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Chapter 5

CAYMAN ISLANDS

Angela Barkhouse, Kim Leck and Phillip Pierson[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Legislation and regulations

The legislation and regulations underpinning the corporate insolvency regime in the Cayman Islands are the Companies Act (2023 Revision) (Act), the Companies Winding Up Rules 2018 (CWR), the Insolvency Practitioners' Regulations (Regulations) and the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018 (FBPR).

The personal bankruptcy regime in the Cayman Islands is governed by the Bankruptcy Law (Cap 7) (1997 Revision) and the Grand Court (Bankruptcy) Rules 1977. While personal bankruptcy proceedings are not commonplace in the Cayman Islands, the robust legislation and enforcement options available in the Cayman Islands to creditors should be noted. However, for the purposes of this chapter, our focus will be on the corporate insolvency regime.

Formal insolvency and restructuring procedures

The Cayman Islands has historically been regarded as a creditor friendly jurisdiction with an insolvency regime formed to prioritise the rights and equal treatment of creditors (regardless of their place of domicile) with significant court oversight. The Act provides for several formal procedures available to companies facing insolvency or financial distress, including a scheme of arrangement (scheme), restructuring, provisional liquidation, liquidation by the court (referred to as an official liquidation) and winding up subject to the supervision of the court. For completeness, the Act also permits the winding up of a solvent company voluntarily and secured creditors have the ability to appoint receivers pursuant to the underlying security documentation.

One of the circumstances in which a company may be wound up by the Grand Court of the Cayman Islands (Court) is if the company is unable to pay its debts.[2] A company is deemed to be unable to pay its debts if:[3]

a a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due has served a demand requiring the company to pay the sum due (statutory demand), and the company has for the space of three weeks succeeding such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

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1 Angela Barkhouse is a managing director, Kim Leck is a director and Phillip Pierson is an associate director at Quantuma.

2 Companies Act (2023 Revision), s 92(d).

3 idem., s 93.

b execution of other process issued on a judgment, decree or order obtained in the court in favour of any creditor against the company is returned unsatisfied in whole or in part; or

c it is proved to the satisfaction of the court that the company is unable to pay its debts.

The language of the Act emphasises that the ability of a company to pay its debts is based on the cash flow test. However, recent case law and authorities suggest that the cash flow test is not confined to consideration of debts that are immediately due and payable; consideration is also to be given to debts that will become due and payable in the reasonably near future.[4] Therefore, aspects of a balance sheet test are incorporated in the determination of whether a company is unable to pay its debts.

Segregated portfolio companies

The Act provides for the creation of what is referred to as a segregated portfolio company (SPC). An SPC is a corporate company that can operate segregated portfolios (SPs) with the benefit of statutory segregation of assets and liabilities between those SPs. The principal advantage of an SPC over a standard exempted company is to protect the assets of one SP from the liabilities of other SPs each of which may have different shareholders and stakeholders. However, while the SPC is considered to be a single legal entity, any SP of or within an SPC shall not constitute a legal entity itself, separate from the SPC.[5]

If, in relation to an SPC, the court is satisfied that the assets attributable to a particular SP are or are likely to be insufficient to discharge the claims of creditors in respect of the SP, the court may make a receivership order in respect of that SP. The receivership order shall direct that the business and assets of, or attributable to, the SP shall be managed by a receiver for the purposes of the orderly closing down of the business of or attributable to the SP and the distribution of the assets attributable to the SP to those entitled to have recourse thereto.[6]

It should be noted that a receivership order may not be made if the SPC is in winding up and shall cease to be of effect upon commencement of the winding up of the SPC. In addition, no resolution for the voluntary winding up of an SPC of which any SP is subject to a receivership order shall be effective without leave of the court.[7]

Secured creditors

It should be noted that the winding up of a company does not affect a secured creditor's ability to enforce its security. Leave of the court is not required and reference to the liquidator does not need to be made by the secured creditor.[8] While there are no statutory provisions governing the appointment of receivers over charged assets, secured creditors rely on the charge document, which defines circumstances in which such appointments may be made (i.e., without any court involvement). The primary duties of the receiver are detailed within the charge document and are generally to take possession of, and sell or manage (or both), the secured property for the benefit of the secured creditor.

4 *Re Weavering Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

5 Companies Act (2023 Revision), s 216.

6 idem., s 224.

7 ibid.

8 idem., s 142.

Dissolution of a company

In respect of winding up by court order, when the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved.[9] In respect of SPs, an order for dissolution extinguishes its creditors' claims against the SPC notwithstanding that the SPC has not been liquidated or dissolved.[10] It is important to note that the Act does not contain any statutory provisions to set aside a company's dissolution, whether the company was dissolved via voluntary liquidation or official liquidation. However, in a judgment dated 24 March 2022 in *Re Porton Capital Inc and Porton Capital Limited*, the Honourable Justice David Doyle provided useful guidance on the ability to set aside such dissolutions obtained by fraud.

Upon the dissolution of a company, any unclaimed dividends or undistributed assets in the possession or control of a liquidator or former liquidator shall be held for the benefit of those entitled to such assets.[11] At the end of one year post-dissolution, any remaining assets shall be transferred to and vested in the Financial Secretary for the benefit of the Cayman Islands.[12] Thus as with other jurisdictions, it is important to deal with such assets prior to dissolution.

ii Policy

While the Cayman Islands has historically been regarded as a creditor friendly jurisdiction, it has more recently demonstrated a desire to move towards a more debtor friendly landscape with regular court approvals of cross-border schemes and the granting of debtor in possession or light-touch provisional liquidation orders and with the introduction of the restructuring officer regime (both further discussed below). This move towards a more debtor friendly landscape has not coincided with any paring back of director's duties, voidable transactions, and Court and regulator oversight typically associated with a creditor friendly jurisdiction.

Restructuring officer regime

Insolvency and restructuring practitioners across the Cayman Islands welcomed the enactment of the Companies (Amendment) (No. 6) Act, 2021 (Amendment) effective from 31 August 2022. The Amendment, now consolidated into the Part V of the Act, outlines the process for a restructuring process distinctive from the 'traditional' liquidation processes, while still being under the supervision of a qualified insolvency practitioner (known as a restructuring officer) and the court.

The drawbacks of the previously used restructuring via a provisional liquidation is largely addressed where:

a the process is designed specifically to support restructuring;
b the moratorium is immediate;
c the nomenclature is less associable with liquidation and winding up; and
d the process deals with unsecured creditors collectively.

The Act provides that the restructuring plan can take the form of a compromise or arrangement between the company and its creditors or members (or classes thereof), either pursuant to the

9 idem., s 152(1).
10 idem., s 152(2).
11 idem., s 153(1).
12 Companies Winding Up Rules, 2018, O.23 r.6(1).

Act, to the law of a foreign country or by way of consensual restructuring.[13] This indicates that the tools to affect the restructuring are not just limited to schemes but also English schemes of arrangement, Chapter 11 in the United States (US) and equivalent procedures under non-Cayman Islands restructuring regimes.

Head count test

In respect of schemes, and as discussed further below, pursuant to the Act, a majority in number (i.e., more than 50 per cent) (head count test) representing 75 per cent in value (value test) of the creditors or class of creditors, or members or class of members, as the case may be, must approve the scheme prior to it returning to the court for sanction.[14] The Amendment also removed the head count test requirement as it relates to schemes between a company and its members or class of members, as the case may be.[15] For the avoidance of doubt, this also applies to member schemes within a restructuring officer proceeding.[16] This addresses the issue encountered in scenarios where the value test is satisfied but the head count test, which usually occurs when a nominee shareholder (or shareholders), representing a significant value of shareholdings, votes in favour of a scheme but multiple small shareholders vote against and block the proposed scheme.

iii Insolvency procedures

General insolvency procedures

The general insolvency procedures available to wind up or rescue companies in the Cayman Islands are:

a scheme of arrangement;
b restructuring officer regime;
c provisional liquidation;
d liquidation by the court (official liquidation); and
e winding up subject to the supervision of the court.

Scheme of arrangement

Where a compromise or arrangement is proposed between a company and its creditors or members or any class of them, the court may, on application by an eligible party (discussed in the next section), order a meeting of the creditors or members or any class of them (scheme meeting), as the case may be, to be summoned.[17]

If such scheme meeting is sanctioned, the first requirement is for a majority in number (i.e., more than 50 per cent) representing 75 per cent in value of the creditors or class of them, as the case may be, present and voting either in person or proxy at a scheme meeting, to agree to such compromise or arrangement; in the case of members or a class of them, as the case may be, only the value test must be met. The second requirement is for the court to then sanction the compromise or arrangement after which it would be binding on all the

13 Companies Act (2023 Revision), s 91B(1)(b).
14 idem., s 86(2).
15 idem., s 86(2A).
16 idem., s 91I (3).
17 idem., s 86(1).

creditors or members or the class of them, as the case may be, and also on the company or where a company is in the course of being wound up, on the liquidator and contributories of the company.[18]

In respect of timing, it generally takes 10 to 12 weeks from the date of the initial court application to the approval of the scheme. Negotiations with creditors or members, as the case may be, can commence in advance of the application, however, which can reduce this time frame.

The protection of a statutory moratorium (i.e., to stay or restrain proceedings against the company) is not available with standalone schemes and as such, often many companies negotiate schemes in conjunction with the use of a provisional liquidation. Companies also have the ability to utilise the restructuring officer regime to effect a scheme.

Restructuring officer regime

A company, through its directors, can present a petition to the court seeking to appoint a restructuring officer on the grounds that the company: [19]

a is or is likely to become unable to pay its debts (as defined above); and

b intends to present a compromise or arrangement to its creditors (or classes thereof), either pursuant to the Act, the law of a foreign country or by way of a consensual restructuring.

The directors have similar powers to make an *ex parte* application to the court for an order appointing an interim restructuring officer to take immediate effect.[20]

Importantly, a moratorium commences immediately upon the filing of the restructuring petition against any suit, action or other proceedings, other than criminal proceedings, resolutions to wind up the company, or filing of a winding-up petition against the company without leave of the court.[21] However, the rights of secured creditors are not affected.[22]

While the moratorium does not apply to criminal proceedings, the Act provides powers to the company through its directors, creditors, contributories and the Cayman Islands Monetary Authority (CIMA) to apply to the court for a stay of such proceedings.[23] However, no such power is provided for the restructuring officer and the restructuring order may remove any power of the directors to make such applications. This does not appear to be the intent or desire of the Amendment, and insolvency and restructuring practitioners are awaiting confirmation on whether amendments to resolve this potential issue will be made.

Similar timing expectations mentioned above for schemes apply to the restructuring officer regime. It should be noted, however, that at any time after the appointment of a restructuring officer, the court may, on hearing an application from the company acting by its directors, a restructuring officer, a creditor or contributory of the company, or CIMA, among other things, discharge the order appointing the restructuring officer.[24]

18 idem., s 86(2).

19 idem., ss 91B(1) and (2).

20 idem., ss 91C(1) and (3).

21 idem., s 91G(1).

22 idem., s 91H.

23 idem., s 91G(2).

24 idem., s 91E.

Provisional liquidation

The court may, at any time after the presentation of a winding-up petition but before the making of a winding-up order, appoint a provisional liquidator.[25] Such application may be made on the grounds that:[26]

a there is a prima facie case for making a winding-up order; and

b the appointment of a provisional liquidator is necessary in order to:

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

In addition, an application may be made by the company (and not creditors, contributories, or CIMA) *ex parte* on the grounds that:[27]

a the company is or is likely to become unable to pay its debts (as defined above); and

b the company intends to present a scheme to its creditors.

It should be noted that when a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court.[28] In respect of schemes, as discussed above, this automatic moratorium provides the 'breathing space', where required, to affect the scheme; however, this course of action is likely to be less frequently applied with the enactment of the restructuring officer regime. The automatic stay does not affect a secured creditor's ability to enforce its security.

In respect of timing, if the purpose of the provisional liquidation is to facilitate a scheme, the hearing of the winding-up petition is generally adjourned until the completion of the scheme. However, if the purpose is primarily the protection of the assets until the hearing of the winding-up petition, such hearing is usually heard as soon as the court is available.

In addition, an application for provisional liquidation may be concluded if:[29]

a the winding-up petition is withdrawn or dismissed (including by way of an appeal); or

b an application to discharge the order for the appointment of a provisional liquidator is made.

Liquidation by the court (official liquidation)

One of the primary functions (and objectives) of an official liquidator is to collect, realise and distribute the assets of the company to its creditors and if there is a surplus, to the persons entitled to it.[30]

The court has jurisdiction to make winding-up orders in respect of:[31]

a an existing company;

b a company incorporated and registered under the Act;

c a body incorporated under any other law; and

25 idem., s 104(1).

26 idem., s 104(2).

27 idem., s 104(3).

28 idem., s 97(1).

29 Companies Winding Up Rules, 2018.

30 Companies Act (2023 Revision), s 110(1).

31 idem., s 91.

d a foreign company that:
- has property located in the Cayman Islands;
- is carrying on business in the Cayman Islands;
- is the general partner of a limited partnership; or
- is registered under Part IX of the Act (referred to as overseas companies).

A company may be wound up by the court if:[32]

a the company has passed a special resolution requiring the company to be wound up by the court: a special resolution is passed by a majority of at least two-thirds of the company's members at a general meeting;[33]

b the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

c the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

d the company is unable to pay its debts (as defined above); or

e the court is of the opinion that it is just and equitable that the company should be wound up.

In respect of a statutory demand it should be noted that should the underlying debt be disputed, the company can apply to court to restrain the presentation of a winding petition or adjourn the hearing of a winding-up petition pending the resolution of such dispute.

In respect of directors, while the Act does not prohibit the continuation of trading a company while it is insolvent (otherwise known as wrongful trading), the directors can be made personally liable for resulting losses for breach of fiduciary duty to act in the best interests of the company. The solvency status of a company determines whose interests the directors should have regard to. In the instance of insolvent companies, the directors should have regard to the interests of creditors and safeguarding the company's assets to prevent or minimise the risk of the company not being able to pay its debts.[34]

The automatic stay that applies when a winding-up order is made or a provisional liquidator is appointed does not apply to the presentation of a winding-up petition.[35] However, at any time after the presentation of the winding-up petition and before a winding-up order has been made, the company or any creditor or contributory may apply for a stay of action or proceeding against the company, including a criminal proceeding.[36]

Unless the court otherwise directs, a liquidation committee shall be established in respect of every company that is being wound up by the court. The membership of the liquidation committee is dependent on whether the company is regarded as solvent or insolvent.[37] The liquidation committee acts as a sounding board for the official liquidator in respect of important decisions encountered during the course of the liquidation and also reviews the remuneration of the liquidator.

32 idem., s 92.

33 idem., s 60(1).

34 *Re Prospect Properties v. McNiell* [1990-91 CILR 171].

35 Companies Act (2023 Revision), s 97(1).

36 idem., s 96.

37 Companies Winding Up Rules, 2018, O.9, r.1.

When a winding-up order has been made, 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 void unless the court otherwise orders.[38] There is no statutory power to disclaim onerous contracts available to official liquidators pursuant to the Act.

In respect of timing, there is no mandated length of time in which an official liquidation must be completed. The length of such official liquidation is dependent on the complexity of the issues that need to be addressed and are encountered therein.

When the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of that order or such other date as the court thinks fit, and the company shall be dissolved accordingly.[39]

Winding up subject to the supervision of the court

Where a company is being wound up voluntarily, its liquidator shall apply to the court for an order that the liquidation continue under the supervision of the court if the directors do not sign a declaration of solvency within 28 days of the commencement of the voluntary liquidation.[40] A voluntary liquidation is generally deemed to commence at the time of the passing of the resolution for winding up.[41]

In addition, during a voluntary liquidation, the liquidator or any contributory or creditor of the company may apply to the court for an order for the continuation of the winding up under the supervision of the court (notwithstanding that the declaration of solvency has been made) on the grounds that:[42]

a the company is or is likely to become insolvent; or

b the supervision of the court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories.

The procedures, issues and timing remain the same as discussed in the above section on liquidations by the court.

iv Starting proceedings

Scheme of arrangement

The court may, on the application of the following parties, order a scheme meeting to be summoned in such manner as the court directs:[43]

a the company;

b any creditor of the company;

c any member of the company; or

d where a company is being wound up, the liquidator.

As mentioned above, a majority in number (i.e., more than 50 per cent) representing 75 per cent in value of the creditors or class of creditors, as the case may be, must approve the scheme prior to it returning to the court for sanction; in the case of members or a class of them, as

38 Companies Act (2023 Revision), s. 99.

39 idem., s 152(1).

40 idem., s 124(1).

41 idem., s 117(1).

42 idem., s 131.

43 idem., s 86(1).

the case may be, only the value test must be met. This means that should any one class of creditors or members reject the scheme, the scheme would be blocked from proceeding. There is currently no ability to cram down a dissenting class. As such, the structuring of the constitution of classes is critical to avoid the situation of a dissenting class blocking the scheme from proceeding. For example, only those creditors whose rights are affected by the scheme are to be taken into consideration so a particular class can be made up of a group of creditors with similar rights rather than splitting that group into multiple discrete classes with identical rights.

Restructuring officer regime

An application for the appointment of a restructuring officer may be made by a company acting by its directors.[44] A company acting by its directors may also make an *ex parte* application for the appointment of a restructuring officer on an interim basis pending the hearing of the petition to appoint a restructuring officer.[45]

An order for the appointment of a restructuring officer may be varied or discharged, at any time after the order has been made, upon the application of: [46]

a the company acting by its directors;
b a restructuring officer appointed over the company;
c a creditor of the company (including a contingent or prospective creditor);
d a contributory of the company; or
e CIMA in respect of any company that is carrying on a regulated business in the Cayman Islands.

Provisional liquidation

An application for the appointment of a provisional liquidator may be made by:[47]

a a creditor of the company;
b a contributory of the company; or
c CIMA in respect of any company that is carrying on a regulated business in the Cayman Islands regardless of whether CIMA presented the winding-up petition.[48]

Upon hearing the provisional liquidation application, the court may, among other things, make a provisional liquidation order. The date of commencement is the date of the provisional liquidation order.

An order for the appointment of a provisional liquidator may be varied or discharged upon the application of:[49]

a the person on whose application the order was made;
b the petitioner, if he or she was not the person on whose application the order was made;
c in the case of a creditor's petition, any other creditor;
d in the case of a contributory's petition, any other contributory; or
e the company, acting by its directors.

44 idem., ss 91B(1) and (2).
45 idem., ss 91C(1) and (2).
46 idem., s 91E(1).
47 idem., s 104(1).
48 idem., s 104(6).
49 Companies Winding Up Rules, 2018, O.4, r.5.

Liquidation by the court (official liquidation)

A winding-up petition may be presented by:

a the company;

b any creditor or creditors (including contingent or prospective creditor or creditors);

c any contributory or contributories; or

d CIMA in respect of any company that is carrying on a regulated business in the Cayman Islands.[50]

Upon hearing the winding-up petition, the court may, among other things, make a winding-up order.[51]

If, before the presentation of a petition for the winding up of a company by the court:[52]

a a resolution has been passed by the company for voluntary winding up,

b the period, if any, fixed for the duration of the company by the articles of association has expired,

c the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred, or

d a restructuring officer has been appointed pursuant to Section 91B or 91C of the Act and the order appointing the restructuring officer has not been discharged,

the winding up of the company is deemed to have commenced at the time of passing of the relevant resolution or the expiry of the relevant period or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to Section 91B of the Act.

In any other circumstance, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up.[53]

Every person who intends to appear and be heard on the hearing of a winding-up petition shall give notice of his or her intention to the petitioner's attorneys, including whether he or she intends to oppose the petition.[54] The court will take into consideration the concerns of those with an economic interest in the outcome of the hearing. For example, if the company is deemed to be insolvent, unsecured creditors will have an economic interest, whereas if the company is deemed to be solvent, the shareholders will have an economic interest.

Winding up subject to the supervision of the court

As mentioned above, the following parties may apply to the court for an order that the liquidation continue under the supervision of the court:[55]

a voluntary liquidator;

b any contributory; or

c any creditor.

50 Companies Act (2023 Revision), s 94(4).

51 idem., s 95(1).

52 idem., s 100(1).

53 idem., s 100(2).

54 Companies Winding Up Rules, 2018, O.3.

55 Companies Act (2023 Revision), ss 124(1) and 131.

Upon hearing the supervision application the court may, among other things, make a supervision order. The date of commencement of the court supervised liquidation would be the date of the passing of a resolution to wind up the company voluntarily.

As with liquidations by the court, persons with an economic interest in the outcome of the hearing may oppose the supervision application for the court's consideration.

Professional qualification and residency requirements

It should be noted that to accept an appointment by the court as official liquidator of any company, a person shall be a licensed insolvency practitioner or a qualified professional accountant with the relevant experience prescribed within the Regulations as well as resident in the Cayman Islands.[56] A foreign practitioner may be appointed to act jointly with a resident qualified insolvency practitioner.[57] Foreign practitioners are commonly appointed when substantial cross-border issues are to be addressed in jurisdictions in which that foreign practitioner may have easier access or experience.

Power to stay winding up

The court may at any time after an order for winding up, on the application either of the liquidator or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings either all together or for a limited time.[58]

International cooperation

Upon the application of a foreign representative, the court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:[59]

a recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor;

b enjoining the commencement or staying the continuation of legal proceedings against a debtor;

c staying the enforcement of any judgment against a debtor;

d requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

e ordering the turnover to a foreign representative of any property belonging to a debtor.

An ancillary order may only be made against:[60]

a the debtor itself; or

b a person who or is a relevant person, defined as any person who:[61]

- has made or concurred with the statement of affairs;
- is or has been a director or officer of the company;
- is or was a professional service provider to the company;

56 Insolvency Practitioners' Regulations 2018, Regulations 4(1) and 5(1).

57 Companies Act (2023 Revision), s 108(1).

58 idem., s 111(1).

59 idem., s 241(1).

60 idem., s 241(2).

61 idem., s 103(1).

- has acted as a controller, adviser or liquidator of the company or receiver or manager of its property; or
- is or has been concerned or has taken part in the promotion or management of the company.

v Control of insolvency proceedings

In respect of schemes, during the process of the scheme, the directors remain in control of the company, if it is not in liquidation, and have the ability to draft the details and provisions of the scheme. In the case of provisional liquidations, as discussed below, the court will determine what powers, if any, will remain with the directors. However, in either case, it is common practice to utilise the expertise of an insolvency practitioner to assist with and implement the scheme.

In respect of the restructuring officer regime, restructuring officers are subject to court supervision and shall carry out only such functions as the court may confer on that person, and that person's power may be limited by the order appointing that person.[62] The court will make similar considerations when determining the powers (including reporting obligations) to be conferred on a restructuring officer as is done with provisional liquidations, discussed in the next paragraph.

In respect of provisional liquidations, as with restructuring officers, provisional liquidators are also subject to court supervision and shall carry out only such functions as the court may confer on that person and that person's powers may be limited by the order appointing that person.[63] The powers (including reporting obligations) conferred on a provisional liquidator is typically driven by the reason for the appointment. For example, in instances where a restructuring is being proposed using a scheme, often the court permits the directors to remain in control of the company subject to supervision of the court and provisional liquidator. These types of provisional liquidations are referred to as light-touch provisional liquidations.

In respect of official liquidations and winding ups subject to the supervision of the court, on the appointment of an official liquidator all the powers of the directors cease, save that directors retain residual powers to allow them to initiate an appeal against the winding-up order.[64] The official liquidator therefore controls the company's affairs subject to the supervision of the court (i.e., official liquidators are officers of the court[65]).

For the avoidance of doubt, and as mentioned above, winding-up orders do not affect a secured creditor's entitlement to enforce its security over the whole or part of the assets of the company.

vi Special regimes

As mentioned above, the primary legislation and regulations governing the insolvency regime are the Act, the CWR, the Regulations and the FBPR. There are no sector-specific insolvency regimes such as in respect of banks, broker dealers, insurance companies and other entities regulated by CIMA.

62 idem., s 91B(4).

63 idem., s 104(4).

64 Companies Winding Up Rules, 2018, O.3, r.22(4).

65 Companies Act (2023 Revision), s 108(2).

However, it should be noted that CIMA has the power to appoint a person to assume control of a licensee's or registered person's affairs (referred to as a controller via a process known as a controllership) if it appears to CIMA that such licensee or registered person has failed to comply with any of its mandated requirements or regulations (for example, failing to file annual audited accounts to CIMA, carrying on business fraudulently, or not conducting the direction and management of its business in a fit and proper manner). The controller has the power to terminate the business of the licensee or registered person and the controllership may then be converted into liquidation by court application (either on a provisional or official basis).

vii Cross-border issues

UNCITRAL Model Law on Cross-Border Insolvency

The Cayman Islands has not adopted or implemented the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency; however, the court takes a pragmatic approach and utilises many of the principles contained therein when dealing with cross-border issues.

The court's discretion to make ancillary orders

In determining whether to make an ancillary order, the court shall be guided by matters that will best assure an economic and expeditious administration of the debtor's estate, consistent with the following:[66]

a the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

b the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

c the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

d the distribution of the debtor's estate among creditors substantially in accordance with the provisions of the Act;

e the recognition and enforcement of security interests created by the debtor;

f the non-enforcement of foreign taxes, fines and penalties; and

g comity.

As can be seen by the above list, the issue of a company's centre of main interest (COMI) does not play a role in the Cayman Islands. The onus is on the foreign representative to satisfy the court that ancillary relief is appropriate and beneficial in the circumstances.

International protocols

An official liquidator has the duty to consider whether it is appropriate to enter into an international protocol with any foreign officeholder. The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid

66 idem., s 242(1).

duplication of work and conflict between the official liquidator and foreign officeholder. The approval of the court and the foreign court or authority is required prior to the international protocol being binding.[67]

Foreign judgments

The Cayman Islands has not entered into any international treaties with regards to the recognition and enforcement of foreign judgments. Nor has any United Kingdom (UK) treaty or convention been extended to the Cayman Islands other than the New York Convention. The Cayman Islands is also not a signatory to the Hague Convention.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory provision for the recognition of foreign judgements subject to reciprocity being assured between the two jurisdictions, but it has largely been restricted to Australia and its territories.

In all other cases, the recognition and enforcement of foreign judgments is generally recognised under common law. As such, foreign judgment creditors would otherwise open fresh proceedings in the court based on the merits of the foreign judgment with the goal of obtaining a judgment of the court. Once obtained, the remedies available to judgment creditors, including the ability to petition for the liquidation of a company pursuant to the provisions of the Act, become available.

A person, being a judgment creditor under a judgment of a superior court of a foreign country, may apply to the court at any time within six years after the date of the judgment to have the judgment registered in the court.[68] Reciprocal treatment in respect of recognition and enforcement by the courts of any foreign country to judgments given in the court is required for such recognition application to be successful or entertained.[69]

II INSOLVENCY METRICS

The Cayman Islands is an important centre in international finance due to its combination of strong governance, developed legal system derived from English law, global expertise, developed infrastructure and tax neutrality. Financial and insurance services, along with professional, scientific and technical services, represent approximately 50 per cent of the gross domestic product (GDP) of the Cayman Islands' economy.[70] Typically, fund inflows to the Cayman Islands originate from onshore jurisdictions, which are then pooled and deployed towards investments and projects across the globe. Accordingly, the Cayman Islands economy is heavily influenced by the economies of North America, Asia and Europe, which typically deploy capital into the Cayman Islands. As an example, more than half of companies listed on the Hong Kong Stock Exchange (HKEX) are incorporated in the Cayman Islands.

Cayman Islands GDP increased in 2021 by 5.2 per cent compared to 2020 as the initial onset of the global pandemic stabilised and the financial services sector of the Cayman Islands

67 Companies Winding Up Rules, 2018, O.21, r.2.

68 Foreign Judgments Reciprocal Enforcement Law (1996 Revision), s. 4(1).

69 idem., s. 10.

70 Economics and Statistics Office of the Government of the Cayman Islands, 'Industry Share to Cayman Islands GDP at Constant Basic Prices, 2021', at https://www.eso.ky/data/files/Pie%20Chart-GDP%20Share%20by%20Industry%202021.pdf, accessed 22 June 2023.

continued largely unimpeded.[71] Furthermore, company registrations have continued to grow year-on-year since 2017. There were 119,128 active companies registered at the end of 2022, representing a 2 per cent increase compared to 2021.[72]

There is no publicly available information available on companies defaulting on their debt obligations; however, a recent review undertaken by CIMA indicated that, of a group of nine financial institutions reviewed, loans books have been generally resilient throughout the pandemic. The review indicated that this was supported by the robust financial services sector and an ongoing construction boom in the Cayman Islands. Tourism, hospitality and transport sectors were the most adversely impacted sectors. The review identified that borrowers in these sectors were provided with repayment moratoriums and had their facilities restructured to support financial viability. It was reported that borrowers also took steps to downsize their asset base and head count, and brought forward renovations to take advantage of low occupancy rates.[73] The Ministry of Investment, Innovation and Social Development also provided, and subsequently extended, a business stipend and implemented an asset grant program to micro and small businesses involved in the tourism, transport and restaurant sectors to ensure the survival of such businesses during the reduced tourism activity caused by the pandemic.[74]

There is no publicly available data set in relation to insolvencies; however, an analysis of winding-up petitions in the court identified that in 2021 there were six petitions (representing 18 per cent of petitions) presented by companies for the primary purpose of appointing provisional liquidators to facilitate a debt restructuring. There were also an additional 16 petitions filed seeking approval of schemes of arrangement, of which 15 related to companies with primary operations in China and one in Africa.[75]

Global inflationary pressures, rising interest rates, ongoing supply chain impacts, global conflicts and a looming global recession will certainly see flow-on impacts in the Cayman Islands in the short to medium term as they do in onshore jurisdictions.

III PLENARY INSOLVENCY PROCEEDINGS

Significant recent insolvency proceedings in the Cayman Islands include the following.

i Rockley Photonics Holdings Limited

Rockley Photonics Holdings Limited (Rockley) was the Cayman Islands registered holding company of a group of companies operating in the medical technology sector. It is the first

71 Economics and Statistics Office of the Government of the Cayman Islands, 'The Cayman Islands' Compendium of Statistics 2020', at https://www.eso.ky/UserFiles/right_page_docums/files/uploads/the_cayman_islands_compendium_of_statist-18.pdf, accessed 22 June 2023.

72 Cayman Islands General Registry, 'Summary of companies registered annually – 2013 thru 2022', at https://www.ciregistry.ky/wp-content/uploads/dlm_uploads/Companies-stats-2022.pdf, accessed 22 June 2023.

73 Cayman Islands Monetary Authority, 'Thematic Credit Review Report', at https://www.cima.ky/upimages/publicationdoc/ThematicCreditRevi_1640362158.pdf, accessed 28 July 2023.

74 Cayman Islands Government, 'Business Grants and Stipends Resume', at https://www.gov.ky/news/press-release-details/business-grants-and-stipends-resume, accessed 28 July 2023.

75 Faulkner, Liam, 'Cayman Insolvency & Restructuring: A Review of 2021', at https://www.campbellslegal.com/wp-content/uploads/2022/01/Cayman-Insolvency-Restructuring-A-Review-of-2021.pdf, accessed 28 July 2023.

successful use of the new Cayman Islands restructuring officer regime in conjunction with foreign proceedings.

Rockley reportedly encountered financial difficulty due to negative global economic developments, electronic device market headwinds and because its products were not yet commercialised. Accordingly, it commenced negotiations with its key creditors during September 2022.

On 23 January 2023, Rockley filed a petition for relief under Chapter 11 of the US Bankruptcy Code along with a pre-packaged plan of reorganisation involving a debt-for-equity swap. The following day, Rockley presented a petition to the court seeking the appointment of the restructuring officers on the grounds that Rockley was or was likely to become unable to pay its debts and because it had presented a plan of reorganisation to its creditors for approval under Chapter 11. Upon the filing of the petition, Rockley obtained the automatic moratorium.[76]

The restructuring officer petition was heard on 14 February 2023 and a restructuring officer order was made. During February and March 2023, the restructuring plan was amended on multiple occasions but was ultimately confirmed before the US Bankruptcy court on 8 March 2023. On 10 March 2023, the court heard and granted the restructuring officers relief in order to implement the restructuring plan.[77]

ii Atom Holdings

Atom Holdings (Atom) was the Cayman Islands registered holding company of a group operating a cryptocurrency exchange known as AAX.com (AAX). AAX reportedly had two to three million users until it suspended (and never reinstated) its exchange in November 2022. During March 2023, two users of AAX petitioned the court on an *ex parte* basis to appoint joint provisional liquidators (JPLs). On 9 March 2023, the court filed the provisional liquidation order along with a confidentiality order for a period of two months in order to support the JPLs in taking control of Atom's subsidiaries registered in the Seychelles, Singapore and Malta. Subsequently, on 11 July 2023, the court filed a further order appointing the JPLs as joint official liquidators (JOLs).

The court's decisions to appoint the JPLs and JOLs were made despite the petitioners' debts being contingent claims. The court considered that this approach was consistent with public interest factors. The court's decision also provided useful guidance on the application of cross-undertakings to support the appointment of provisional liquidators where the petitioners may not have the means to do so. In order that creditors can access justice, the making of cross-undertakings could be avoided where the means of creditors is limited.[78]

76 Companies Act (2023 Revision), s 91G.

77 Walkers, 'The first restructuring plan under the new Cayman restructuring officer regime', https://globalrestructuringreview.com/article/the-first-restructuring-plan-under-the-new-cayman-restructuring-officer-regime, accessed 2 July 2023.

78 Baker & Partners, 'Cayman Islands court Confirms Importance of Access to Justice in Case Involving Collapse of the AAX cryptocurrency Exchange' https://www.bakerandpartners.com/briefings-articles/cayman-islands-court-confirms-importance-of-access-to-justice/, accessed 17 July 2023.

iii Global Cord Blood Corporation

Global Cord Blood Corporation (GCB) was a Cayman Islands-registered company involved in cord blood collection, processing and storage services. In September 2022, the court appointed JPLs to GCB to prevent misconduct, mismanagement and the dissipation or misuse of assets. The underlying proceedings in the Cayman Islands were based on a winding-up petition on just and equitable grounds; however, there were no allegations of insolvency.

The JPLs applied for Chapter 15 foreign recognition in the US in order to examine witnesses and take evidence. However, the US Bankruptcy Court for the Southern District of New York denied the JPLs' application, finding that GCB was not a 'foreign proceeding' under Chapter 15 because it was not commenced for the purpose of addressing an insolvency, reorganisation or liquidation.[79]

iv The Real Estate and Finance Fund

The Real Estate and Finance Fund (REFF) was a Cayman Islands mutual fund that was dissolved in May 2019 following the conclusion of its voluntary liquidation as conducted by the holder of its sole management share, Giant Management Seychelles Limited (GMS). REFF and related company Worldwide Opportunities Fund SPC (Worldwide) were defrauded by individuals controlling GMS. An application was brought by the JOLs of Worldwide to reinstate REFF on UK common law principals; there was no precedent in the Cayman Islands.

The court found, among other things, that the winding up of REFF was on fraudulent grounds, and that REFF should be reinstated into liquidation under the control of Worldwide's JOLs.[80]

v Modern Land (China) Co, Ltd

Modern Land (China) Co, Ltd (Modern Land) is a Cayman Islands-incorporated holding company with shares listed on the HKEX conducting property investment and development in the People's Republic of China and the US. During 2021, Modern Land defaulted on its New York law-governed debt.

Modern Land proposed a scheme of arrangement in the Cayman Islands, which was approved by the court. It then sought recognition of the Cayman Islands scheme in the US under Chapter 15 of the US Bankruptcy Code. Modern Land did not intend to seek recognition and enforcement of the Cayman Islands scheme (or the Chapter 15 order) in Hong Kong. This appears to be a divergence from previous cases where a Hong Kong scheme would typically be proposed, a practice that had come under scrutiny due to the duplication of costs, among other things.

The US Bankruptcy Court granted recognition of Modern Land's Cayman Islands scheme as a foreign main proceeding, under Chapter 15. The decision supports the position that recognition under Chapter 15 would constitute a substantive discharge of New York

79 Global Restructuring Review, 'JPLs denied Ch15 recognition as blood storage group's provisional liquidation not a collective proceeding', https://globalrestructuringreview.com/article/jpls-denied-ch15-recognition-blood-storage-groups-provisional-liquidation-not-collective-proceeding, accessed 17 July 2023.

80 Ogier, 'The Grand court makes first restoration order in respect of fraudulently dissolved Cayman company', https://www.ogier.com/news-and-insights/insights/the-grand-court-makes-first-restoration-order-in-respect-of-fraudulently-dissolved-cayman-company/, accessed 17 July 2023.

law-governed debt and would not be limited in effect to the US. This contrasts with the UK position established under the *Gibbs* rule that creditors holding debt governed by English law may still sue to recover the full amount of their debts in England even if such debts have been discharged or modified in connection with a non-UK bankruptcy or insolvency proceeding.

In making its decision, the US Bankruptcy Court concluded that Modern Land's COMI was in the Cayman Islands because:

a it was incorporated in the Cayman Islands;
b of scheme creditor support;
c of lack of objection;
d Hong Kong law-governed debt was not sought to be compromised; and
e of the maximisation of value and good faith of the debtor.

Interestingly, the argument in the alternative, that the Cayman Islands scheme could be recognised as a foreign non-main proceeding, was not justified. While it was ultimately immaterial, the US Bankruptcy Court considered that the debtor was not 'established' in the Cayman Islands as the assets were not considered to be in the Cayman Islands, any bookkeeping taken place in the Cayman Islands could not be considered 'non-transitory' and the debtor's economic activities were largely outside of the Cayman Islands.[81]

IV ANCILLARY INSOLVENCY PROCEEDINGS

As detailed above, the court may make ancillary orders of a foreign bankruptcy proceeding for the purposes of:

a recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor;
b enjoining the commencement or staying the continuation of legal proceedings against a debtor;
c staying the enforcement of any judgment against a debtor;
d requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
e ordering the turnover to a foreign representative of any property belonging to a debtor.[82]

In considering such applications the court is guided by matters that will best assure an economic and expeditious administration of the debtor's estate, consistent with: [83]

a the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
b the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
c the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

81 Kirkland & Ellis, 'Modern Land — Recognition of Foreign Restructuring/Insolvency Proceedings Under U.S. Chapter 15 Does Discharge New York Law Debt', at https://www.kirkland.com/publications/kirkland-alert/2022/07/modern-land-recognition-of-foreign-restructuring-insolvency-proceedings, accessed 28 July 2023.

82 Companies Act (2023 Revision), s 241(1).

83 idem., s 242(1).

d the distribution of the debtor's estate among creditors substantially in accordance with the order prescribed by Part V of the Act;
e the recognition and enforcement of security interests created by the debtor;
f the non-enforcement of foreign taxes, fines and penalties; and
g comity.

The matter of *Awal Bank BSC (In Liquidation) (Awal)* involves Charles Russell Speechlys LLP (CRS), which was appointed as liquidator of Bahraini investment bank Awal. CRS filed an application seeking recognition of its appointment as liquidator in the Cayman Islands during December 2022. CRS did this in parallel with seeking recognition in the English High Court which it contended would 'promote comity' and 'ensure consistency across the various jurisdictions'.[84]

In January 2023, the court ordered the recognition of CRS as foreign representative of Awal in the Cayman Islands and relief, including a stay of proceedings without leave of the court, examination and production of records and the turning over of Awal's assets.[85]

V TRENDS

i Restructuring officer regime

The restructuring officer regime was eagerly anticipated by the Cayman Islands restructuring community; however, the rush of restructuring officer appointments has been more of a trickle, with fewer than five applications having been filed at the date of writing. The key features of the restructuring officer regime are described in Section 1, but there is an expectation that the Cayman Islands will grow as a jurisdiction to restructure where:

a the requirement to file a winding-up petition and seek appointment of a provisional liquidator to obtain a moratorium and an opportunity to restructure is no longer required where the moratorium commences upon the filing of the restructuring officer petition;
b the stigma associated with liquidation, even in circumstances where the appointment is a provisional liquidator appointed to restructure the company's affairs, is avoided;
c the process is flexible, allowing for the debtor and restructuring officer to propose a process to the court that provides (in the debtor company and restructuring officer's view) the best possibility of a successful restructuring;
d court oversight is maintained and significant unsecured creditor approval is required to accept a restructuring proposal; and
e the procedure recognises equivalent restructuring procedures in other jurisdictions.

ii Cryptocurrency

As the volatility of cryptocurrency and cryptoasset markets (collectively crypto) continues to provide investors with boom or bust outcomes, practitioners in the Cayman Islands anticipate an increase in insolvencies involving these types of assets and technologies.

84 Global Restructuring Review, 'Bahraini bank's liquidators seek recognition in Cayman and England' https://globalrestructuringreview.com/article/bahraini-banks-liquidators-seek-recognition-in-cayman-and-england, accessed 27 July 2023.

85 Grand Court Notices, Case No. FSD 291 of 2022 (IKJ) *In the matter of Awal Bank BSC (In Liquidation)* dated 18 January 2023.

Other than the liquidation of Atom, the Cayman Islands has not yet been one of featured jurisdictions for cryptocurrency debtor failures.[86] Notwithstanding, many of the prominent crypto platforms have Cayman Islands holding companies, and it is only a matter of time before we see more. The Cayman Islands judiciary is likely to be well placed to deal with crypto failures, as demonstrated in the liquidation of Atom where:

a there was no impediment to contingent creditors with relatively small individual claims to petition the winding up;

b the court did not require the petitioners, given their modest means, to provide undertakings as to damages;

c the court provided a period of confidentiality to significantly reduce the risk of asset and records being dissipated, which is a significant risk inherent to crypto platforms; and

d the court provided strong powers to the liquidators enabling them to take control of group entities and assets quickly.

The court is yet to rule on whether crypto meets the definition of property. While English authority would appear to support crypto being within the scope of an insolvent's estate and private keys being information that would need to be delivered up, unique challenges arise with hacking and loss of private keys, potentially resulting in an asset being unrecoverable.[87]

iii Special purpose acquisition companies

A high proportion of special purpose acquisition companies (SPACs) that were listed on US stock exchanges since around 2019 were incorporated in the Cayman Islands. The popularity of this investment vehicle, in which funds are pooled into a listed entity ready to jump on investment takeover opportunities as they arise (known as De-SPACs), peaked in 2021. It is now apparent that there are a number of SPACs that have been unable to deploy their capital that must now wind up their structures and redeploy their capital elsewhere. This has led to a lot of disappointment and grounds for disputes between sponsors, management and other stakeholders in winding up procedures, which may become a trend in coming years.[88]

iv Sanctions

The invasion of the Ukraine triggered sanctions being imposed against thousands of Russian individuals and businesses by the US, the UK and Europe. It was reported that the Cayman Islands had identified US$8.4 billion in assets connected to Russian companies and individuals since the sanctions began following the submission of 801 compliance reports by Cayman Island financial service providers. Of that, an estimated €300 million in cash had been frozen by financial institutions.[89]

86 *Global Restructuring Review*, 'cryptocurrency in insolvency: is it property and to whom does it belong?', https://globalrestructuringreview.com/article/cryptocurrency-in-insolvency-it-property-and-whom-does-it-belong, accessed 27 July 2023.

87 Wright, Tom, 'Cayman Islands: cryptoassets In Cayman - Destined To Be 'Property'?', at https://www.mondaq.com/caymanislands/fin-tech/896272/cryptoassets-in-cayman--destined-to-be-39property39, accessed 28 July 2023.

88 Roberts, Murray and Weston, George, ''De-SPAC' Transactions: A Cayman Islands and British Virgin Islands Perspective', at https://businesslawtoday.org/2021/06/de-spac-transactions-a-cayman-islands-and-british-virgin-islands-perspective/, accessed 27 July 2023.

89 Michael Klein, 'Cayman holds US$8.4 billion under Russia sanctions', *Cayman Compass*, 12 July 2023.

The execution of sanctions can raise practical difficulties for regulators and financial institutions where those assets under sanction require preservation and maintenance such as superyachts, private jets and real estate assets. While widespread appointments are yet to be reported in the Cayman Islands, insolvency practitioners are anticipating an increase in exposure to sanctioned businesses and assets. This may include insolvency procedures such as court-appointed receiverships where an insolvency practitioner is appointed by the court to, for example, identify and preserve such assets, divert any proceeds from those assets into trust or escrow accounts, conduct investigations into the origin of an asset's funding and potentially realise the asset.