Americas Restructuring Review 2020

Edited by
Richard J Cooper and Lisa M Schweitzer

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AMERICAS
RESTRUCTURING REVIEW 2020

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Richard J Cooper and Lisa M Schweitzer

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Preface

Welcome to the *Americas Restructuring Review 2020*, one of *Global Restructuring Review*'s annual, yearbook-style reports.

Global Restructuring Review, for anyone unfamiliar, is the online home for international restructuring specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GRR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our *GRR Live* banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. The *Americas Restructuring Review*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from all across the Americas.

Across 17 chapters and 208 pages, this edition provides an invaluable retrospective from 32 authors. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international restructuring events of the year just gone, supported by footnotes and relevant statistics. Other articles provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular jurisdiction.

This edition is bigger than ever and covers Argentina, Bahamas, Bermuda, Brazil, Canada, the Cayman Islands, Chile, Dominican Republic, Mexico and the US (from several angles). It also includes two chapters on sovereign debt.

Among the nuggets you will find:

- a case study of the Noble Group's restructuring (the chapter of the Bahamas);
- a prediction on when Brazil's fabled new restructuring law might see the light of day;
- a request to Mexico's ruling party to amend the Concorso Law;
- clarification on when a foreign-to-foreign transfer may be "too foreign" for the purposes of US bankruptcy law;

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- analysis of the (somewhat) contradictory Chapter 15 decisions in Oi, Agrigkor and QCOG; and
- a description of some new stratagems hedge funds and private equity funds have found to get high returns in rescue deals.

And much, much more. We hope you enjoy the review.

On behalf of *GRR*, I would like to thank the review's editors Richard Cooper and Lisa Schweitzer, of Cleary Gottlieb Steen & Hamilton, for the direction and energy they've given, and my colleagues Jon Allen and Adam Myers, in our production department, for changes to our design that provide a digest of each chapter for those short of time. Thanks to them, this is the finest review we've produced.

If readers have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalrestructuringreview.com.

David Samuels
Publisher
November 2019

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Cayman Islands

Guy Manning and Paul Kennedy
Campbells

In summary

This chapter provides an update and recap of material developments in the Cayman Islands in restructuring and insolvency over the past two years.

Discussion points

- New guidance from the Cayman courts on cross-border cooperation between jurisdictions
- Further developments in the jurisprudence on hedge fund redemptions in the context of insolvency
- Some welcome clarity in areas such as third-party funding of liquidation expenses
- Guidance as to when dispositions of assets during winding up will be validated by the courts
- When a winding-up petition will be considered 'cynical and abusive'

Referenced in this article

- JIN Guidelines and Modalities
- Grand Court Practice Directions 1 of 2018 and 2 of 2019
- American Law Institute/International Insolvency Institute Guidelines
- *Case law: Pearson v Primeo; Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited; DD Growth Premium 2X Fund (In Official Liquidation) v RMF Market Neutral Strategies; Skandinaviska Enskilda Banken AB (SEB) v Conway & Shakespeare (as joint official liquidators of Weavering Macro Fixed Income Fund Ltd); Aurora Funds Management Limited et al v Torchlight GP Limited; Ctrip Investment Holding Limited v eHi Car Services Limited; Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited*

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Introduction

The Cayman Islands continues to be at the forefront of developments in restructuring and insolvency law in the offshore world and among common law jurisdictions. As the number one jurisdiction globally for hedge funds, as well as a leading domicile for corporate structures of all types, it is perhaps unsurprising that the Cayman Islands' courts have dealt with such a variety of issues.

Previous country chapters of the *Americas Restructuring Review* have provided a primer for practitioners on the Cayman Islands as a restructuring and insolvency jurisdiction. Here we aim to give readers an update and a recap of material developments in the Cayman Islands since the last country chapter published two years ago.

A brief introduction to the Cayman Islands legal system

The Cayman Islands is a British Overseas Territory with a common law legal system. The doctrine of judicial precedent applies, and where there is no applicable Cayman Islands case law the Cayman courts will usually look to English authorities or decisions of other common law jurisdictions which, while non-binding, will as a general rule be followed to the extent that they are not inconsistent with either Cayman statutory provisions or authorities.

Corporate insolvency in the Cayman Islands is governed by Part V of the Companies Law (2018 Revision) (the 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 Law and (pursuant to Section 36 of the Exempted Limited Partnership Law (2018 Revision)) to the winding up of Cayman Islands exempted limited partnerships.

Hearings at first instance are held at the Grand Court in George Town, Grand Cayman (which has a dedicated Financial Services Decision). Appeals are made to the Cayman Islands Court of Appeal, which is largely made up of former judges of the English High Court and sits at regular intervals through the year in George Town. The Cayman Islands' ultimate court of appeal is the Judicial Committee of the Privy Council (JCPC) in London. The JCPC is made up of current members of the UK's Supreme Court.

Adoption of JIN Guidelines

The Judicial Insolvency Network (JIN) is a network of insolvency judges from across the world with the aim of providing judicial thought leadership, the development of best practices, and communication and cooperation between jurisdictions. The JIN held its inaugural conference in Singapore on 10 and 11 October 2016, which concluded with the issuance of a set of guidelines entitled Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines). The first JIN members (which included representatives of the Cayman Islands judiciary) contributed to the drafting of the JIN Guidelines.

The JIN Guidelines address key aspects of communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings. The JIN Guidelines are adopted in practice through either incorporation in a protocol between officeholders in different jurisdictions, which is

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subsequently approved by the respective courts; or alternatively imposed from above on the officeholders by the courts in the relevant jurisdictions where the cross-border insolvency is taking place. The overarching aim of the JIN Guidelines is the preservation of enterprise value and the reduction of legal costs. In practice, these aims should be achieved by protocols that allow for the avoidance of duplication of work and conflict, the exchange of information between officeholders, and procedures for coordinating sanction applications as between parallel insolvency proceedings.

Following JIN conferences in 2018 and 2019, further guidelines were issued that focus on the modalities of court-to-court communication in insolvency proceedings (the Modalities). Unlike the JIN Guidelines, which focus on court cooperation at the level of principle, the Modalities focus on the mechanics of court-to-court communication. These include how a court may initiate communication with another court, the arrangements as to time, method and language of communication, and the designation of a facilitator for this purpose. According to JIN, the Modalities seek to 'distil the basic administrative issues a court may wish to address in advance in relation to court-to-court communication, bearing in mind the time, language and cultural differences that may underpin much of cross-border communication'.

The Cayman Islands has incorporated both the JIN Guidelines and the Modalities into Cayman practice and procedure through Practice Directions 1 of 2018 and 2 of 2019 (as well as the American Law Institute/International Insolvency Institute Guidelines).[1] Perhaps unsurprisingly given their very recent adoption, we are not aware of any decisions of the Cayman courts that consider the impact of the JIN Guidelines or the Modalities; however, they are clearly a welcome addition to the practice and procedure of the Cayman Islands given the cross-border nature of much of the insolvency and restructuring work in the Islands.

'The path to redemption is not always smooth.' – Lord Mance[2]

A series of cases relating to high-value redemptions from Cayman Islands hedge funds have come before the Cayman Courts in recent years. By way of background, previous decisions dealt with the status of redeeming investors. In *Strategic Turnaround*,[3] the JCPC had to decide whether Culross, a shareholder who had requested a redemption of its shares but had not received payment due to the suspension of redemptions imposed by the fund after the applicable redemption date, was a creditor. The JCPC held that, under the fund's articles, the shareholder became a creditor on the relevant redemption date, which was when property in its shares passed back to the company and the payment obligation arose. That decision was followed in *Pearson v Primeo*,[4] where the liquidators of the Herald Fund attempted to rely on provisions of the Law that they said subordinated redeeming shareholders behind ordinary

1 Pursuant to paragraph 2 of Practice Direction 1/18.

2 *Pearson v Primeo* [2017] UKPC 19.

3 *Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited* [2010] UKPC 33.

4 [2017] UKPC 19.

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creditors. The JCPC rejected the liquidators' analysis and held that redeeming shareholders become creditors at the point of redemption and rank with other unsecured creditors for the proceeds of redemption.

Two recent cases before the JCPC have again focused on the redemption mechanism in relation to Cayman Islands hedge funds; however, in each case, the primary question was not the status of the redeemer as of the commencement of the liquidation, but whether the relevant redemptions could be overturned by the liquidators.

Avenues for liquidators to recover unlawful company payments

In *DD Growth Premium 2X Fund (In Official Liquidation)* (DD) *v RMF Market Neutral Strategies Limited* (RMF),[5] the redeeming investor (RMF) applied to the Grand Court for a declaration that it was not liable to repay redemption proceeds paid to it by DD. In 2008, RMF made a number of redemption requests and in early 2009 received US$23 million. At the time of the payments, DD was cash-flow insolvent and paid the redemptions from share premium. In the Grand Court, DD submitted that the payments were contrary to the Companies Law (2007 Revision)[6] as they constituted payments 'out of capital',[7] which were prohibited unless the paying company was solvent at the time of payment. The Grand Court (Smellie, CJ) held that payments out of share premium that were made in order to redeem shares were not payments out of capital, and the Court of Appeal agreed with those findings.

The JCPC disagreed and held that redemption payments out of share premium are in fact payments out of capital. Such payments can only be made if the company is solvent and since redemption creditor claims are to be considered debts and the fund was not in a position to pay all such debts as they fell due, it therefore failed the solvency test. However, despite finding that the payment had been unlawful, the JCPC went on to find that the proceeds of payment were not recoverable on the basis of unjust enrichment. The basis for the payment of the redemption proceeds was that the shares had been redeemed and cancelled, and a valid debt was owed by the appellant. The appellant's payment of part of the proceeds discharged (in part) the lawful debt. Although the company acted illegally in making the payment, upon receipt, it discharged a valid legal entitlement of the redeeming shareholder. A payment could not amount to enrichment if it was made for full consideration, and it could not be unjust to receive or retain it if it were made in satisfaction of a legal right. The fact that the payment was made by the company in breach of the directors' duties might give rise to a constructive trust over the proceeds, but that was a different area of law and subject to separate questions of knowledge that the company would have to prove in the courts below.

5 [2017] UKPC 36.

6 S.37(6)(a).

7 As defined by s.37(5)(b).

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Redeemers: shareholders or creditors?

In *Skandinaviska Enskilda Banken AB* (SEB) *v Conway & Shakespeare (as joint official liquidators of Weavering Macro Fixed Income Fund Ltd)* (Weavering),[8] the JCPC upheld the decisions of the Grand Court and Court of Appeal in finding that certain redemption payments received by SEB from Weavering shortly prior to its liquidation constituted voidable preferences.

SEB had subscribed for approximately US$9.5 million of shares in Weavering as custodian and nominee for two clients. In 2008, many of Weavering's investors sought to redeem their shares. As a result, redemptions totalling US$138.4 million became due to redeeming shareholders on 1 December 2008 (the December Redeemers). Redeeming shareholders with a 2 January 2009 redemption day (the January Redeemers) were owed US$54.7 million. Redeeming shareholders with a 2 February 2009 redemption day (the February Redeemers) were owed US$30 million. SEB was paid just over US$1 million by Weavering on 19 December 2008. It received a second payment of 25 per cent of the balance of the redemption amounts owing to it on 2 January 2009 and a third and final payment of the remaining 75 per cent on 11 February 2009. In total, SEB received approximately US$8.2 million in redemption payments (the SEB Redemption Payments).

All but three large December Redeemers had been paid their redemption claims in full by the time the Company went into liquidation on 19 March 2009, with the balance owed to the unsatisfied December Redeemers being about US$50 million. The January Redeemers and the February Redeemers were never paid.

Weavering's liquidators issued proceedings against SEB seeking a declaration that the SEB Redemption Payments were invalid as preferences under section 145(1) of the Companies Law (2013 Revision),[9] and an order that the monies be repaid with interest.

The JCPC concluded that the courts below were correct to determine that payments had been made with a dominant intention to prefer SEB (as one of the class of December Redeemers). The fact that Weavering had fully discharged SEB's redemption claim, whereas the three largest December Redeemers received only 25 per cent of their claims, was, in the view of the court, itself sufficient to demonstrate a dominant intention to prefer SEB over those partially paid December Redeemers. Further, the fact that Weavering had a policy in place designed to allow December Redeemers to be paid before January Redeemers and February Redeemers, all of whom were, to the knowledge of Weavering, unlikely to be paid, was also held to be a sufficient indication of a dominant intention to prefer SEB. The JCPC left open the question of whether the fact of payment in the knowledge of insolvency is sufficient, without more, to found an inference of the requisite dominant intention to prefer.

8 [2019] UKPC 36.

9 Section 145(1) provides that: 'Every conveyance or transfer of property … made … by the company in favour of any creditor at a time when the company is unable to pay its debts … with a view to giving such a creditor a preference over the other creditors shall be invalid if made … within six months immediately preceding the commencement of the liquidation.'

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Similarly to its conclusion in *DD*, the JCPC determined that the right to repayment of the proceeds of unlawful redemption payments is not automatic under statute but merely renders the relevant transfer or payment voidable. The court also accepted that the Weavering liquidators were entitled to restitution of a payment avoided under section 145 at common law on the grounds of unjust enrichment – subject to any defences available to SEB.

A number of points arise from these two cases on redeeming shareholders in Cayman Islands hedge funds:

- redemption requests by shareholders can create a situation of insolvency which itself makes certain payments unlawful;
- the status of a redeeming investor in the distribution of assets from a liquidation estate is now settled law in the Cayman Islands. Once a redemption request is submitted and the redemption day passes without a suspension or gating of redemptions, the shareholder becomes a creditor ranking with all unsecured creditors. However if the relevant redemption day has not passed at the time of suspension then the shareholder remains a shareholder and does not have a creditor claim in any subsequent liquidation (see *Pearson v Primeo*); and
- unlawful payments, and even those that are voidable by operation of statute, do not give rise to an automatic repayment obligation and any liquidator pursuing such a claim must base it on remedies such as unjust enrichment or constructive trust.

The concept of a redeemable share is a relatively novel one; however, it is a key device in the Cayman hedge fund industry, and one through which billions of dollars in value are transferred between investors and funds annually. One of the unforeseen consequences of the liquidity crisis of the past decade is that the Cayman Islands now has a body of jurisprudence from its highest court that leaves little room for doubt as to the status of redeeming shareholders and the claims that liquidators do and do not have against them.

Pragmatic approach: post-winding up dispositions of property

The courts have long exercised oversight in relation to any purported disposition of company shares or property when a winding up has commenced. Section 99 of the Companies Law provides that, upon the making of a winding up order:

> *any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.*

In the Cayman Islands, significant value often becomes locked within investment funds pending winding up and distribution. The Cayman courts have therefore generally taken a pragmatic view of transfers within a liquidation, and applications under section 99 are generally processed administratively by the presiding judge without the need for a hearing.

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In the recent decision of *Aurora Funds Management Limited et al v Torchlight GP Limited* (Torchlight),[10] the Cayman Islands Court of Appeal was required to consider the principles applying to validation orders under s99 of the Companies Law in the case of a solvent company, being the general partner of Torchlight Fund LP. Torchlight had applied for validation of a variety of payments including in relation to loan repayments, professional adviser fees and management fees payable to itself. Those payments were approved by the judge at first instance, whose decision was appealed by Aurora and other limited partners.

While the application of s99 has typically been limited to sanctioning transactions by insolvent companies, and therefore concerns whether a transaction is in the best interests of the unsecured creditors, the Court of Appeal confirmed the criteria applicable for solvent companies, which will be welcome news for restructuring advisers. The Court of Appeal has endorsed the four criteria laid down by Henderson J in *In re Fortuna Development Corporation*[11] (Fortuna), as supplemented by Smellie CJ in his subsequent judgment in *In re Cybervest Fund:*[12]

> *First, the proposed disposition must appear to be within the powers of the directors … Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company … Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.*

Henderson J added that 'the test the applicant must satisfy is not high. Nevertheless, there must be a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable director, having only the best interests of the company in mind, might endorse'.

The Court of Appeal held that the judge had examined the evidence concerning each disposition in respect of which validation was sought, measured it against the standard established by the authorities, reminded himself that at this interlocutory stage of the winding-up proceedings he was not required to embark on a mini-trial, noted that several of the dispositions had passed the scrutiny of the independent auditors, and concluded that there was a body of evidence which, viewed objectively, established that the decision was one that a reasonable general partner, having the best interests of the partnership in mind, might endorse.

This decision demonstrates the high threshold that exists where a stakeholder seeks to disturb a finding of fact or the exercise of discretion by the judge in winding-up proceedings. It also shows the pragmatic approach that the Cayman courts have long adopted to reasonable commercial dispositions of property within a winding-up.

10 [2018 (1) CILR 290].

11 [2004–05] CILR 533.

12 [2006] CILR 80.

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Just and equitable petition abusive

In dismissing a shareholder's just and equitable winding-up petition on grounds that it was an abuse of process, the Grand Court in *Ctrip Investment Holding Limited* (Ctrip) *v eHi Car Services Limited* (eHi)[13] has sent a warning to shareholders seeking to wind-up a company for an ulterior motive.

The case concerned a petition by a minority shareholder in the context of a proposed take-private of eHi. eHi had its headquarters in Shanghai and its main business was car rental in the People's Republic of China (PRC). The petitioner was part of a leading PRC travel conglomerate that held a 21.3 per cent voting stake in the company. At all material times, it had a representative on the company's board of directors.

Two rival bidders sought to purchase eHi's shares. One bidder was backed by Ctrip while the other rival group was backed by the company's chairman and had its bid recommended by the board of eHi. Ctrip petitioned to wind eHi up on the basis, inter alia, that the interests of the chairman were preferred over the best interests of the company as the consortium's proposal was not the best offer available.

The Grand Court held on the facts that the petitioner's complaints of misconduct were unsustainable. It seemed clear to Kawaley J that they were factually incapable of proof and unmeritorious. In addition, it was clear that the main purpose of the petition was to advance the rival bid supported by the petitioner, not to advance the class interests of the shareholders that the petitioner was supposed to represent.

While the facts in that case were quite specific, of significance for restructuring practitioners was Justice Kawaley's determination that a petitioner cannot use a just and equitable winding-up petition to further its own commercial interests; it can only seek relief designed to vindicate the rights of shareholders generally, or shareholders of its class. Kawaley J held the main purpose of eHi's petition was to advance a rival merger bid supported by the petitioner, not to advance the class interests of the shareholders on whose behalf the petitioner was meant to be representing.

That finding raises questions since it is a hallmark of many just and equitable winding-up applications that there is a tension between the commercial interests of the minority petitioner and the majority of shareholders. In the recent decision of *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited*,[14] the Court of Appeal acknowledged that if a creditor's petition did not invoke a class remedy then the petition may be an abuse of process, but doubted the same principle would apply in respect of a shareholder who must be able to petition against acts of the company promoted by other shareholders. The Court suggested that a shareholder acting only in its self-interest 'may support an argument that the petition is brought for an improper purpose. On the face of it, that is what Kawaley J's remarks amount to.'

13 [2018 (1) CILR 641].

14 [2019] CICA J0405-1.

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The Court of Appeal's clarification that Kawaley J's findings do not support a wider principle that a petition which advances the commercial interest of a minority shareholder will automatically be deemed abusive is welcome. The just and equitable petition is often the only available remedy for disgruntled shareholders in Cayman Islands' funds where voting rights are often curtailed and there is no statutory remedy for oppression. In circumstances where the courts have set a high bar in recent years for such petitions to succeed (including rolling back the previously broad interpretation of the failure of substratum jurisdiction), it would be an unwelcome outcome for shareholders if such petitions were susceptible to be struck out simply because they further the petitioner's own commercial interests.

Guy Manning
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Guy Manning is head of Campbells' Litigation, Insolvency & Restructuring Group. He advises and appears in the Cayman Islands Courts on behalf of creditors, shareholders, provisional and official liquidators, directors, managers and other professional service providers in relation to the restructuring and liquidation of Cayman companies and other entities. Guy also has an active general litigation practice involving widely varying commercial contexts and structures, but with a particular emphasis on shareholder and investment fund disputes. He has been involved in many of the jurisdiction's highest profile disputes, liquidations and restructurings.

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Paul Kennedy is a counsel in Campbells' Litigation, Insolvency and Restructuring Group, based in the Cayman Islands office. He acts for investors, officeholders and institutions, and has particular expertise in complex cross-border disputes relating to funds and other offshore structures, fraud investigations and in-breach-of-duty claims in relation to the managers, auditors, administrators and custodians of investment vehicles. Paul has significant experience advising on sanctions and freezing orders affecting offshore assets, and has written and spoken extensively on cross-border litigation and insolvency matters.

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Campbells

Campbells specialises in insolvency and restructuring, investment fund litigation and liquidation disputes. The group acts for 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. They have specific experience of co-ordinating cross-border appointments, obtaining injunctions, assisting with gathering evidence and obtaining recognition and assistance from overseas courts.

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