Revamped Cayman Islands restructuring regime takes shape

The new restructuring regime in the Cayman Islands distinguishing between winding-up and recovery gives multinationals another option, say **Alex Davies** and **Spencer Vickers**

Recent amendments to part V of the Cayman Islands Companies Act have updated the domestic restructuring regime and introduced the new role of a court-appointed restructuring officer and a dedicated restructuring petition. The Cayman Islands restructuring officer regime shares certain features with the administration regime in the UK and the Chapter 11 bankruptcy procedure in the US.

As a preliminary (but important) point, the regime now provides a clear distinction between winding-up processes and rescue or recovery paths. Previously, a winding-up petition was required to be presented prior to any application to appoint office-holders (including for the purpose of promoting a restructuring). The filing of a winding-up petition was often the precise act that a distressed company (and/or its stakeholders) was trying to avoid, especially where that event may trigger a public announcement on a stock exchange. Given the global reach of many Cayman Islands companies, it is understandable that stakeholders in other jurisdictions would often have an instinctive negative reaction to terms such as 'winding-up petition' and 'liquidator', particularly in situations where it was believed that a restructuring could aid in ensuring the distressed company could continue as a going concern. It is now possible to initiate restructuring efforts using a bespoke method with the benefit of a statutory moratorium effective from the time of filing a 'restructuring petition' (while avoiding the negative connotations associated with the winding-up petition process).

Key features of the new regime:

- A company may seek the appointment of restructuring officers on the grounds that (i) the company is or is likely to become unable to pay its debts; and (ii) intends to present a compromise or arrangement to its creditors.
- The petition seeking the appointment of a restructuring officer may be presented by the directors of a company: (i) without a shareholder resolution and/or an express power to present a petition in its articles of association; and (ii) without the need to present a winding up petition (which addresses longstanding issues related to the rule in *Emmadart*).
- The moratorium will arise on presenting the petition seeking the appointment of restructuring officers, rather than from the date of the appointment of office-holders, and it will have extraterritorial effect as a matter of Cayman Islands law.

> **Justice Kawaley's judgment confirms that a company may, in response to a winding-up petition, file its own application to appoint restructuring officers**

- The default position is that this will be an *inter partes* process with adequate notice to be given to all stakeholders.
- The powers of restructuring officers will be flexible and will be defined by the terms of the appointment order made by the Cayman Court. The extent to which the directors will continue to manage the affairs of the relevant company will be defined by the order and will depend on the facts of the particular case.
- During the restructuring proceedings, the company will be able to seek sanction of a scheme of arrangement without the need to initiate separate proceedings under section 86 of the Act.
- Secured creditors with security over the whole or part of the assets of the company will still be entitled to enforce their security without the leave of the court and without reference to the restructuring officers. Unsecured creditors and other stakeholders must seek leave to initiate proceedings and circumvent the stay.

On 11 November 2022, the first appointment of restructuring officers was made by the Cayman Islands Court, as set out in the judgment of the Honourable Justice Kawaley in *Oriente Group Limited* (unreported, FSD 231 of 2022 (IKJ), 8 December 2022).

The application to appoint restructuring officers was made by Oriente Group Limited following the expiry of statutory demands and the presentation of a creditor's winding-up petition.

Upon filing the application to appoint restructuring officers, the moratorium immediately came into effect. However, after this date, the petitioners in the Cayman Islands proceedings also filed a winding-up petition in Hong Kong, which the court subsequently determined was in breach of the moratorium.

Justice Kawaley's judgment confirms that a company may, in response to a winding-up petition, file its own application to appoint restructuring officers. The judgment further confirms the reach of the automatic moratorium upon the making of such an application, which the judge described as '*turbo-charging*' the degree of protection in contrast with the former process of presenting a winding-up petition for restructuring purposes.

As high interest and inflation rates continue to put companies under increased pressure, the enacting of the new regime is well timed and, while not appropriate for all circumstances, will be a sensible and effective method by which large, multinational groups may seek to restructure their debt obligations and other affairs for the benefit of their stakeholders (together with recognition/assistance in the UK or abroad, as may be necessary).

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