

Are you ready? Rule changes of relevance to insolvency practitioners in the Cayman Islands

January 2018

On 1 February 2018, new versions of the following rules and regulations will come into effect:

- Companies Winding Up Rules, 2018;
- Insolvency Practitioners' Regulations, 2018; and
- Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018.

While the revised rules and regulations do not provide a complete overhaul of the liquidation regime in the Cayman Islands, the principal developments are of interest.

Most importantly, the current versions of the rules and regulations will no longer be effective. Below, we provide a snapshot of the main changes that will take place on 1 February 2018.

Companies Winding Up Rules 2018 (the CWR)

A new Part V has been inserted in to Order 3. The new Part V makes provision for a company to present a petition for its own winding up. The process set out in the new Part V closely mirrors the procedure applicable to creditor petitions, with the associated advertisement requirements. Notwithstanding the clarification provided by the new Part V, it remains open to a company to:

- Seek the appointment of provisional liquidators on an ex parte basis under CWR Order 4; or
- Resolve to appoint liquidators on a voluntary basis (if the company is cash-flow solvent).

On a practical note, CWR O.1 r.4(1B) is a new provision which permits the Court to grant dispensation to a liquidator from the need to publish any notice in any newspaper where the rules would otherwise require publication. The Court may grant this dispensation where it considers the expense of publishing the notice would be disproportionate and / or unlikely to serve any useful purpose.

Liquidators should also be aware that the amended CWR include more guidance in respect of the membership of a liquidation committee. In particular, CWR O.9 r.2(5) states that a person cannot, on the same committee:

- Be both a creditor and a contributory member;
- Act as a representative for more than one member at the same time; and
- Act as both a member of the liquidation committee and a representative for another member.

Finally, it is perhaps a welcome point of clarification that the revised CWR explicitly provide that upon the appointment of an official liquidator, all powers of the directors of that company cease, save that directors retain residual powers to allow them to initiate an

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appeal against the winding up order (see CWR O.3 r.22(4)).

Insolvency Practitioners' Regulations 2018 (the IPR)

Liquidators' remuneration is a key aspect of the IPR of obvious interest to practitioners. Where it is proposed that a liquidator is to be remunerated either by reference to the percentage of the distributions made to the stakeholders of a liquidation, or as a percentage of the net realisations from the sale of the company's assets, the liquidator must seek sanction for those remuneration proposals within specific timeframes.

Specifically, in these circumstances a liquidator must apply for the Court's approval on the later of:

- 6 months from the date a liquidation committee is established; or
- 9 months from the date of the commencement of the liquidation.

The levels of the prescribed rates of remuneration previously contained in the 2013 iteration of the IPR have not changed.

Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (the FBPR)

The FBPR are principally concerned with the terms and process by which a foreign representative may be recognised in the Cayman Islands and seek the assistance of the Cayman Islands Court pursuant to section 103 of the Companies Law (as revised).

The updated FBPR now prescribe the process which must be followed by a foreign representative, recognised in the Cayman Islands, when examining a *"relevant person"* pursuant to section 103 of the law.

The terms of that examination stipulate that the examination shall be conducted in private and that while the examinee is entitled to have legal counsel present, such attorney or foreign lawyer is not entitled to put questions to the examinee without the prior permission of the person conducting the examination.

Interestingly, subject to legal professional privilege and claims of self-incrimination, an examinee is required to answer all questions put which are *"within his knowledge or means of knowledge regarding any matter within the scope of the order"*. This would suggest that the efficacy of the examination process is likely to turn on the terms of the order compelling the examination.

From an investigatory point of view, a person who is called to be examined under oath may also be compelled to provide the names and addresses of all persons who reasonably might be expected to have knowledge of the matters falling within the scope of the examination.

Previously there was uncertainty regarding the persons against whom a foreign recognised practitioner could examine; however, this update now brings the FBPR procedures in line with those available to official liquidators under section 103 of the law and O.7 of the CWR.

Furthermore, the FBPR bring some much needed clarity regarding the provision of security for costs by a foreign representative making an application under section 241 of the law. The FBPR now states unequivocally that no order for security for costs shall be made against a foreign representative in those circumstances.

The revised CWR, IPR and FBPR bring into effect changes which should provide some certainty on those discrete matters for insolvency practitioners appointed to act in Cayman liquidations.

If you would like more information on the changes that are to take effect on 1 February 2018 please do not hesitate to contact member of our Cayman Islands Dispute Resolution team.

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