable to be wound up if it is unable to pay any debts immediately due and payable or debts which will become due and payable in the "reasonably near future". What constitutes the "reasonably near future" will be specific to each case. If a creditor's claim is disputed by the company in good faith and on substantial grounds, however, then it cannot be relied on to demonstrate insolvency. A winding-up petition based on non-payment of such a claim is liable to be struck out as an abuse of process.

2.7 Specific Statutory Restructuring and Insolvency Regimes

Although there are no statutory restructuring and insolvency regimes applicable to specific types of entity or business, CIMA does have the power to appoint controllers over banks, trust companies, regulated mutual funds and licensed fund administrators. Controllers are granted a wide range of powers, including the power to terminate the business, and CIMA can exercise various powers on receipt of a controller's report, including applying for winding-up or requiring the reorganisation of affairs. In the liquidation of a bank, eligible depositors enjoy a (limited) priority over other unsecured creditors.

3. Out-of-court Restructurings and Consensual Workouts

3.1 Restructuring Market Participants

Due to the nature of the Cayman Islands as an offshore jurisdiction, restructuring market participants, company management and lenders are almost invariably based onshore. As such, their views and preferences on consensual workouts and restructurings tend to reflect the prevailing market views and preferences in the onshore jurisdiction(s) where they are based. These vary from case to case, but the most common jurisdictions (in no particular order) are London, New York and Hong Kong.

Cayman insolvency and creditors' rights laws do not interact to a significant extent with the viability, desirability or choice of informal and consensual out-of-court restructuring and workout strategies. In particular, Cayman legislation is silent on consensual restructuring negotiations and therefore does not require that they take place before the commencement of a formal statutory process. That said, if a company requires a stay while it negotiates a scheme of arrangement or other form of compromise, it will need to apply for the appointment of provisional liquidators. The Financial Services Division Guide states that, on application, the Grand Court will expect to see evidence from the CEO or chairman including why the directors believe that the company's affairs can be restructured in such a way that it can continue as a going concern. Although conducting consensual restructuring negotiations is not necessarily a prerequisite to the directors forming any such view, positive restructuring negotiations can help to underpin their belief, particularly if these negotiations have led to substantial creditors signing restructuring support agreements. The absence of any such negotiations (or unsuccessful negotiations) might undermine the directors' evidence.

As noted in **2.3 Obligation to Commence Formal Insolvency Proceedings**, if a company is insolvent or of doubtful solvency then its directors have a fiduciary duty to act with regard to the interests of its creditors. Whether that duty can be discharged by commencing/attempting an informal/consensual restructuring process rather than a statutory insolvency process will depend on all the facts and circumstances of the particular case.

3.2 Consensual Restructuring and Workout Processes

As noted in **3.1 Restructuring Market Participants**, due to the nature of the Cayman Islands as an offshore jurisdiction, restructuring market participants, company management and lenders are almost invariably based onshore. As such, there is not really a standard "Cayman" approach to consensual restructuring and workout processes. The processes adopted in a consensual restructuring will tend to vary based on the prevailing processes in the onshore jurisdiction(s) where the majority of the participants are based.

3.3 New Money

For information on the approach to the injection of new money, see **3.2 Consensual Restructuring and Workout Processes**.

3.4 Duties on Creditors

Consensual/out of court restructurings in Cayman require the agreement of 100% of creditors; in most circumstances a creditor's consent would preclude it from subsequently challenging the restructuring. Remedies may, however, exist at common law and/or in equity if a creditor gave consent based on some form of misinformation. Without a separate contractual agreement between creditors, or one creditor voluntarily assuming a duty to another, there is no basis on

which creditors would owe duties to each other in a consensual restructuring governed by Cayman Islands law.

3.5 Out-of-court Financial Restructuring or Workout

Creditors cannot be crammed down in a consensual, out-of-court restructuring under Cayman Islands law. This can only be achieved through the use of a scheme of arrangement, which involves a court process. Shareholders' rights can be crammed down in certain circumstances without court proceedings, most commonly through a merger or consolidation under Part XVI of the Companies Law. Under that procedure a shareholder's shares can be acquired for "fair value" if the merger or consolidation is approved by a special resolution of the shareholders (requiring a two-thirds majority unless the articles impose a higher threshold). However, although a dissenting minority shareholder does not have the ability to block the merger/consolidation, it is entitled to be paid fair value for its shares, and the question of what fair value is will have to be resolved in court proceedings if the company and the shareholder disagree.

See also **3.2 Consensual Restructuring and Workout Processes**.

4. Secured Creditor Rights and Remedies

4.1 Liens/Security

Subject to the nature of the asset, the most common forms of security are mortgages, fixed and floating charges, liens and pledges.

There are central ownership registers for land, ships, aircraft and motor vehicles on which mortgages and charges can be recorded. A third-party buyer is deemed to have notice of any interest registered at the time of purchase, and acquires the asset subject to the creditor's interest as the holder of the registered mortgage or charge. In practice, transfers of these assets cannot be registered without the creditor's consent.

There is no central register for other types of immovable property or for charges over company assets other than the company's internal register of mortgages and charges, which is not publicly available.

Therefore, the creditor must ensure that it has sufficient control over the asset to prevent a third party from buying or otherwise dealing with it. A creditor should review the company's register of mortgages and charges before making a loan, and ensure the company updates this register upon the security being granted.

4.2 Rights and Remedies

Section 142 of the Companies Law and CWR Order 17 specifically provide that a creditor with security over the whole or part of the assets of a company is entitled to enforce its security without the leave of the Grand Court and without reference to the company's liquidator.

There is, therefore, no stay of any kind on the enforcement of security, although the secured creditor's exercise of its rights would be subject to the applicable terms of any intercreditor agreement entered into by the secured creditor.

A secured creditor whose debt is more than the value of their security may prove in the liquidation for the unsecured balance. When filing a proof of debt in the liquidation, the secured creditor is required to state particulars of the security held and the value they put on the security. If a secured creditor omits to disclose their security in their proof of debt, they shall surrender their security for the general benefit of creditors, unless the Court relieves them from the effect of this rule on the ground that their omission was inadvertent or the result of an honest mistake.

The liquidator may, at any time, give notice to a creditor whose debt is secured that he proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put upon it in the creditor's proof. The creditor then has 21 days in which to apply to the Court for leave to alter the value of his security.

The remedies available to a secured creditor will depend principally on the terms of its security document, but this might typically include the right to appoint a receiver over a charged asset.

4.3 Typical Timelines

The timeline will depend on the terms of the security to be enforced and, for example, whether there is any resistance to the enforcement. No timelines are prescribed by statute and there are no special procedures for enforcing any specific type of collateral.

4.4 Foreign Secured Creditors

There is no distinction between foreign and local creditors under Cayman Islands law.

4.5 Special Procedural Protections and Rights

See **4.2 Rights and Remedies**.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

See **4.2 Rights and Remedies** and **5.8 Statutory Waterfall of Claims**.

5.2 Unsecured Trade Creditors

Given the nature of the Cayman Islands as an offshore jurisdiction, trade creditors will typically have claims against the group's onshore operating subsidiaries, rather than its Cayman holding company. Whether trade creditors are kept whole during the restructuring will, therefore, typically depend upon any prevailing practice in the applicable onshore jurisdiction and the circumstances of the case, including the extent to which the continued provision of services by trade creditors is required by the company to continue operating as a going concern.

5.3 Rights and Remedies for Unsecured Creditors

A moratorium on unsecured creditors' claims in a restructuring will only arise if provisional liquidators are appointed. Without this moratorium, unsecured creditors may be able to disrupt a restructuring by obtaining and enforcing judgment on their claims. The Grand Court does, however, have jurisdiction to stay a writ action brought by a creditor in the Cayman Islands, pending the outcome of the restructuring.

In the absence of a moratorium, unsecured creditors would, alternatively, be able to disrupt a restructuring by filing a winding-up petition against the company if the debt is undisputed. Although an unpaid creditor of an insolvent company is entitled to a winding-up order ex debito justitiae (as of right), the making of a winding-up order remains a matter for the Grand Court's discretion, and it might adjourn or dismiss the creditor's petition if other creditors are opposed to the winding-up due to proposed restructuring.

If a company is placed into official liquidation, the Grand Court has the power, on the application of the liquidator or any creditor or shareholder, to stay the liquidation either altogether or for a limited time. This power is rarely exercised in practice, but a stay might be granted if the court was satisfied that it would result in successful restructuring.

5.4 Pre-judgment Attachments

Although pre-judgment attachments are not strictly available in the Cayman Islands, Mareva (or freezing) injunctions are available as an interim remedy to a plaintiff who can show a good, arguable case and a real risk that, if the injunction is not granted, the defendant will remove the relevant assets from the jurisdiction or otherwise dissipate them.

Grand Court injunctions are available in respect of substantive proceedings brought in the Cayman Islands and in relation to proceedings which have been or are about to be commenced in a court outside the Cayman Islands, which could give rise to a judgment which may be enforced in the Cayman Islands under any Cayman Islands statute or at common law.

5.5 Timeline for Enforcing an Unsecured Claim

The time taken to obtain and enforce a judgment outside liquidation will depend on the extent to (and the manner in) which the proceedings are contested, but six to 12 months would be typical.

If a creditor seeks to enforce its rights by filing a winding-up petition then the petition will normally be heard within six to eight weeks of the filing. If a winding-up order is made, the timeline for distribution to creditors varies widely from liquidation to liquidation.

5.6 Bespoke Rights and Remedies for Landlords

Landlords may have the right to distrain the goods or effects of a company, but if they do so within the three months preceding its winding-up then the preferential debts in the liquidation will constitute a first charge on the goods or effects so distrained, or the proceeds of sale thereof.

5.7 Foreign Creditors

There are no special procedures/impediments that apply to foreign creditors – all creditors of the same class are treated equally, regardless of where they are domiciled.

A foreign creditor, like any domestic creditor, may file a proof of debt in the liquidation of a Cayman Islands company in relation to its debt. This may constitute a submission to the Cayman Islands' jurisdiction.

5.8 Statutory Waterfall of Claims

The basic statutory order of priorities in a liquidation is as follows:

- liquidation expenses;
- preferential debts, comprising certain sums due to or payable on behalf of employees; certain taxes due to the Cayman Islands government; and for some Cayman Islands banks, certain sums due to depositors;
- unsecured debts which are not subject to subordination or deferral agreements (with contractually subordinated/deferred debts being paid in accordance with the subordination agreement);
- amounts due to preferred shareholders under the company's articles of association, provided that the rights of those shares are preferred to the rights of the shares referred to below;
- debts incurred by the company in respect of the redemption or purchase of its own shares (although it remains an open question whether such claims arising where the redemption or purchase took place before the liquidation commenced, rank ahead of or pari passu with such claims where the shares were due to be redeemed before the liquidation commenced but were not redeemed due to the company's default); and
- any surplus remaining after payment of the above amounts is returned to the shareholders of the company

in accordance with its articles or any shareholders' agreement.

Pursuant to Section 140 of the Companies Law, the collection and distribution of the company's assets is without prejudice to:

- any agreement between the company and any creditors that their claims will be subordinate of deferred to others;
- any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multilateral set-off or netting arrangements between the company and any person or persons); and
- any agreement between the company and any person or persons to waive or limit the same.

In the absence of any contractual right of set-off or non set-off, an account is taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set off against the sums due from the other.

5.9 Priority Claims in Restructuring and Insolvency Proceedings

See **5.8 Statutory Waterfall of Claims** and **6.10 Priority New Money**.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 Statutory Process for a Financial Restructuring/Reorganisation

The principal restructuring tool in the Cayman Islands is the scheme of arrangement under Section 86 of the Companies Law. Cayman schemes are substantively very similar to schemes in the UK, although there are certain procedural differences.

A scheme is a statutory form of compromise or arrangement between a company and its creditors (or any class of them) or its shareholders (or any class of them). There is no statutory definition of the terms "compromise" or "arrangement". The Grand Court will construe them broadly, but they must involve some element of accommodation or "give and take" between the company and the scheme creditors or shareholders.

The principal uses of Cayman schemes are to reorganise the company's share capital, to enable a company to restructure its liabilities and avoid an insolvent liquidation, or to alter the distribution rights of creditors and/or shareholders in the company's liquidation.

Scheme proceedings can be commenced by the company, any creditor or shareholder of the company or (where the company is being wound up) by a liquidator. Scheme proceedings commenced by a creditor or shareholder would, however, require the company's support.

If a moratorium is required during the scheme process then the company will present a winding-up petition and apply for an order appointing provisional liquidators prior to filing the scheme petition.

If the scheme is supported by more than 50% by number and 75% by value of those attending and voting in each scheme class, and is subsequently approved by the Grand Court, it will bind all scheme creditors/shareholders (including those who did not vote or who voted against the scheme) in accordance with its terms.

Generally speaking, a Cayman scheme will usually take between ten to 12 weeks from the date when the scheme petition and summons for directions are filed, to the date when an order approving the scheme is made. The Grand Court requires that the entire timetable be established at the outset, which ensures a swift resolution of the scheme process.

However, prior to the filing of the scheme petition, there may and likely will be a lengthy period in which the scheme terms are negotiated with key creditors, funding raised and the scheme document, detailed explanatory memorandum, evidence and other documentation are prepared.

Order 102, rule 20 of the GCR and Practice Direction 2/2010 govern the procedure for obtaining approval of a scheme of arrangement. After the filing of a scheme petition there is a three-stage process. In broad terms:

- first, there must be an application to the Grand Court for an order convening meetings of creditor/classes of creditors or members/classes of members for the purpose of approving the scheme – this is known as the convening hearing;
- second, the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made, and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy – these are known as the scheme meetings;
- third, if approved at the meeting or meetings, there must be a further application to the court to obtain sanction of the scheme – this is known as the sanction hearing.

Each of the three stages serves a distinct purpose:

- At the first stage, the Grand Court directs how the meeting or meetings are to be convened. It is concerned

primarily with class composition, the adequacy of the scheme documentation, and ensuring that those who will be affected by the proposed compromise or arrangement have a proper opportunity to be present (in person or by proxy) at the scheme meetings.
- The second stage ensures that the proposals are acceptable to at least 50% in number, representing 75% in value, of those who take the opportunity to be present (in person or by proxy) at each meeting.
- At the third stage, the court is concerned to ensure that the meeting or meetings have been convened and held in accordance with the previous order, the proposals have been approved by the requisite majorities, and the scheme is fair.

The scheme process is not confidential. Detailed scheme documentation will be sent to all scheme participants and may also be advertised depending on the circumstances. All scheme participants have the right to appear by counsel at the scheme sanction hearing, which is held in open court. They may also appear at the convening hearing, although the convening application will typically be made on an ex parte basis unless there are contentious issues of class composition or jurisdiction.

If there is any uncertainty over creditors' claims then this will principally be relevant for the purposes of voting at the scheme meetings and distributions to be made under the scheme. As regards the former, the Grand Court might give directions at the convening hearing regarding the valuation of claims for voting purposes, or it may leave that issue to be addressed by the chairperson of the scheme meetings. As regards the latter, the scheme document will typically contain a mechanism for determining claims, post-sanction of the scheme, for distribution purposes.

The scheme process comes to an end once all compromise or arrangement terms to which it relates have been complied with.

6.2 Position of the Company
The company can and will continue to operate its business during the restructuring process. If the company is not in provisional liquidation, incumbent management will continue to manage the company. If the company is in provisional liquidation, the appointment order will specify whether, and to what extent, incumbent management or the provisional liquidators will manage the business during the restructuring.

The company can borrow money during the process but during provisional liquidation, this will require Grand Court approval.

No moratorium is available if the scheme is initiated when the company is not in liquidation. If the scheme is initiated during a provisional liquidation, an automatic stay prohibits the commencement or continuance of any suit, action or other proceeding against the company without the Grand Court's leave.

6.3 Roles of Creditors
As noted in **6.1 Statutory Process for a Financial Restructuring/Reorganisation**, a scheme must be approved by a majority in number representing at least 75% by value of each class of scheme creditors. The Grand Court considers the class composition of scheme creditors at the convening hearing. The basic test is whether the members in each class have rights which are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

If the company is not in liquidation then there are no statutory provisions regarding creditor committees, although, in practice, ad hoc committees may be formed. If the company is in provisional liquidation, the Grand Court will decide whether a committee should be established and, if so, how that should be done. If a committee is established, its role will be to act as a sounding board for the provisional liquidators and to review their fees. The committee may be authorised to retain counsel at the company's expense.

At the convening hearing, the Grand Court will need to be satisfied that the scheme document and supporting explanatory statement contain all the information reasonably necessary to enable the scheme creditors (and/or shareholders as applicable) to make an informed decision about the merits of the proposed scheme. If the company is in provisional liquidation, it is likely that the Grand Court will also require the provisional liquidators to report to the court and the creditors periodically.

6.4 Claims of Dissenting Creditors
Dissenting creditors' rights will be crammed down in accordance with the terms of the scheme if the statutory majorities are obtained in each class and the scheme is sanctioned by the Grand Court.

6.5 Trading of Claims Against a Company
There is no statutory prohibition on the trading of creditor claims, but notice of the assignment must be given to the company.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group
A restructuring procedure may be utilised to reorganise a corporate group on a combined basis. A separate scheme would be required for each scheme company, but the procedure can be co-ordinated and streamlined by the Grand Court to minimise inefficiencies.

6.7 Restrictions on a Company's Use of or Sale of Its Assets

If a scheme is implemented when a company is not in provisional liquidation, no restrictions or conditions will be applied to the use or sale of the company's assets, other than those established in a contract. If the company is in provisional liquidation, any disposition of assets would be subject to the approval of the Grand Court. Contractual consents would be enforceable unless the applicable right was itself compromised by the scheme.

6.8 Asset Disposition and Related Procedures

If a scheme is implemented when a company is not in provisional liquidation, the sale of assets will be executed by the duly authorised representatives of the company, typically its directors. If a scheme is implemented when a company is in provisional liquidation, the terms of the appointment order (or subsequent orders) will determine whether and to what extent the sale is executed by the directors or by the provisional liquidators. In either case, the company would only transfer such right, title and interest as it had in the assets. In particular, any security over the assets would remain in place unless it was compromised by the scheme.

Creditors may bid for assets and act as a stalking horse in a sale process. No specific rules apply to bids by creditors, but if the restructuring is happening in a provisional liquidation, the Grand Court will need to approve the sale and, in so doing, it will consider the sales process as part of its assessment of whether the creditor's bid represents the best deal available in the circumstances.

In appropriate circumstances a pre-packaged sale of assets could be arranged. Grand Court approval would be required if the company is in provisional liquidation.

6.9 Secured Creditor Liens and Security Arrangements

Secured creditor liens and security arrangements may be released pursuant to a scheme, but it is very unlikely that secured creditors and unsecured creditors would be in the same scheme class and, therefore, secured creditors' rights could be crammed down by the votes of unsecured creditors.

6.10 Priority New Money

New money can be given priority by the company granting security to the lender or by subordinating the claims of scheme creditors through the scheme itself. Pre-existing security over an asset would take priority over any new security granted to the lender.

6.11 Determining the Value of Claims and Creditors

The process is not prescribed by statute, but if there are disputed, contingent or unliquidated claims, the scheme document will include an adjudication mechanism.

6.12 Restructuring or Reorganisation Agreement

As noted above in **6.1 Statutory Process for a Financial Restructuring/Reorganisation**, the scheme, as embodied in the scheme document, must be approved by the requisite majorities in each scheme class and sanctioned by the Grand Court, which will not do so unless satisfied as to the fairness of the scheme terms.

6.13 Non-debtor Parties

In certain circumstances, a scheme can release non-debtor parties from liabilities, provided that there is a sufficiently close connection between the subject matter of the scheme and the relationship between the company and its creditors/members, see In the matter of the SPhinX Group of Companies [2010 (1) CILR 452].

6.14 Rights of Set-off

The question of whether creditors can exercise rights of set-off or netting in a proceeding would need to be addressed in the scheme documentation.

6.15 Failure to Observe the Terms of Agreements

The implications of a company/creditor failing to observe the terms of a scheme would depend on the particular circumstances.

6.16 Existing Equity Owners

Existing equity owners can receive/retain any ownership or other property on account of their ownership interests.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

There are three types of insolvency/liquidation proceedings in the Cayman Islands: voluntary, provisional and official liquidations.

Voluntary Liquidation

Objective

Voluntary liquidation can be used by any company incorporated and registered under the Companies Law (or predecessor laws). The company must cease its business activities, except so far as continuing them is necessary for its beneficial winding-up. Its affairs are wound up, creditors are paid in full and its remaining assets or the proceeds of their realisation are distributed to shareholders.

Initiation

A company may be wound up voluntarily in the following cases:

- when the fixed period, if any, for the duration of the company in its memorandum or articles expires;

- if an event occurs which the memorandum or articles provide is a trigger to the company's winding-up;
- if the company resolves by special resolution that it be wound up voluntarily; or
- if the company resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts as they fall due.

Supervision and control

The directors are displaced by a voluntary liquidator on the commencement of a voluntary liquidation, except if the company (through a general meeting) or the voluntary liquidator sanctions the continuance of the directors' powers. The directors may be appointed as voluntary liquidators as there are no qualification requirements for the role.

A voluntary liquidator does not require the Grand Court's authorisation to exercise his or her powers, but they may apply to the court under Section 129 of the Companies Law to determine any question that arises during the winding-up process.

A voluntary liquidator must apply to the Grand Court within 35 days of the commencement of the voluntary liquidation for an order that the liquidation continues under the court's supervision unless, within 28 days of the commencement of the voluntary liquidation, the directors sign a declaration that the company will be able to pay its debts in full (with interest) within a period not exceeding 12 months. Even if this declaration is made, the liquidator or any creditor or shareholder can apply to bring the liquidation under the Grand Court's supervision on the grounds that either:

- the company is, or is likely to become, insolvent; or
- court supervision will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the shareholders and creditors.

If a voluntary liquidation is brought under the supervision of the Grand Court, it continues as an official liquidation deemed to have commenced on the commencement of the voluntary liquidation. The official liquidators must be qualified insolvency practitioners under Cayman Islands law. Voluntary liquidators will, therefore, be replaced if they are not so qualified or if their appointment as official liquidators is successfully opposed on other grounds.

Moratorium

No protection from company creditors is available during a voluntary liquidation. Voluntary liquidators are required to pay debts owed to creditors as they fall due. If they fail to do so, there is nothing to stop a secured creditor from enforcing its security, preventing any creditor from commencing litigation against the company or applying to bring the liquidation under the Grand Court's supervision.

Claims

There is no statutory set off or netting off which applies during voluntary liquidation, nor is there any procedure for adjudicating creditors' actual or contingent claims. The voluntary liquidator is required to pay claims in full and, as noted above, there is no moratorium preventing a creditor from commencing ordinary litigation or winding-up proceedings in respect of its claim. Any dispute in respect of an actual or contingent claim would need to be determined by whichever court or arbitral tribunal had jurisdiction over the claim. Claims may be traded during a voluntary liquidation, subject to any contractual restrictions.

Onerous contracts

Voluntary liquidators have no statutory power to disclaim onerous contracts.

Information rights

Voluntary liquidators are required to provide reports and accounts to the company's shareholders and (on request) any creditors who have not been paid in full, whenever the voluntary liquidator thinks appropriate, in connection with each annual general meeting and for the final meeting in the voluntary liquidation. Shareholders and creditors have no other statutory information rights during a voluntary liquidation.

Length of procedure

The duration of a voluntary liquidation depends on how complicated the winding-up process is, but is typically shorter than an official liquidation. The statute contemplates that all creditors in a voluntary liquidation will be paid in full within 12 months by imposing an obligation to apply to bring the liquidation under the Grand Court's supervision, unless all the directors swear a statutory declaration of their belief that the company will be able to do so.

Conclusion

As soon as the affairs of a company in voluntary liquidation have been fully wound up, the liquidator must call a general meeting of the company to present their account of the voluntary liquidation. The liquidator must file a return with the Registrar of Companies and the company is then deemed to have been dissolved three months after the return's registration date. Once it is deemed to have been dissolved, the company cannot be restored to the register.

Provisional Liquidation

Objective

Provisional liquidation is available to any company liable to be wound up under the Companies Law, following the presentation of a winding-up petition.

Applications by creditors, shareholders or CIMA to appoint provisional liquidators are made for the purpose of preserving and protecting the company's assets until the hearing

of a winding-up petition and the appointment of official liquidators.

A company can petition for its own winding-up and apply for the appointment of provisional liquidators in order to present a compromise or arrangement to creditors with the protection of an automatic stay. The purpose of appointing a provisional liquidator in this situation is similar to the UK administration process or US Chapter 11 procedure, with significant legal and procedural differences. If the restructuring is successful, the company will, typically, emerge from provisional liquidation and the winding-up petition will be dismissed.

Initiation
Creditors, shareholders or (in respect of regulated businesses) CIMA may make an application (usually ex parte or without notice to the company) on the grounds that there is a prima facie case for making a winding-up order and the appointment of a provisional liquidator is necessary to prevent:

- the dissipation or misuse of the company's assets;
- the oppression of minority shareholders; or
- mismanagement or misconduct on the part of the company's directors.

As mentioned above, the company may, if properly authorised, apply to appoint provisional liquidators on the grounds that the company is, or likely to become, unable to pay its debts and intends to present a compromise or arrangement to its creditors.

Supervision and control
Provisional liquidators are appointed and supervised by the Grand Court. The consent of stakeholders is not required, but their views on who, if anyone, should be appointed will or may (depending on the circumstances) be considered by the Grand Court in the exercise of its discretion.

Provisional liquidators only have the powers given to them in the appointment order. The scope of those powers will depend on the reason for their appointment. If a restructuring is proposed, in some cases existing management will be allowed to remain in control of the company, subject to the supervision of the provisional liquidators and the Grand Court, in what are known as "light touch" provisional liquidations. In other restructuring cases, the directors' powers may be displaced entirely by the powers given to the provisional liquidators for the duration of the provisional liquidation.

The Grand Court may (or may not) direct that a provisional liquidation committee be established. The principal functions of a committee are to act as a sounding board for the provisional liquidators and to review their fees.

Moratorium
On the appointment of provisional liquidators, a statutory stay automatically takes effect pursuant to Section 97 of the Companies Law. No suit, action or other proceeding against the company may proceed or commence without the leave of the Grand Court. The stay does not prohibit secured creditors from enforcing their security.

Claims
There is no statutory mechanism for dealing with the submission and/or adjudication of creditors' claims during a provisional liquidation, or for setting or netting off claims. If the provisional liquidation is being used to preserve assets pending a winding-up, then claims will be adjudicated in the official liquidation (see below). If the provisional liquidation has commenced for the purpose of a restructuring, the scheme of arrangement (or other form of compromise or arrangement) will address the process for submitting and adjudicating claims. In either case, claims may be traded during the provisional liquidation, subject to any contractual restrictions.

Onerous contracts
Provisional liquidators have no statutory power to disclaim onerous contracts.

Information rights
The frequency and scope of provisional liquidators' reporting obligations are matters to be addressed in the appointment order (and/or subsequent orders) made by the Grand Court.

Length of procedure
If the purpose of the provisional liquidation is to protect assets pending the hearing of a winding-up petition, the provisional liquidation is likely to be brief. The Grand Court aims to hear creditors' winding-up petitions within four to six weeks of the petition being filed.

If the purpose is to enable a restructuring, it is typical for the winding-up petition to be listed for hearing within one to three months to allow time for an initial assessment of viability. If it does not appear viable, the company will typically be wound up at that first hearing. If it appears that a restructuring may indeed be viable, the Grand Court will typically adjourn the petition for one or more fixed periods to allow the restructuring to proceed. The length of the provisional liquidation will vary in these circumstances, but it could last for up to a year (or longer in more complex cases).

Conclusion
Provisional liquidation is brought to an end by court order. This is usually as a result of either the winding-up order being made (in which case the company is dissolved at the conclusion of the liquidation) or an order dismissing or

withdrawing the winding-up petition (in which case, the company continues to exist).

The court can order an earlier termination of the provisional liquidator's appointment either on application by the provisional liquidator, the petitioner, the company or a creditor or a shareholder, or if an appeal against the provisional liquidator's appointment succeeds.

Official Liquidation

Objective

Official liquidation is available to:

- companies incorporated and registered under the Companies Law (or predecessor laws);
- bodies incorporated under any other law; and
- foreign companies which carry on business or have property located in the Cayman Islands, or foreign companies which are the general partner of a limited partnership registered in the Cayman Islands, or foreign companies which are registered under Part IX of the Companies Law.

The functions of official liquidators are to:

- collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and
- report to the company's creditors and contributories on the affairs of the company and the manner in which it has been wound up.

Initiation

The company (if properly authorised), any creditor (including a contingent or prospective creditor), or any shareholder of the company, may present a winding-up petition to the Grand Court at any time.

The right of creditors and contributories to present a winding-up petition is, however, subject to any contractually binding non-petition clauses and, in the case of a contributory, to the contributory having either inherited or been allotted its shares, or having been a registered shareholder for at least six months.

CIMA may present a winding-up petition to the Grand Court, at any time, in relation to a company which is carrying on a regulated business in the Cayman Islands.

A company may be wound up by the Grand Court if any of the following apply:

- the company passes a special resolution requiring it to be wound up by the court;
- the company does not commence business within a year of incorporation;
- the company suspends its business for a whole year;
- the period (if any) fixed by the company's articles for the company's duration expires, or an event occurs which, under the articles, triggers the company's winding-up;
- the company is unable to pay its debts (see below);
- the Grand Court decides that it is just and equitable for the company to be wound up;
- the company is carrying on a regulated business in the Cayman Islands and is not duly licensed or registered to do so; or
- certain other grounds specified in regulatory and other laws.

The test of inability to pay debts for this purpose is a cash-flow test (see **2.6 Requirement for Insolvency** above).

If the debt claimed in the demand is disputed by the company in good faith and on substantial grounds, it cannot form the basis of a winding-up petition. It is not necessary for the debt claimed to be a judgment debt, however, if it is a judgment debt, the company is unlikely to be able to assert that there is a legitimate dispute in relation to the debt unless an appeal against the judgment is pending and/or execution of the judgment has been stayed by the court.

A company is placed into official liquidation by order of the Grand Court. The consent of stakeholders is not required, but creditors' views on whether a winding-up order should be made and who should be appointed may be taken into account in the exercise of the court's discretion.

Supervision and control

Official liquidators must be a qualified insolvency practitioner resident in the Cayman Islands or foreign practitioners appointed jointly with a resident qualified insolvency practitioner. They displace the company's directors and control the company's affairs, subject to the Grand Court's supervision. Some of their powers can be exercised without the sanction of the court, whereas others require court sanction. A liquidation committee is required to be established in every official liquidation, unless the Grand Court orders otherwise. The principal functions of a committee are to act as a sounding board for the official liquidators and to review their fees.

Moratorium

At any time between the presentation of a winding-up petition and the making of a winding-up order the company or any creditor or shareholder may apply for an injunction to restrain further proceedings in any action or proceeding pending against the company in a foreign court. The application can be made to either:

- any Cayman Islands court in which proceedings are pending against the company; or
- the foreign court.

On the making of a winding-up order, an automatic stay is imposed prohibiting any suit, action or other proceeding from going ahead or being commenced against the company without the leave of the Grand Court. The stay does not prohibit secured creditors from enforcing their security.

Claims
Creditors (including contingent creditors) claim in an official liquidation by submitting a "proof of debt" for adjudication by the official liquidator who has a duty to ascertain the liabilities of the company. The proof of debt contains details of the amount owed, including the basis for the debt, and any interest owed. The liquidator may require further evidence to be submitted by the creditor before accepting (in full or in part) or rejecting the claim. When adjudicating claims, the liquidator acts in a quasi-judicial function. A creditor has a right of appeal to the Grand Court against the rejection or partial rejection of its proof of debt. In addition, other creditors (or the liquidator themselves) may, in certain circumstances, apply to expunge a proof which has been admitted by the liquidator.

All debts payable on a contingency, and all claims against the company are admissible. Official liquidators are required to make a just estimate, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

The collection and application of the property of the company is without prejudice to:

- the rights of preferred and secured creditors (and to any agreement between the company and any creditors),.;
- any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multilateral set-off or netting arrangements between the company and any person or persons); and
- any agreement between the company and any person or persons to waive or limit the same.

There is no prohibition on the trading or assignment of creditor claims within an official liquidation, subject to any contractual restrictions. Shareholders, however, require the leave of the court and the consent of the liquidator before they can transfer their shares to third parties.

Onerous contracts
Official liquidators have no statutory power to disclaim onerous contracts.

Information rights
Official liquidators are subject to various reporting obligations to the liquidation committee, creditors, shareholders and the Grand Court. Creditors, shareholders and certain other interested parties also have rights to inspect the court's liquidation file. On the application of an official liquidator the Grand Court has the power to seal various documents on its files to prevent their inspection, where they contain confidential information which, if disclosed, could harm the economic interests of the stakeholders.

Length of procedure
The duration of official liquidation proceedings depends on the nature of the assets and the complexity of the issues. There is no maximum period within which liquidation must be completed and complex liquidations can take several years.

Conclusion
When the affairs of a company in official liquidation have been fully wound up the Grand Court makes an order, on the liquidators' application, that the company be dissolved from the date specified in the order. Once the company is dissolved following an official liquidation, it cannot be reinstated.

7.2 Distressed Disposals
Upon the making of a winding-up order, the custody and control of all the property and choses in action of the company are transferred to the liquidators charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme. All powers of dealing with the company's assets are exercisable by the liquidator alone. In a provisional or official liquidation, the power to sell the company's property may only be exercised by liquidators with the sanction of the Grand Court.

A purchaser would only obtain such right, title and interest in any assets sold as the company itself holds, and the liquidator would be unlikely to give any representations or warranties as to the title of such assets.

Creditors of the company are not restricted from bidding for the assets of the company and may also act as a stalking horse in these sale procedures, although court approval of the obligation to pay a stalking-horse bidder would be required in a provisional or official liquidation.

It is possible to effectuate pre-negotiated sales transactions following the commencement of a statutory procedure, but Grand Court approval would be required in a provisional or official liquidation and the liquidator must demonstrate that the sale price was the best achievable having regard to all circumstances.

7.3 Failure to Observe Terms of Agreed/Statutory Plan
The implications of a company/creditor failing to observe the terms of an agreed/statutory plan would depend on the particular circumstances.

7.4 Priority New Money During the Statutory Process

Priority new money can be invested or loaned during the statutory process and security granted over assets, subject to Grand Court approval in a provisional or official liquidation.

7.5 Insolvency Proceedings to Liquidate a Corporate Group

Concurrent liquidation proceedings in respect of several group companies can be co-ordinated by the Grand Court to avoid duplication and improve efficiency and cost-effectiveness. In certain circumstances, the Grand Court may order the pooling of assets and liabilities of group companies, but this is rare in practice.

7.6 Organisation of Creditors or Committees

There are no (formal) liquidation committees in voluntary liquidations. In provisional liquidations, the Grand Court has the power to give directions with regard to the establishment of a provisional liquidation committee. In official liquidations, a liquidation committee must be appointed unless the Grand Court orders otherwise. The committee must comprise three to five creditors (if the official liquidator has determined that the company is insolvent) or shareholders (if the official liquidator has determined that the company is solvent). If the official liquidator determines that the company is of doubtful solvency. the committee must comprise three to six members, the majority of whom must be creditors and at least one of whom must be a shareholder. Members are elected at meetings of creditors and/or shareholders, as appropriate.

The committee's role is to act as a sounding board for the liquidators and to review their remuneration. The committee does not have powers, as such, but it may make sanction applications to the Grand Court with regard to the exercise or proposed exercise of the liquidators' powers.

The committee may retain counsel at the expense of the estate. Committee members are not remunerated, but they are entitled to be reimbursed for reasonable travel expenses and/or telephone charges properly incurred in attending meetings of the committee. No other committee expenses may be reimbursed unless they have been approved by the committee and the liquidator before being incurred.

7.7 Use or Sale of Company Assets During Insolvency Proceedings

There are no statutory restrictions on the use or sale of a company's assets in a voluntary liquidation.

In a provisional or official liquidation, the liquidators' power to sell assets is only exercisable with the sanction of the Grand Court. Liquidators have a duty to obtain the best price they can for the assets of the company; see, for example, Trident Microsystems (Far East) Limited [2012 (1) CILR 424], where it was held that "the primary duty of a liquidator when selling the assets of a company is to take reasonable care to obtain the best price available in the circumstances... taking into account the nature of the business to be sold, the relevant market, the steps taken to market and to sell the assets and the urgency of the sale".

8. International/Cross-border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings

On application by a foreign representative (defined as a trustee, liquidator or other official appointed for the purposes of a foreign bankruptcy proceeding), the Grand Court can make orders ancillary to the foreign bankruptcy proceedings to:

- recognise the foreign representative's right to act in the Cayman Islands on behalf, or in the name, of the foreign debtor;
- grant a stay of proceedings or the enforcement of a judgment against the foreign debtor;
- require certain persons with information concerning the foreign debtor's business or affairs to be examined by, and produce documents for, the foreign representative; and/or
- order that the foreign debtor's property be turned over to the foreign representative.

In determining whether to make these orders, the Grand Court must aim to assure the economic and expeditious administration of the foreign debtor's estate, consistent with:

- the just treatment of all holders of claims wherever they are domiciled, in accordance with established principles of natural justice;
- the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;
- the prevention of preferential or fraudulent dispositions of property in the foreign debtor's estate;
- the distribution of the estate among creditors, substantially in accordance with the statutory order of priority;
- the recognition and enforcement of security interests created by the foreign debtor;
- the non-enforcement of foreign taxes, fines and penalties; and
- comity (mutual recognition and co-operation concerning legal decisions).

8.2 Co-ordination in Cross-border Cases

Order 21 of the CWR deals with international protocols in relation to Cayman companies in liquidation which are the subject of concurrent bankruptcy proceedings under the

laws of a foreign country, or where the assets of a Cayman company in liquidation located in a foreign country are the subject of a foreign bankruptcy proceeding or receivership. Order 21 obliges Cayman Islands Official Liquidators to consider whether or not it is appropriate to enter into an international protocol with a foreign officeholder and provides for this protocol to be approved by the Cayman and foreign courts.

On 30 July 2018, the Cayman Islands adopted the use of the Judicial Insolvency Network (JIN) Guidelines pursuant to Practice Direction No. 1 of 2018 (the 2018 Practice Direction), (and in doing so joining Bermuda and the British Virgin Islands) and the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the American Guidelines). The 2018 Practice Direction requires Cayman Islands-appointed officeholders to consider, at the earliest opportunity, whether to incorporate some or all of the guidelines with suitable modification either into:

- an international protocol to be approved by the court; or
- by an order of the court adopting the guidelines.

The Guidelines were designed primarily to enhance communication between courts, insolvency representatives and other parties in the context of global restructurings and insolvencies. They apply in insolvency or restructuring proceedings supervised by, or related to, courts in more than one jurisdiction. This includes a scheme of arrangement relating to a company being supervised by the Grand Court that also involves a parallel scheme or ancillary proceedings in another jurisdiction.

On 25 July 2019, JIN adopted the Modalities of Court-to-Court Communication (the Modalities). The Modalities are designed to establish an administrative framework within which the JIN Guidelines will operate. Pursuant to a further Practice Direction (2 of 2019), the Grand Court adopted the Modalities with effect from 1 August 2019.

Under Part XVII of the Companies Law, the Grand Court also has a statutory jurisdiction to recognise and assist foreign representatives appointed in the place of a company's incorporation.

8.3 Rules, Standards and Guidelines

In cross-border cases, the Grand Court adopts a flexible and co-operative approach to ensure the most effective winding-up of the affairs of the company and protection of the interests of its creditors, wherever those creditors are situated.

8.4 Foreign Creditors

There are no alternative procedures in the Cayman Islands that apply to foreign creditors. All creditors are treated equally, regardless of where they are domiciled.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

There are no restrictions on who may be appointed as a voluntary liquidator of a company under Cayman Islands law. Provisional and official liquidators must be qualified insolvency practitioners resident in the Cayman Islands or foreign practitioners appointed jointly with a resident qualified insolvency practitioner.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Voluntary liquidators are officers of the company over which they are appointed and owe statutory and fiduciary duties to the company and its stakeholders.

Provisional and official liquidators are officers of the Grand Court and act as agents of the company over which they are appointed. They stand in a fiduciary position towards the company and must act in the interests of the general body of the company's stakeholders. An official liquidator is required to make "himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the course of his investigation, which is material to ascertain the exact truth in every case before the Court" (see Gooch's Case 1872, 7 Ch App 207). Official liquidators have various statutory duties, including the duty to ensure that the assets of the company are secured, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.

9.3 Selection of Officers

Voluntary liquidators are appointed by a resolution of the company's shareholders. Provisional and official liquidators are nominated by the petitioner and appointed by the Grand Court (which may have regard to any alternative nominees put forward by other stakeholders).

See **7.1 Types of Voluntary/Involuntary Proceedings** for a description of how statutory officers interact with company management and directors and **9.1 Types of Statutory Officers** for a description as to who can and cannot serve as a statutory officer.

10. Advisers and Their Roles

10.1 Typical Advisers Employed

Voluntary liquidators often do not retain attorneys or other professionally qualified persons, but they may do so if they deem it necessary, such as where complex legal issues arise.

The power of provisional and official liquidators to retain lawyers and other professionally qualified persons is only exercisable with the sanction of the Grand Court. Cayman Islands attorneys will always be retained by provisional and

official liquidators to assist them with various aspects of the liquidation process. Foreign counsel may also be retained as necessary.

Financial advisors are commonly retained by provisional liquidators who have been appointed for the purpose of a restructuring. They are less commonly retained by official liquidators, although this is possible with Grand Court approval.

10.2 Compensation of Advisers

Professionals are retained by the liquidators at the expense of the liquidation estate. As noted above, Grand Court approval is required before professionals can be appointed by provisional or official liquidators. In many cases, the Grand Court will leave the terms of the professionals' remuneration to be negotiated by the liquidators, but a liquidator would be unlikely in practice to agree to any professional being remunerated on a basis other than time spent, without seeking the express approval of the alternative fee basis from the Grand Court.

The reasonableness of the fees charged by Cayman and foreign counsel to the liquidators can be taxed (assessed) by the Grand Court.

10.3 Authorisation and Judicial Approval

See **10.1 Types of Professional Advisors.**

10.4 Duties and Responsibilities

Professional advisors owe duties/responsibilities to the liquidation estate, on whose behalf they have been retained by the liquidators.

See **10.1 Types of Professional Advisors** for a description of the roles typically played.

11. Mediations/Arbitrations

11.1 Utilisation of Mediation/Arbitration

Mediation is used relatively rarely in Cayman restructuring and insolvency processes (and in disputes generally). If a company in any form of liquidation has agreed to resolve a dispute by arbitration, that agreement will remain binding in the liquidation in respect of claims by the company. Claims against a company in official liquidation will typically be resolved through the proof of debt process, notwithstanding any arbitration clause.

11.2 Mandatory Arbitration or Mediation

The Grand Court does not have power to mandate arbitration or mediation in any restructuring or insolvency proceedings.

11.3 Pre-insolvency Agreements to Arbitrate

See **11.1 Use of Arbitration/Mediation in Restructuring/ Insolvency Matters**.

11.4 Statutes Governing Arbitration/Mediation

The Arbitration Law 2012 is in force and is largely based on the UNCITRAL Model rules. Enforcement proceedings are based on the New York Convention, provisions of which have been incorporated into the Arbitration Law and the Foreign Arbitral Awards Enforcement Law (1997 Revision).

There are no statutes or rules governing mediation, save in relation to family law proceedings.

11.5 Appointment of Arbitrators

Parties to an arbitration clause are free to choose the method adopted for selection of an arbitral tribunal. The Arbitration Law 2012 provides a default mechanism in the absence of agreement which can lead to the Grand Court (as appointing authority) selecting the tribunal.

As mediation is still an ad hoc process in the Cayman Islands, parties must agree to the appointment of a mediator or mediators between themselves.

There are no restrictions as to who may serve as arbitrator/mediator. However, the Cayman Islands Association of Mediators and Arbitrators has been established in order to provide a locally-based pool of qualified mediators and arbitrators.

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

12.1 Duties of Directors

As a general principle of Cayman Islands law, directors' duties are owed to the company, rather than directly to shareholders or creditors. A number of duties might be engaged in circumstances of financial difficulty, but the fiduciary duty to act in the best interests of the company will always be relevant. What is meant by the best interests of the company in times of financial difficulty was considered in Prospect Properties v McNeill (1990-91 CILR 171).

In Prospect Properties, the Grand Court, following the well-known line of English authorities, held that where a company is insolvent or of doubtful solvency, the directors' duty to act in the best interests of the company requires them to have regard for the interests of its creditors. It is in the interest of the creditors to be paid, and it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay. Although there is no prescribed point at which a company must enter a restructuring or insolvency process, directors can be made personally liable

to the company for losses which they cause to the company if they act in breach of that duty; an example of this might be incurring additional liabilities when they knew, or should have known, that there was no reasonable prospect of the company avoiding insolvent liquidation.

12.2 Direct Fiduciary Breach Claims

A creditor could only bring a claim directly against the directors if the directors had voluntarily assumed a direct duty to the creditor. Once the company has entered into official liquidation, claims against a company's directors for breach of their fiduciary duty to the company would be pursued by the liquidator in the name of the company. Note that it is common for the articles of association of Cayman Islands companies to indemnify and hold directors harmless in respect of liability for non-intentional wrongdoing.

12.3 Chief Restructuring Officers

The appointment of a Chief Restructuring Officer is not something that typically occurs in the Cayman Islands.

12.4 Shadow Directorship

A shadow director is defined under the Companies Law as being "any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the 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". Certain provisions of the Companies Law are expressly stated to apply to shadow directors, including those sections which deal with fraud committed prior to the commencement of a company's liquidation, misconduct in the course of the winding-up, and the production of the company's statement of affairs.

12.5 Owner/Shareholder Liability

A Cayman company is a legal entity that is separate and distinct from the individual members of the company. The court will only lift the "corporate veil" in exceptional circumstances where it is shown that it is a mere facade concealing the true facts. Generally, the doctrine of piercing the corporate veil will only be invoked where a person is under an existing legal obligation or liability, or subject to an existing legal restriction which they deliberately evades or the enforcement of which they deliberately frustrate by interposing a company under their control, eg, see Prest v Petrodel Resources Ltd, 2013, UKSC 34 at (35).

13. Transfers/Transactions That May Be Set Aside

13.1 Historical Transactions

The principal statutory provisions are Sections 99 (avoidance of property dispositions), 145 (voidable preference), 146 (avoidance of dispositions at an undervalue) and 147 (fraudulent trading) of the Companies Law. These sections only apply in official liquidations.

Section 99 (avoidance of property dispositions) provides that any dispositions of a company's property (or transfers of its shares) made after the deemed commencement of the winding-up will be void in the event that a winding-up order is subsequently made, unless validated by the Grand Court. The liquidator is entitled to apply for appropriate relief to require the repayment of the funds or the return of the asset.

Pursuant to Section 145 (voidable preference), any payment or disposal of property to a creditor constitutes a voidable preference if:

- it occurs in the six months before the deemed commencement of the company's liquidation and at a time when the company is unable to pay its debts; and
- the dominant intention of the company's directors was to give the applicable creditor preference over other creditors.

A payment or disposition is deemed to have been made to give the creditor preference where the creditor has the ability to control the company or exercise significant influence over it in making financial and operating decisions.

If a payment or disposition is a preference, the liquidators may bring a proprietary claim to recover the asset or its proceeds (where identifiable) or a personal claim in unjust enrichment to recover the amount of the payment or value of the asset. Upon making payment or returning the asset, the creditor may file a proof of debt for the amount of its claim in the liquidation and will rank pari passu with the other unsecured creditors.

Section 146 (avoidance of dispositions at an undervalue) provides that transactions in which property is disposed of at an undervalue with the intention of wilfully defeating an obligation owed to a creditor are voidable on the application of the liquidator. This is subject to the application being brought within six years of the disposal. If a transferee has not acted in bad faith then, although the disposition will be set aside, the transferee's pre-existing rights and claims will be preserved, and it will be entitled to a charge over the property securing the amount of costs which it properly incurs defending the proceedings.

If the business of a company was carried on with intent to defraud creditors or for any fraudulent purpose then, pursuant to Section 147 (fraudulent trading), a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the court thinks proper.

Transactions made by a company in financial difficulty and in breach of the directors' fiduciary duties may also be vulnerable to claims based on dishonest assistance or knowing receipt.

13.2 Look-Back Period

An application to set aside a transaction at an undervalue must be brought within six years of the relevant disposal.

To constitute a voidable preference, a payment or disposal of property to a creditor must have occurred in the six months before the deemed commencement of the company's liquidation.

13.3 Claims to Set Aside or Annul Transactions

Claims to set aside or annul transactions must be brought in the name of the company (acting by its liquidators) or, in certain cases, in the names of the official liquidators.

Creditors cannot bring claims on behalf of a company in a liquidation. However, outside of liquidation any creditor of a company may apply, pursuant to the Fraudulent Dispositions Law (1996 Revision), for a declaration that a disposition is void if it was made at an undervalue with the intention to defraud the company's creditors.

14. Importance of Valuations in the Restructuring and Insolvency Process

14.1 Role of Valuations

Valuations are often required in the restructuring and insolvency process in the Cayman Islands. Valuations may, for example, be relevant in relation to:

- valuing assets for the purpose of preparing a liquidation analysis as the relevant comparator in a restructuring;
- valuing claims of stakeholders with regards to a scheme of arrangement to ensure that the statutory majorities have been passed (see **6.1 The Statutory Process for a Financial Restructuring/Reorganisation** and Re Hawk Insurance Company Ltd (2001 EWCA Civ 241);
- valuing assets to be sold by a liquidator; or
- valuing offers to purchase a petitioner's shares in the context of winding-up proceedings (see O'Neill and Another v Phillips and Others (1999, 1 WLR 1092).

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Valuations are not relevant in relation to the test for insolvency as this is a cash flow rather than a balance sheet test.

14.2 Initiating a Valuation

Valuations would typically be initiated by an officeholder in relation to assets of the company over which they are appointed, but this would depend on the circumstances of the case.

14.3 Jurisprudence

There is relatively little Cayman Islands valuation jurisprudence in a restructuring and insolvency context, but the Grand Court would be likely to follow such jurisprudence from, for example, the English courts. There have, however, been a number of recent Grand Court decisions concerning valuations of companies in the context of fair-value proceedings, commenced to determine the value of shares held by dissenting shareholders in a statutory merger procedure. These decisions could be relevant to the valuation of companies in a restructuring and insolvency context.

There are various valuation experts in the Cayman Islands who are regularly retained to give expert evidence on the valuation of a variety of asset types, but onshore valuation experts are also frequently used.

The result obtained from a sales/marketing process would form a critical part of the valuation evidence in most insolvency cases and is typically considered to be a more reliable indication of market value than a desktop valuation. Liquidators will sometimes seek the Grand Court's approval of any proposed bidding process.

Officeholders and experts would generally tend to rely on multiple valuation methods to determine the valuation range of a particular asset. In a restructuring context, the Grand Court will require expert evidence in connection with the relevant comparator to the scheme, which is typically the estimated outcome of an insolvent liquidation of the company.