Cayman Islands publishes reforms to restructuring regime

Insights - 29/10/2021

The Cayman Islands Government has published the Companies (Amendment) Bill, 2021 (**Bill**) which will introduce welcome amendments to the Companies Act (2021 Revision) (**Act**), to facilitate the efficient restructuring of distressed companies for the benefit of their stakeholders. The amendments, which are anticipated to be in force in short order, introduce a formal restructuring procedure for companies outside the traditional winding up process and under the supervision of a "restructuring officer" and the Grand Court of the Cayman Islands (**Court**).

Restructuring Petition

Under the proposed amendments, a company may petition the Court for the appointment of a restructuring officer [1] on the grounds that it is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors (**Restructuring Petition**). The introduction of a bespoke Restructuring Petition will address some of the stakeholder concerns arising from the provisional liquidation regime, and the reputational or commercial consequences associated with the presentation of a winding up petition, which is required as part of the procedure presently in force. In particular:

1. it will no longer be necessary for a winding up petition to be presented in order to facilitate a court-supervised restructuring, and the Court will have no power to wind up a company on the basis of a Restructuring Petition
2. an automatic stay will take effect as soon as a Restructuring Petition is presented (and not once the order is made, as is the case under the current regime), which will prevent the continuation or commencement of any proceedings against the company - including all foreign proceedings, the presentation of a winding up petition or the passing of any resolutions for a company to be wound up - without leave of the Court
3. a petition for the appointment of restructuring officers may be presented without a resolution

of a company's members or an express power in its articles of association. Under the existing regime, in the absence of such authority, directors of a Cayman Islands company must procure a friendly creditor to present a winding up petition in order to engage the Court's jurisdiction to appoint provisional liquidators. This will apply automatically to companies incorporated after the amendments are introduced, while the legislation provides for an "opt-in" option for companies incorporated before that date

4. the requirements for the appointment of a restructuring officer are otherwise the same as those for the appointment of a provisional liquidator under section 104(3) of the Act. That is, they require the satisfaction of a two-limb test; that (a) a company is or is likely to become unable to pay its debts as they fall due; and (b) the company intends to present a compromise or arrangement to its creditors. It is therefore likely that the Court will continue to follow the well-established authorities on the interpretation of this test, which address how the interests of stakeholders are to be balanced and how advanced a restructuring proposal must be for a company to present a Restructuring Petition; see for example *In the Matter of Sun Cheong Creative Development Holdings Limited*(unreported, Smellie CJ, 20 October 2020)

5. the powers of the restructuring officer, including the manner and extent to which such powers will modify the function of the board of directors, are flexible and will continue be defined by the terms of the appointment order

Creditor Rights

The amendments to the Act also ensure that there are adequate protections in place to preserve and protect the rights of creditors, including:

1. requiring that a restructuring Petition be heard on an inter partes basis, unless the company can satisfy the Court that there are grounds justifying an ex parte application (unlike the existing regime which was ex parte by default). This is consistent with recent efforts by the Court to ensure adequate notice of an application is provided to creditors and stakeholders where possible; see for example *In the Matter of Midway Resources International*(unreported, Segal J, 30 March 2021)

2. a contributory or creditor may apply to the Court for a variation or a discharge of an order appointing the restructuring officers, or for the removal and replacement of a restructuring officer. With respect to grounds for removal, we anticipate that the Court will continue to follow the existing authorities on this question which were set out most recently by Doyle J *In the Matter of Global Fidelity Bank, Ltd*(Unreported, Doyle J, 20 August 2021)

3. creditors with security over the whole or part of the assets of the company will remain entitled to enforce that security without the leave of the Court and without reference to the restructuring officer

4. creditors may still present a winding up petition in respect of the Company, with leave of the

Court

5. if the restructuring of a company fails and the company is subsequently wound up, the winding up will be deemed to have commenced from the date of the presentation of the Restructuring Petition, such that official liquidators will be in a position to claw back any preference payments made to creditors within the six months immediately preceding the presentation of the Restructuring Petition and any invalidated transactions in the twilight period between presentation of the Restructuring Petition and the winding up order will be void under section 99 of the Companies Act

Other Amendments

Where Restructuring Officers are able to formulate a viable restructuring plan and wish to pursue a scheme of arrangement:

1. an application may be made in the restructuring proceedings to sanction a compromise or arrangement with the creditors or members of a company, without the need to commence separate proceedings to sanction the scheme of arrangement under section 86 of the Companies Act. This amendment will remove a significant financial and administrative burden, which will be particularly helpful for the restructuring of corporate groups
2. a members' scheme of arrangement will be deemed to be binding on the members of a company if the scheme is approved by a majority of 75% of members in value and no longer also requires the approval by the majority of members in number. A creditor scheme of arrangement will still require approval by a majority of creditors in number representing 75% in value of the creditors

Conclusion

These much-anticipated amendments to the Cayman Islands Companies Act will at last introduce a formal restructuring process distinct from the winding up procedure, with additional flexibility for companies looking to reorganise for the benefit of their stakeholders, and at the same time retain important safeguards for the benefit of unsecured creditors. It is an important step in the ongoing development of the Cayman Islands as a leading financial centre with the ability to effectively and efficiently implement large-scale cross-border restructurings according to established legal principles.

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[1] The restructuring officers appointed to a company are officers of the Court and must include at least one licensed Cayman insolvency practitioner. The Court also has discretion to appoint a foreign practitioner to act as a restructuring officer in appropriate cases.

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