A new era of restructuring in the Cayman Islands

August 2022

A new restructuring regime comes into force today in the Cayman Islands under the Companies (Amendment) Act 2021 (**Amendment Act**) and the Companies Winding Up (Amendment) Rules 2022 (**Amendment Rules**), referred to herein as the **Restructuring Regime**.

As outlined below, the principal changes brought into effect by the Restructuring Regime strike a balance between offering a debtor-friendly restructuring process and protecting the interests of creditors, and enhance the financial services regime in the Cayman Islands.

Changes in brief

The Restructuring Regime is intended to provide a flexible and efficient restructuring process. The amendments introduce the role of a restructuring officer who may propose a compromise or arrangement with a company's creditors and / or members (or classes thereof). Importantly, an application for the appointment of a restructuring officer triggers the protection of a statutory moratorium (**Restructuring Moratorium**) and is an application which may be made without the liquidation framework of the Cayman Islands first being invoked.

Prior to the Restructuring Regime if a company wished to propose a restructuring to its creditors and have the benefit of a stay while doing so it was necessary to first file a winding-up petition against the company, and then seek the appointment of provisional liquidators. From a commercial point of view debtors were frequently reluctant to commence a process with a 'liquidation' label, thereby engaging the insolvency jurisdiction of the Grand Court of the Cayman Islands (**Court**).

What corporate entities can a restructuring officer be appointed to?

A restructuring officer may be appointed to a company incorporated and registered within the jurisdiction and to any other entity or partnership which is liable to be wound up by the Court.

Accordingly, the Restructuring Regime may be invoked by limited liability companies, foreign companies which would otherwise be liable to be wound up within the jurisdiction, and partnerships.

Who has standing to seek the appointment of a restructuring officer?

Only the company acting by its directors has the ability to apply for the appointment of a restructuring officer. Creditors and contributories do not have standing to make such an application and seek to impose a restructuring process on the company.

The Amendment Act empowers the directors of a company to seek the appointment of a restructuring officer without those directors needing prior authorisation to do so from either the terms of the articles of association or a resolution of the shareholders of the company. This ensures the Restructuring Regime is a company driven process and streamlines the procedure by avoiding the need to engage with and obtain approval from the company's members.

More broadly, the Amendment Act makes it easier for directors of companies formed on or after 31 August 2022 to file a winding-up petition in respect of the company. Previously directors were limited in their ability to take steps to appoint provisional liquidators to a company for the purposes of implementing a restructuring, and it was often the case that directors would need to seek the support of a friendly creditor to issue a winding-up petition so that an application appointing provisional liquidators could then be made by the company.

The Amendment Act gives statutory authorisation for directors of companies incorporated on or after 31 August 2022 to file a petition without there being a power to do so in the company's articles or the directors being authorised by a shareholder resolution to do so. This amendment does not have retrospective effect and for companies incorporated prior to the relevant date the directors will still require specific authorisation to file a winding-up petition either in the articles or by a shareholder resolution.

When can an application be made for the appointment of a restructuring officer?

A company, acting by its directors, may seek the appointment of a restructuring officer where:

1. the company is or is likely to become unable to pay its debts within the meaning of section 93 of the Companies Act (as revised); and

2. the company intends to present a compromise or arrangement to its creditors (or classes thereof).

The grounds for the appointment of a restructuring officer reflect the legislative gateway that applied to a company's application for provisional liquidators for the purpose of proposing a compromise or arrangement with its creditors[1]. In contrast to that process it is not necessary for a winding-up petition to be presented against the debtor company first. As such the Restructuring Regime is a stand-alone process falling outside the Court's winding-up jurisdiction.

An application for a restructuring officer must be brought by a petition and the Amendment Rules stipulate that unless otherwise directed by the Court, the petition shall be heard in open court within 21 days of the petition being filed in Court. Equally, if the circumstances require that a restructuring officer be appointed immediately, the restructuring officer may be appointed on an interim basis prior to the petition being heard.

What is the effect of filing a petition for the appointment of a restructuring officer?

The most significant consequence of filing a petition for the appointment of a restructuring officer is the commencement of the Restructuring Moratorium, which immediately stays all civil proceedings once a petition seeking the appointment of a restructuring officer is filed. Under the previous regime a stay would only apply once provisional liquidators had actually been appointed. This exposed the company to unilateral creditor action between the date of filing a winding-up petition and the determination of the company's application for provisional liquidators.

Under the Restructuring Regime, the company is protected from the actions of hostile creditors at an earlier stage than under the previous regime which enhances the ability of the Restructuring Regime to preserve assets and value of a financially distressed company.

The Amendment Act stipulates that the stay which comes into effect to support a restructuring shall have domestic and extra-territorial effect. While the extent to which the stay will be given effect outside the Cayman Islands will be a matter for foreign courts that are

asked to recognise the Cayman proceedings, the Court is given clear guidance in the Amendment Act as to the intended scope of the statutory moratorium.

Is the Restructuring Regime creditor-friendly?

There are a number of aspects of the Restructuring Regime which make it an attractive process for secured and unsecured creditors of a company, namely:

- First and foremost, the Restructuring Moratorium does not bind secured creditors. Creditors with security over the assets of a company may continue to take steps to enforce their security, provided that those steps do not require the commencement of legal proceedings against the company.

- The Amendment Rules relating to an application for the appointment of a restructuring officer set out advertising requirements which will ensure that the application is brought to the attention of all relevant stakeholders, be they within or outside of the jurisdiction. These requirements may be departed from or modified with the leave of the Court.

- Creditors have standing to participate and make their views known in the proceedings in a variety of ways, including (i) making an application for the Restructuring Moratorium to be lifted; (ii) seeking leave to bring a winding-up petition against the company; (iii) attending the hearing of the company's application and nominating alternative restructuring officers to those proposed by the company; and (iv) applying to have the appointment of restructuring officers set aside or their powers varied.

- Ultimately, if the company seeks to undertake a restructuring through a scheme of arrangement, those creditors who are caught by the scheme will also have the option to vote in favour of or against the proposed restructuring.

How do the Restructuring Regime and the Court's winding-up jurisdiction relate to one another?

As previously noted, the Restructuring Regime is independent of the Court's winding-up jurisdiction. The independence of the Restructuring Regime from the insolvency framework is enhanced by the express prohibition placed on the Court's discretion in the Amendment Act on hearing an application for the appointment of a restructuring officer. On considering the petition the Court may (i) make an order appointing a restructuring officer; (ii) adjourn the hearing conditionally or unconditionally; (iii) dismiss the petition; or (iv) *"make any other order as the Court thinks fit, except an order placing the company into official liquidation"* (emphasis added)[2].

From a practical point of view, the separation of the Restructuring Regime from the liquidation process removes the sword of Damocles which often swung over a debtor company seeking a restructuring through the provisional liquidation process. In those circumstances the default position of a restructuring not being approved by the requisite majority of creditors was the placement of the company into official liquidation. Under the Restructuring Regime the default position falls away and, if a restructuring fails, the leave of the Court[3] would need to be obtained before a winding-up petition could be filed against the company.

The creation of a restructuring framework that is not dependent on a debtor company being placed into some form of 'liquidation' is arguably an attractive route for directors and stakeholders alike, by avoiding the commercial stigma, adverse connotations and potential loss of value which often follow where a company has been placed into an insolvency process.

International impact

Cayman corporate vehicles frequently finance their operations by procuring foreign debt, principally English or New York law-governed debt. To the extent that a company seeks to compromise foreign debt using the Restructuring Regime it may be necessary for the restructuring officer and resulting compromise to be recognised in a foreign jurisdiction.

Whether the restructuring officer would be recognised in a foreign jurisdiction is a matter for the relevant foreign court. However, the substantial similarities between the Restructuring Regime and the prior provisional liquidation process through which restructurings were previously proposed suggest that restructuring officers appointed under the Amendment Act will be afforded recognition and assistance in jurisdictions that have implemented the UNICTRAL Model Law, such as New York.

While a restructuring plan could be reached consensually, it is often the case that a scheme of arrangement is used to achieve a compromise of a debtor's financial obligations. The Restructuring Regime amends the current Companies Act to provide for two forms of schemes of arrangement, (i) generally available under the Companies Act; and (ii) within the context of the Restructuring Regime with the protection of the Restructuring Moratorium. While the scheme provisions mirror each other, a Cayman scheme of arrangement proposed under the Restructuring Regime ought to be capable of recognition and enforcement in England & Wales as an insolvency proceeding.

The Amendment Act further illustrates the international context in which the Restructuring Regime is intended to operate by allowing for the compromise or arrangement presented to the company's creditors to be a compromise or arrangement under the Companies Act or under foreign law.

In summary

The Restructuring Regime offers a flexible and streamlined process through which a qualifying company may propose a restructuring to its creditors or, as is more commonly the case, a class of its creditors. The statutory stay under the Restructuring Regime prevents unilateral creditor action being taken between the presentation of the petition and order appointing a restructuring officer, which is likely to preserve and maximise value for all stakeholders with an interest in the outcome of the restructuring.

Given the importance of the Cayman Islands as a financial centre, the introduction of the Restructuring Regime is a welcome and timely development for debtors and creditors alike.

[1] Section 104(3) Companies Act (as revised)

[2] Section 91B Companies Act, (as revised)

[3] Subject to the appointed restructuring officer being discharged.

For more information please contact:

Annalisa Shibli

Counsel // Cayman

t:+1 345 914 9656 // *e:*annalisa.shibli@collascrill.com

Kirsten Bailey

Senior Associate // Cayman

t:+1 345 914 9658 // *e:*kirsten.bailey@collascrill.com