RESTRUCTURING & INSOLVENCY

Cayman Islands

LEXOLOGY
Getting The Deal Through

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Restructuring & Insolvency

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Quick reference guide enabling side-by-side comparison of local insights, including a general overview; types of liquidation and reorganisation processes; insolvency tests and filing requirements; directors' and officers' regime; stays of proceedings and moratoria; doing business during reorganisations; asset sales; creditor remedies, involvement and proving claims; security; clawback and related-party transactions; treatment of groups of companies; international cases; and recent trends.

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GENERAL

Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main legislation applicable to insolvencies and reorganisations of companies in the Cayman Islands is the Companies Act (2022 Revision) (the Act) and the Companies Winding Up and Restructuring Rules 2018. Additional legislation may be relevant to insolvencies and reorganisations of other types of entities, such as partnerships and limited liability companies. This chapter focuses on companies.

Law stated - 28 October 2022

Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

There are no exclusions from customary insolvency or reorganisation proceedings. Assets over which security has been granted and any assets that the company holds on trust are exempt from claims of unsecured creditors.

Law stated - 28 October 2022

Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

The Act applies to companies regardless of the identity of their owners. However, where a quasi-governmental entity is established by a separate statute, that statute should be reviewed to establish whether the entity falls within the scope of the Act and whether any special procedures apply.

Law stated - 28 October 2022

Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered ‘too big to fail’?

No.

Law stated - 28 October 2022

Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Insolvency and restructuring cases are heard by the specialist Financial Services Division of the Grand Court of the

Cayman Islands. Appeals from winding-up orders lie to the Cayman Islands Court of Appeal. This appeal is available as of right, without the need to obtain permission. Appeals against interlocutory orders within the winding-up proceedings also lie to the Cayman Islands Court of Appeal, but permission is required. The Court may impose conditions, such as the payment of security for costs.

A further appeal lies to the Judicial Committee of the Privy Council in the United Kingdom.

Law stated - 28 October 2022

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A company can be placed into voluntary liquidation by a shareholder resolution. Depending on the circumstances, this can be an ordinary resolution or a special resolution.

A special resolution will suffice to commence voluntary liquidation regardless of the reason for which it is passed. The company does not have to be insolvent. Provided the company's directors swear declarations of solvency within 28 days, the liquidation can continue as a voluntary liquidation. On the appointment of a voluntary liquidator, all the powers of the directors cease (unless specifically preserved). The business of the company will cease to save to the extent that it is beneficial to continue it for the purposes of winding up. The voluntary liquidators will wind down the business of the company and distribute its assets to its creditors and then to its shareholders. Upon the conclusion of the voluntary winding up, the company will be dissolved.

However, if, during the course of a voluntary liquidation, the voluntary liquidators (or any shareholder or creditor) form the view that the company is or is likely to become insolvent or that the supervision of the court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of its shareholders and creditors, then the liquidators (or any shareholder or creditor) may apply to bring the voluntary liquidation under the supervision of the court. If the court makes a supervision order, this will effectively convert a voluntary liquidation into an official (or involuntary) liquidation.

An ordinary resolution will also suffice to place a company into voluntary liquidation if it is passed on the basis that the company is unable to pay its debts. However, in such a case, the voluntary liquidation is likely to come under court supervision and, in effect, be converted into an official (or involuntary) liquidation, because the directors of such a company are unlikely to be in a position to swear the requisite certificate of solvency.

Law stated - 28 October 2022

Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A reorganisation can be achieved via a scheme of arrangement, which involves mutual compromise by both the company and its stakeholders. A scheme of arrangement is not, in and of itself, an insolvency process – it can be used by both solvent and insolvent companies for a variety of purposes other than debt restructuring (eg, mergers). However, in an insolvency context, it is often used in tandem with the appointment of provisional liquidators (which gives the company a moratorium from claims while the restructuring can be implemented). Legislation introduced in 2022 permits the company to apply to court for the appointment of a restructuring officer, which similarly provides a

moratorium to allow the company to promote a restructuring, via a scheme of arrangement or otherwise.

The scheme of arrangement is commenced by presenting a proposal to the relevant stakeholders and then by applying to the court for an order that a meeting of the relevant stakeholders or classes of stakeholders is convened to vote on the same. At the initial hearing, the court will scrutinise the proposals for the constitution of the voting classes and the information to be provided to them.

If the scheme of arrangement is approved by the requisite statutory majorities, a further court hearing is held at which the court is invited to sanction the scheme. If a sanction is obtained, the scheme becomes binding on the company and all the stakeholders, regardless of whether they consented to the scheme or not.

Law stated - 28 October 2022

Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

The scheme of arrangement must be approved by each class of stakeholders affected by it. Class approval is obtained if stakeholders representing a majority in number representing 75 per cent by value vote in favour of the scheme. Stakeholders can be grouped into a class provided their legal rights are not so dissimilar that they cannot sensibly consult with each other with a view to their common interest.

A scheme can also be used to release non-debtor parties (such as guarantors, officers, advisers, lenders, etc) from liability. The requirements are the same as for any other scheme of arrangement.

Law stated - 28 October 2022

Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

A creditor can apply to wind up a company (that is, to place it in official or involuntary liquidation) on the basis that the company is unable to pay its debts. The creditor must present a winding-up petition, which will be advertised, and a hearing of the petition will be held.

If the petition is granted, a winding-up order will be made and official liquidators will be appointed over the company. The powers of the directors will cease. Unlike in the case of a voluntary liquidation (where any person may serve as a liquidator), official liquidators must be licenced insolvency practitioners. Also, unlike in the case of voluntary liquidation, a moratorium on claims against the company will take effect (although secured creditor rights will not be affected).

The official liquidators will investigate the circumstances of the company's failure, collect in all its assets (including by means of commencing legal proceedings if necessary), and distribute the estate to the creditors (and, if there is any surplus left, to the shareholders). Thereafter, the company will be dissolved.

Law stated - 28 October 2022

Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Although it is less common, a scheme of arrangement may be implemented in an official liquidation. There are no material differences to a scheme of arrangement opened within a provisional liquidation or following the appointment of a restructuring officer. However, as a company cannot exit official liquidation (but the official liquidation may be stayed), the goals of the scheme of arrangement may differ in official liquidations from those in provisional liquidations.

Law stated - 28 October 2022

Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No specific legislation or guidance exists for expedited reorganisations. However, the Cayman Islands procedures are flexible, and in the right circumstances, a restructuring can be implemented in short order.

Law stated - 28 October 2022

Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A scheme of arrangement can be defeated at any one of three junctures – the initial court hearing at which the order for convening class meetings is sought, the class meetings themselves, or the subsequent sanction hearing.

If, at the initial hearing, the court is dissatisfied with the manner in which classes are proposed to be constituted, this may cause a scheme to be abandoned if it is apparent that class votes cannot be won within the re-drawn class categories.

If any one of the class votes fails to meet the statutory thresholds (ie, majority in number representing 75 per cent by value) the scheme will be defeated.

Finally, if the court refuses to sanction the scheme at the subsequent sanction hearing (eg, because it is unfair), the scheme will also be defeated.

The effect of a scheme of arrangement being defeated is that the creditors' original rights against the company remain unmodified and can be enforced in the usual way.

Once sanctioned, the scheme of arrangement is binding on the company (as well as on all the stakeholders). If the company fails to perform its restructured obligations, its creditors will have the usual recourse to the court and the company will probably end up in official liquidation.

Law stated - 28 October 2022

Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

It is possible to dissolve a company administratively without going through a liquidation procedure (whether voluntary or official) by striking it off the register of companies under the provisions of Part VI of the Companies Act (2022 Revision).

Administrative dissolution is much quicker and cheaper than a liquidation procedure. However, the effects are very different.

Unlike a company that has been dissolved following a liquidation procedure (from which a company cannot then be revived), a company that has been dissolved administratively can be reinstated on the application of any creditor, shareholder, or the company itself during a period of up to 10 years after dissolution. If it is so reinstated, it is treated as if it had never been dissolved in the first place. Further, where a company has been dissolved administratively, this does not have any effect on any liabilities of the company's directors, officers, or shareholders, which can be enforced notwithstanding the dissolution.

Any property still vested in the company at the time of its striking off the register will vest in the government minister charged with responsibility for finance.

Law stated - 28 October 2022

Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidations, both voluntary and official, are concluded with the dissolution of the company. Unlike the administrative dissolution mentioned earlier, this dissolution cannot be reversed. Any unclaimed assets of the company are held by the liquidator as trustee for the benefit of the creditors or shareholders to whom the assets are owed for a year, after which they are transferred to the government minister charged with responsibility for finance.

Reorganisations formally conclude with the approval of the scheme of arrangement and, if the reorganisation also involved the appointment of provisional liquidators, with the discharge of the provisional liquidators. The company then carries on its activities.

Law stated - 28 October 2022

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The Cayman Islands applies the cash-flow test of insolvency (as opposed to the balance-sheet test). That is, the debtor must be shown to be unable to pay its debts as they fall due. However, the test does incorporate an element of futurity, in that the court may take into account debts that will fall due in the reasonably near future. How far into the future the court will look will depend on the facts of each particular case.

Law stated - 28 October 2022

Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

No.

Law stated - 28 October 2022

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors have a general fiduciary duty to act in the best interests of the company at all times. When the company is solvent, those interests are generally defined by reference to the interests of the company's shareholders as a body. When the company is insolvent (or of doubtful solvency), the interests of its creditors as a body have to be taken into account. Since it might not be in the best interests of creditors for a company to continue trading as usual when it is insolvent, directors who cause the company to do so may well find themselves in breach of their fiduciary duties.

Law stated - 28 October 2022

Directors' liability – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Generally, directors are not personally liable for their company's obligations. However, there are circumstances, in addition to breaches of fiduciary duties mentioned earlier, in which directors can incur personal liability.

A director who, within the period of 12 months immediately preceding the commencement of winding up, has concealed or removed company property worth CI$10,000 or more, concealed any debt due to or from the company, falsified, concealed or destroyed any documents relating to the company's affairs, or performed certain other actions with intent to defraud the company's creditors or contributories commits a criminal offence and is liable to a fine or imprisonment for five years (sections 134 and 135 of the Companies Act (2022 Revision) (the Act)).

Further, if in the course of the winding up it is established that any business of the company was carried on with the intent to defraud creditors (whether of the company or another company) or for any other fraudulent purpose, any persons who were knowingly parties to such conduct (including directors) may be ordered to contribute to the assets of the company (section 147 of the Act).

Law stated - 28 October 2022

Directors' liability – defences

What defences are available to directors and officers in the context of an insolvency or reorganisation?

There are no particular statutory defences available to directors in connection with potential liability under sections

134, 135 and 147 of the Act. However, as with any liability that is based on intent to defraud, proof of such intent on the part of the director has to be established by the prosecutor or claimant.

Law stated - 28 October 2022

Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Directors always owe their fiduciary duties to the company, rather than to any particular shareholder or creditor of the company. However, when the company is solvent, those interests are generally defined by reference to the interests of the company's shareholders as a body. When the company is insolvent (or of doubtful solvency), the interests of its creditors as a body have to be taken into account. The transition from solvency to insolvency can be an imperceptible process and there is often no clear dividing line (at least without the benefit of hindsight) between the time when shareholders' interests are paramount and the time when creditors' interests prevail.

Law stated - 28 October 2022

Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

Upon the making of a winding-up order in an official liquidation, the powers of directors cease.

Directors' powers also cease upon the appointment of voluntary liquidators, unless specifically preserved.

The appointment of provisional liquidators can have a range of consequences for directors' powers, depending on the terms of the appointment order. In light touch provisional liquidations (often utilised for restructuring purposes) directors' powers of day-to-day management may be largely preserved, with the provisional liquidators performing a supervisory function. In full-powers provisional liquidations (often used when the purpose of the provisional liquidation is to preserve a company's assets in the context of suspected fraud) directors may be divested of all their powers. There may also be situations between the two extremes.

The promotion of a scheme of arrangement does not, in and of itself, affect directors' powers, unless it is also done in parallel with the appointment of provisional liquidators.

Law stated - 28 October 2022

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

An automatic moratorium on proceedings against the company comes into effect on the appointment of official or provisional liquidators, or on the filing of an application for the appointment of a restructuring officer. Once a moratorium is in place, proceedings may only be commenced or continued with leave of the court.

This moratorium does not prevent secured creditors from enforcing their rights. They may do so without reference to

the court or the liquidators or restructuring officer.

Voluntary liquidations do not give rise to any moratorium, nor does the promotion of a scheme of arrangement (unless coupled with provisional liquidation or an application to appoint a restructuring officer).

Law stated - 28 October 2022

Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

In a provisional liquidation commenced for the purposes of restructuring or following the appointment of a restructuring officer, the company will usually carry on its ordinary business activities (subject to complying with the terms of the appointment order and any requirement to obtain court sanction for dispositions of the company's property).

In a voluntary liquidation, the company shall cease to carry on business except to the extent that this is beneficial for its winding up.

In an official liquidation, the official liquidators may carry on the business of the company so far as it is beneficial for its winding up, but only with the sanction of the court (unless the power is included in the appointment order).

Creditors can, at any time, apply to the court to resolve any issue that arises in the course of a liquidation in connection with the exercise by the liquidators of their powers (sanction application). The court exercises overall supervision of the liquidation process.

Law stated - 28 October 2022

Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Official liquidators can raise new finance (with the sanction of the court). If unsecured, it will rank as an expense of the liquidation and be payable in priority to other creditors.

Law stated - 28 October 2022

Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Liquidators can exercise the power to sell the company's property with the sanction of the court (unless such power is included in the appointment order).

The company will transfer to the purchaser only such rights in the assets as it has. Liquidation will not create any new claims on those assets that would travel with them on a sale, but to the extent that such assets were already encumbered pre-liquidation and the encumbrance has not been released then such encumbrance will remain in place

on sale.

Law stated - 28 October 2022

Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

There is no prohibition on stalking-horse bids. However, to the extent that court approval will be required for a sale (mentioned earlier), the court will consider whether the sale process represents the best value for the liquidation estate.

There is no prohibition on credit bidding. However, again, the sale will ultimately require court sanction.

Law stated - 28 October 2022

Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

There is no statutory power to disclaim unfavourable contracts. Breach of contract after commencement of winding up will give rise to a claim for damages, but the counterparty will probably have to prove in the winding up.

Law stated - 28 October 2022

Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Whether an intellectual property (IP) licensor or owner may terminate the debtor's right to use the IP when the debtor enters liquidation will depend on the terms of the relevant IP licensing agreement.

The same applies to the IP rights granted by the debtor that enters liquidation.

Law stated - 28 October 2022

Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

Personal data must be dealt with in accordance with the Data Protection Act (2021 Revision). The fact that the company has entered a liquidation or a reorganisation process does not alter this fact.

Any duties of confidentiality owed by the company will also need to be considered, and applications under the

Confidential Information Disclosure Act 2016 might be necessary.

Law stated - 28 October 2022

Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Only the court has jurisdiction to make a winding-up order. However, the Cayman Islands is a pro-arbitration jurisdiction, and in appropriate circumstances, arbitration can play a role.

If the debt based on which a creditor's petition is presented arises from a contract that contains an arbitration agreement, and if the court is satisfied that the debt is being disputed bona fide on substantial grounds, it may stay the winding-up petition in favour of arbitration. Stay of winding up petition in favour of arbitration is much less likely in the context of petitions presented by shareholders on the just and equitable ground. This is because it is likely to be very difficult or impossible to identify any issues that can be arbitrated without trespassing on the court's exclusive jurisdiction to decide whether it would be just and equitable to wind up the company.

Similarly, only the court has jurisdiction to administer a liquidation once a winding-up order is made. However, again, in appropriate circumstances, reference may need to be made to arbitration. For example, only the court has jurisdiction to decide whether a reserve held for contingent claims should be released, but if the contingent claims in question are subject to an arbitration clause then it is for the arbitral tribunal (and not the court) to determine those claims.

Further, to the extent that before liquidation the company had entered into agreements that contained arbitration clauses, such clauses will remain enforceable after commencement of winding up.

Law stated - 28 October 2022

CREDITOR REMEDIES

Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

There are no processes by which the assets of a company can be seized without a court order unless such processes are contractually agreed upon (eg, the appointment of a receiver).

Law stated - 28 October 2022

Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

If an unsecured creditor does not wish to petition for the company's winding up, it can sue the company for the debt by way of an ordinary money claim. Once judgment is obtained, it can be enforced in a variety of ways, depending on the type of property being targeted, including by charging orders, garnishee proceedings, writ of fieri facias and the appointment of a receiver.

The difficulty and duration of these processes depend on the facts of each particular case.

Freezing orders may be obtained in certain circumstances to prevent improper dissipation of assets by the company, but this will not give the creditor any security over the assets themselves.

Law stated - 28 October 2022

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

The official liquidator must prepare reports and accounts with respect to their conduct of the liquidation and provide copies to all creditors and to the liquidation committee (if any) ahead of every creditor meeting. The official liquidator's report and accounts must set out the steps taken (and intended to be taken) in the liquidation, any discrete matters that in the opinion of the liquidator are of particular concern to creditors, as well as other matters. The report and account must also include financial information that is sufficient to enable the creditors to form a view on the company's financial condition and prospects of recovery. The accounts must include the nature and estimated realisable value of the company's assets, details of any security over them, the nature and amount of the company's liabilities and income, expenses of the liquidation, liquidators' remuneration claimed and approved by the court. The accounts must also record distributions already made.

The first creditor meeting must be convened within 28 days of the date of the winding-up order. Thereafter, meetings must take place not less than once a year. Creditors' meetings must be convened on not less than 21 days' notice.

Any creditor whose debts are valued in total at the lesser of CI$500,000 or 5 per cent of the company's total unsecured liabilities may requisition a creditors' meeting. If the official liquidator is satisfied that the requisitionists meet the statutory tests, the liquidator shall convene the meeting within 21 days of the date upon which the requisition was received.

A final creditors' meeting is convened before dissolution.

Law stated - 28 October 2022

Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

A liquidation committee must be established in every official liquidation unless the court otherwise directs. It may also be established in a provisional liquidation if the court so directs.

The liquidation committee comprises not less than three and not more than five creditors. It is elected at the first meeting of creditors. Any creditor who is not fully secured and whose proof of debt has not been wholly disallowed or rejected is eligible for election.

The official liquidator has a duty to report to the liquidation committee all matters that appear to the liquidator are of concern to the committee. The official liquidator must convene the first meeting of the liquidation committee within three months of its establishment. Thereafter, meetings must be held not less than once every six months. Each

committee member has one vote and resolutions are passed by a majority of those present.

The liquidation committee may resolve to appoint a legal adviser to the committee. The reasonable legal fees and expenses of such counsel to the liquidation committee are paid out of the assets of the company as an expense of the liquidation.

The purpose of the liquidation committee is to act as a sounding board for the official liquidator. The liquidation committee does not have any inherent power to overrule the official liquidator, nor is it the function of the liquidation committee to run the liquidation instead of the official liquidator.

However, the official liquidator is required to seek approval of his or her remuneration from the liquidation committee before seeking sanction of that remuneration from the court. Support of the liquidation committee also tends to make various other sanction applications that an official liquidator must file easier. Finally, as a step of last resort, the liquidation committee does have the standing to apply to the court for directions that the official liquidator exercise or refrain from exercising any of the liquidator's powers in a particular way.

Law stated - 28 October 2022

Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

Claims that belong to the company may be assigned to third parties in the same way as they could be before the liquidation. Sanction of the court will be required.

Claims that are statutory in nature and specifically vest in the official liquidators (eg, voidable preferences) cannot be so assigned.

However, it is often possible for official liquidators to raise litigation funding (including from creditors themselves).

Law stated - 28 October 2022

Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Creditors submit their claims using the prescribed proof of debt form. There is no universal time limit for submitting proof of debt. However, whenever a dividend is to be declared (whether interim or final), a cut off time for submission of proofs that may participate in that dividend will be set by the liquidators. This cut off time will be not less than 30 days from the date of publication of notice of interim dividend and not less than 60 days from the date of publication of notice of final dividend. Proofs submitted after this cut off cannot participate in that particular dividend (although they may, to the extent admitted, be eligible to participate in future dividends). If a creditor submits proof of debt after the cut-off date for the final dividend, the liquidator may (but is not required to) consider that proof of debt.

The official liquidator adjudicates the proofs of debt and either accepts them or rejects them (in full or in part), giving each creditor appropriate written notice. If the proof is rejected (whether in full or in part), the notice will state the reasons for such rejection. A creditor who is dissatisfied may appeal the liquidator's decision to the court within 21 days.

The official liquidator must estimate the value of any contingent debt or a debt that otherwise does not bear a certain value. Where such an estimate has been made, the liquidator must notify the creditor of the estimate and the basis for it in writing.

The right to receive a liquidation dividend may be assigned. A notice of assignment must be given by the assignor to the official liquidator.

Law stated - 28 October 2022

Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Set-off and netting rights that arose pre-liquidation remain enforceable in liquidation. Further, where no contractual arrangements apply, statutory set-off provisions will apply and account will be taken of the mutual obligations, with only the net amount being payable.

The treatment of creditors' set-off and netting rights in a reorganisation will depend on the nature of the reorganisation. In principle, a scheme of arrangement may override or modify such rights.

Law stated - 28 October 2022

Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

Creditors' rights, including the ranking of their claims, may be varied as part of a consensual reorganisation or a reorganisation implemented via a scheme of arrangement.

Law stated - 28 October 2022

Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Preferred debts comprising debts due to employees, bank depositors and various taxes rank ahead of secured creditors who have a floating charge, but these claims will not be paid out of fixed-charge assets over which the secured creditor has enforced its security.

Law stated - 28 October 2022

Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

All employment contracts are automatically terminated upon official liquidation of the company.

Law stated - 28 October 2022

Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Any sum due and payable by the company on behalf of an employee in respect of pension fund contribution falls into the category of preferred debts and is payable in priority to all debts other than those of the fixed-charge holders.

Law stated - 28 October 2022

Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Insolvency statutes do not provide for any special treatment of environmental claims.

Law stated - 28 October 2022

Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

Other than employment contracts, all other contractual obligations of the company survive the making of the winding-up order (unless the relevant contracts provide otherwise). However, in practice, given the company's insolvency, compelling performance may be impossible and the counterparty may be reduced to claiming damages in the liquidation.

Liabilities do not survive the dissolution of the company following its liquidation, save to the extent that the relevant creditors might have claims to any residual assets in any liquidating trust.

Whether a contractual obligation survives a reorganisation depends on the terms of the reorganisation.

Law stated - 28 October 2022

Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

The timing of interim distributions to creditors is at the discretion of the official liquidators. The final distribution must be declared once the liquidator has realised all of the company's assets (or so much of them as can be realised without needlessly protracting the liquidation).

Law stated - 28 October 2022

SECURITY

Secured lending and credit (immovables)

What principal types of security are taken on immovable (real) property?

Principal types of security over immovable property are mortgages (legal and equitable) and fixed charges.

Law stated - 28 October 2022

Secured lending and credit (movables)

What principal types of security are taken on movable (personal) property?

Principal types of security on movable property include liens and pledges.

Law stated - 28 October 2022

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

A transaction may be attacked as a voidable preference under section 145 of the Companies Act (2022 Revision) (the Act). Such transaction shall be invalid if it was made in favour of a creditor at a time when the company was insolvent and with a view to giving such creditor a preference over other creditors, provided it was made within six months preceding the commencement of liquidation. Liquidation commences when the winding-up petition is presented (not when the winding-up order is made). Only the liquidator can challenge on this basis. If the challenge succeeds, the transaction is invalid. Common law defences such as change of position are not available.

A transaction may also be attacked as a fraudulent disposition at undervalue under section 146 of the Act. Such transaction shall be set aside if both undervalue and intent to defraud creditors is proven. Again, only the liquidator has the standing to challenge on this basis. Proceedings must be commenced within six years of the disposition.

Further, all dispositions of the company's property made between the presentation of the petition and the making of the winding-up order are automatically void unless validated by the court (section 99 of the Act).

Law stated - 28 October 2022

Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There are no statutory restrictions on such claims. However, to the extent that the company has cross-claims against them, such claims may be netted off.

Law stated - 28 October 2022

Lender liability

Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

Lenders are not generally liable for the insolvency of a debtor simply by virtue of being lenders. Liability may arise under section 147 of the Act if the lender (or indeed any other person) becomes a knowing party to the company carrying on business with intend to defraud creditors or for any fraudulent purpose. Liability may also arise under ordinary principles of the tort of conspiracy or where a lender ends up acting as a de facto director of the debtor.

Law stated - 28 October 2022

GROUPS OF COMPANIES

Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Parent companies are not, simply by virtue of their status as parent companies, responsible for the liabilities of their subsidiaries. Such responsibility may arise as a result of contractual arrangements (eg, guarantees) or if the parent or affiliate is found to have participated in fraudulent trading by the subsidiary (section 147 of the Companies Act (2022 Revision) (the Act)). In certain limited circumstances liability may also be imposed by piercing the corporate veil.

Law stated - 28 October 2022

Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

The liquidation of each company must proceed within its own distinct liquidation proceeding, but in appropriate circumstances, related proceedings could be case managed together. Pooling of assets and liabilities between companies is generally not permissible as a routine approach. However, the court may sanction it in exceptional circumstances.

Further, subject to conflicts, the court may be amenable to appointing the same liquidators to different companies within a group to achieve efficient and economical liquidation. Even where different liquidators have to be appointed, a degree of cooperation between the estates within a group is generally expected on matters where there is a commonality of interest.

Law stated - 28 October 2022

INTERNATIONAL CASES

Recognition of foreign judgments

Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The Cayman Islands is not a signatory to any treaties on international insolvency or the recognition of foreign

judgments.

Foreign judgments (other than certain Australian judgments, which can be enforced under statute) can be sued on at common law and converted into a Cayman Islands judgment, which is then enforceable in the usual way.

Foreign insolvency officeholders may obtain recognition in the Cayman Islands under the international cooperation provisions of Part XVII of the Companies Act (2022 Revision) (the Act).

Law stated - 28 October 2022

UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No. But foreign insolvency officeholders may obtain recognition under Part XVII of the Act.

Law stated - 28 October 2022

Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

There is no difference in treatment between foreign and domestic creditors in liquidations and reorganisations. Domicile of creditor is not a relevant consideration.

Law stated - 28 October 2022

Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

In principle, liquidators have wide powers to deal with a company's assets in what they consider to be the best interests of creditors (subject to court sanction). However, it is difficult to conceive of circumstances where it would be in the best interests of the liquidation estate for the liquidators to transfer assets of a company to another group company (whether or not in another country) gratis.

If the company in question is a foreign company being wound up both in the Cayman Islands and abroad, the foreign insolvency officeholder could apply under Part XVII of the Act for an order for delivery up of the property of the company. However, in parallel cross-border insolvencies of this sort, one would expect a cooperation protocol to be in place in any event, which should render such application unnecessary.

Law stated - 28 October 2022

COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The issue of COMI does not generally arise directly. Recognition of foreign insolvency practitioners is based on other

considerations (see Part XVII of the Act). Jurisdiction to wind up a foreign company is also based on other factors (set out in section 91 of the Act).

Law stated - 28 October 2022

Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Part XVII of the Act addresses international cooperation where foreign insolvency practitioners have been appointed over a foreign company. The court may exercise its discretion to make orders ancillary to a foreign bankruptcy proceeding for a variety of purposes. The discretion is exercised on the basis of a number of factors, including considerations of comity.

However, Part XVII of the Act does not apply to a situation where a foreign insolvency proceeding has been commenced in respect of a Cayman Islands company. Common law principles apply in such a situation and the circumstances in which the court will be prepared to grant recognition in such situations are limited, although such recognition has been granted, as exemplified in a recent Hong Kong centred restructuring of a Cayman Islands company.

Law stated - 28 October 2022

Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Cayman Islands liquidators have a statutory duty to consider entering into protocols with foreign officeholders to avoid duplication and promote the orderly administration of cross-border insolvency processes.

The Cayman Islands court has adopted practice directions that provide for the use (with appropriate modifications) of the American Law Institute or International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (including the Modalities of Court-to-Court Communication). The Cayman Islands Court has previously communicated with the courts of other jurisdictions, including England and the United States.

Law stated - 28 October 2022

Winding-up of foreign companies

What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

Pursuant to section 91 of the Act, the court has jurisdiction to wind up a foreign company if it has property in the Cayman Islands, has been carrying on business in the Cayman Islands, is the general partner of a Cayman Islands limited partnership, or is registered as a foreign company.

Law stated - 28 October 2022

UPDATE AND TRENDS

Trends and reforms

Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Legislative proposals are being considered that would allow companies that wish to restructure their debts to benefit from a moratorium on claims without the need to enter provisional liquidation (which carries unwelcome connotations and has the potential to trigger default provisions in contracts). This would involve the appointment of restructuring officers (rather than provisional liquidators).

There are also proposals to revise the Companies Act (2022 Revision) (the Act) to empower company directors to present winding up petitions in respect of their companies. Currently, directors are unable to do so unless expressly authorised by articles of association or shareholder resolution. This can create difficulties for the initiation of provisional liquidation restructurings (as provisional liquidators can only be appointed once a winding-up petition has been filed). At present, these difficulties are usually solved via friendly creditor petitions. Revisions to the Act would obviate the need for this work-around practice.

Law stated - 28 October 2022

Jurisdictions

Australia	Gilbert + Tobin
Austria	Freshfields Bruckhaus Deringer
Belgium	Freshfields Bruckhaus Deringer
Bermuda	Carey Olsen
British Virgin Islands	Carey Olsen
Canada	Thornton Grout Finnigan
Cayman Islands	Carey Olsen
China	Dentons
Croatia	Schoenherr
Dominican Republic	Guzmán Ariza
European Union	Freshfields Bruckhaus Deringer
Finland	Waselius & Wist
France	Freshfields Bruckhaus Deringer
Germany	Freshfields Bruckhaus Deringer
Ghana	B&P Associates
Greece	PotamitisVekris
Guernsey	Carey Olsen
Hong Kong	Freshfields Bruckhaus Deringer
Hungary	Nagy és Trócsányi
India	Chandhiok & Mahajan, Advocates and Solicitors
Indonesia	Oentoeng Suria & Partners
Ireland	Dillon Eustace LLP
Italy	Freshfields Bruckhaus Deringer
Japan	Anderson Mōri & Tomotsune
Jersey	Carey Olsen

Malta	Ganado Advocates
Mauritius	Benoit Chambers
Netherlands	Freshfields Bruckhaus Deringer
Romania	CITR SPRL
Singapore	Ashurst
Slovenia	Jadek & Pensa
South Africa	Fasken
Spain	Freshfields Bruckhaus Deringer
Switzerland	Walder Wyss Ltd
Taiwan	Lee and Li Attorneys at Law
Thailand	Weerawong, Chinnavat & Partners Ltd
Ukraine	Vasil Kisil & Partners
United Arab Emirates	Freshfields Bruckhaus Deringer
United Kingdom - England & Wales	Freshfields Bruckhaus Deringer
USA	Paul, Weiss, Rifkind, Wharton & Garrison LLP
Vietnam	Freshfields Bruckhaus Deringer