Global Restructuring Review

The Art of the Pre-Pack

Editors
Yushan Ng and Jacqueline Ingram

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Publisher's Note

'Pre-packs' are a hot topic in the world of restructuring and insolvency – wherever you are. But – until now – there hasn't been a thematic overview that sets out the essentials of different jurisdictions while also drawing out what they have in common. This guide changes that.

It draws on the wisdom of 18 pre-eminent practitioners to help the reader become more adept at completing a pre-pack deal, through a series of overviews, country chapters and case studies. *The Art of the Pre-Pack* is GRR's second such guide, joining *The Art of the Ad Hoc* in our library. We hope you enjoy the volume, which will be revised and expanded regularly. If you have feedback, or would like to participate, don't hesitate to get in touch. Please write to us at insight@globalrestructuringreview.com

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Contents

PART III
PRE-PACKS IN THE GLOBAL CONTEXT

Part III

Pre-Packs in the Global Context

7

Cayman Islands

Christopher Harlowe and Christopher Levers[1]

The Cayman Islands has established itself as the jurisdiction of choice for financially sophisticated businesses such as hedge funds, private equity funds, special purpose vehicles and trusts that use offshore vehicles.

Given the prominence of the Cayman Islands, it is unsurprising that it has been at the centre of a number of high-value, complex restructurings over the last few years.[2] Indeed, the Cayman Islands' courts, and specifically its dedicated Financial Services Division, are well experienced and equipped to deal with such matters. The Cayman Islands' jurisprudence is largely based upon English common law, except where specific statutory provisions have been passed or case law developed to deal with issues specific to the jurisdiction or business. Similarly, its judicial system is largely modelled upon its English parent; a number of the Grand Court and Court of Appeal judges in the Cayman Islands are former English high court or court of appeal judges, or experienced former Cayman commercial litigation attorneys, and its final court of appeal is the Judicial Committee of the Privy Council in London.

However, despite its similarities, there is one notable difference between the Cayman Islands and comparable jurisdictions: the Cayman Islands has no formal rehabilitation process akin to the US Chapter 11 or English law administration procedures. Until a dedicated restructuring process is introduced (see Conclusion) the Cayman courts have adapted existing tools to engineer restructurings that are pre-pack in effect.

1 Christopher Harlowe is a partner and Christopher Levers is a counsel at Mourant.

2 These include the recent cases of *Ocean Rig UDW Inc*, *LDK Solar Co Ltd* and *Suntech Power Holdings Co Ltd*.

Provisional liquidations: the tool of choice

Given the lack of a dedicated restructuring regime, the Cayman Islands does not have specific legislation or procedures geared towards implementing a pre-pack restructuring.[3] However, the Cayman courts have adapted provisional liquidations to facilitate restructurings that allow for a pre-packaged sale of assets and businesses where appropriate.

Restructuring provisional liquidations

While a restructuring (including the sale of a business or its assets) can be implemented outside of a formal insolvency process, in practice, this would be relatively uncommon where the company is experiencing financial difficulties, as the spectre of creditor enforcement actions may hinder the company's ability to effectively manage the sales process. As such, and to obtain some protection from the claims of unsecured creditors, a company will usually invoke a formal insolvency process to obtain the protection of the statutory moratorium.

Given that the Cayman Islands does not have a similar insolvency process to Chapter 11 in the United States or an administration in the United Kingdom, the courts have creatively used the appointment of provisional liquidators, which will automatically trigger a moratorium against unsecured creditor claims or enforcement, to achieve those ends. The appointment of provisional liquidators can be made on an expedited basis where immediate protection against such creditor claims is required.

Provisional liquidation procedure

Section 104 of the Companies Law (2018 Revision) (the Law) governs the appointment of provisional liquidators. While a provisional liquidator is normally appointed to prevent the dissipation or misuse of company assets in the period between the issue of a winding-up petition and its eventual hearing, the Cayman Islands has, in absence of an administration-type process, expressly legislated that a provisional liquidator may be appointed to facilitate attempts to rescue the company.

Section 104(3) of the Law provides that the company can make an *ex parte* application to appoint a provisional liquidator on the grounds that it is or is likely to become unable to pay its debts within the meaning of Section 93,[4] and the company intends to present a compromise or arrangement to its creditors.[5]

Somewhat paradoxically, a company seeking to use this provision must first present a winding-up petition against itself and demonstrate its insolvency (on a cash flow basis) as a precondition of seeking the court's permission to implement a restructuring plan to remedy that insolvency.[6] In determining whether to allow such an application, in a recent decision, the Grand Court held that a company's directors cannot unilaterally effect a restructuring

3 A pre-packaged sale is an arrangement by which a company agrees to sell its business or assets, or any part thereof, in principle with a buyer prior to the appointment of an insolvency practitioner. The insolvency practitioner will then complete the sale shortly after being appointed.

4 i.e., that the company is experiencing cash flow insolvency.

5 For the purposes of Section 104(3), both Chapter 11 restructuring or a foreign scheme of arrangement have been held to be examples of compromises and arrangements.

6 At present, Section 104(3) only permits the company to apply for the appointment of provisional liquidators for the purpose of a restructuring and not creditors, contributories or the Cayman Islands Monetary Authority.

using a provisional liquidation without such shareholder approval unless constitutionally empowered to do so.

In *Re China Shanshui Cement Group Limited,*[7] the company's directors caused the company to present a winding-up petition against itself with the view to subsequently applying for the appointment of provisional liquidators to effect a restructuring. However, they did so without first obtaining shareholder approval to do so, and the company's articles of association did not expressly give the company's directors power or authority to issue such a petition. In accordance with the English decision in *Re Emmadart Ltd*,[8] the Grand Court held that a company could not present a winding-up petition without either shareholder sanction or an express provision in the articles of association authorising the directors to do so on the company's behalf, even where the intention of the petition was to save the company rather than to wind it up.[9] The winding-up petition was accordingly struck out for lack of standing.

This decision would, at first blush, appear to limit the use by creditors of schemes of arrangement as, following *Re China Shanshui*, a scheme could only be pursued with the protection of a provisional liquidation, and the moratorium that comes with it, if a company first presented a winding-up petition with the support of its shareholders. The shareholders may not support the restructuring and may, as in the *China Shanshui* case, oppose it.

However, the recent decision of the Grand Court in *CHC Group Ltd*[10] has demonstrated the flexibility of the provisional liquidation in furtherance of a restructuring by confirming that a company may apply for the appointment of a provisional liquidator in the context of a creditor's, as opposed to a company's, winding-up petition.

In the *CHC Group* case, the company could not have presented its own petition for the purposes of a restructuring by way of scheme of arrangement as this was not expressly permitted by its articles of association and it did not have a shareholders' resolution permitting the directors to do so. However, it arranged for a petition to wind the company up to be issued by an intra-group creditor, on the back of which the company then applied for the appointment of a provisional liquidator for the purpose of implementing a restructuring by, *inter alia*, a scheme of arrangement. This was done without obtaining shareholder approval.

The court held that, where a creditor has already filed a winding-up petition in respect of a company, not only may the directors of the company apply by themselves for the appointment of joint provisional liquidators, but they may also do so without a shareholders' resolution or express provision in the company's articles of association.

7 [2015] (2) CILR 255.

8 [1979] 2 WLR 868, first applied in the Cayman Islands in *Re Global Opportunity Fund Ltd* [1997] CILR Note 7a.

9 In doing so, the Grand Court considered that the earlier decision of *Re China Milk Products Ltd* [2011] (2) CILR 61, which held that directors of an insolvent company could present a winding-up petition on behalf of and in the name of the company without reference to the shareholders and irrespective of the terms of the articles, was wrongly decided.

10 Unreported, 24 January 2017.

The provisional liquidation

The successful appointment of provisional liquidators triggers a moratorium to protect against unsecured creditor claims against the company.[11] This will give the company, through the provisional liquidators, the necessary breathing room to effect the restructuring and to complete the sale of the assets.

In this connection, the powers given to the provisional liquidator upon appointment are important. An official liquidator appointed upon the making of a winding-up order is automatically given a full suite of powers set out in the Law. By contrast, a provisional liquidator will instead only have those powers expressly granted by the terms of the appointment order. The powers granted to the provisional liquidators are theoretically individually tailored to each appointment, although they are in practice largely standardised.

The scope of the provisional liquidators' powers will therefore depend upon the reasons for their appointment. In this context, if the provisional liquidator is being appointed for the purpose of completing a pre-packaged sale of the company's assets, the terms of the appointment order should be specifically tailored to meet those needs and expressly allow the provisional liquidator to pursue the possibility of a sale, even if final Court sanction to complete it is still required.

The appointment of provisional liquidators for these purposes does not automatically dismiss or terminate the winding-up petition pursuant to which the provisional liquidators were appointed: the petition is merely stayed for the duration of the provisional liquidation. This gives the Court ongoing oversight over the provisional liquidation, which it normally exercises by listing regular interim hearings at which the provisional liquidators are required to report to the Court on progress.

Recognition of the provisional liquidation in foreign jurisdictions

As the assets that are the subject of sale may be held in jurisdictions outside of the Cayman Islands, the recognition of provisional liquidators appointed by the Cayman Islands' courts is important to ensure that they have the authority to bind the company and creditors or other stakeholders in the foreign jurisdiction in question. There is little concern in this regard as the validity of the Cayman Islands' provisional liquidation regime has routinely been recognised in other jurisdictions. Provisional liquidators appointed under Section 104(3) of the Law have been recognised pursuant to Chapter 15 of the US Bankruptcy Code (including, for example, in the cases of *LDK Solar Co Ltd*, *Suntech Power Holdings Co Ltd* and, more recently, *Ocean Rig UDW Inc*).

Further, although the Grand Court has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency or the Judicial Insolvency Network Guidelines for Cooperation in Cross-Border Insolvency Matters, it will apply common law cross-border insolvency principles to recognise overseas attempts to effect a restructuring. For example, the Grand Court has, in several instances, appointed provisional liquidators to companies in the Cayman Islands (at the behest of either the company itself or creditors) that are the subject of Chapter 11 proceedings in the United States.

11 The moratorium does not prohibit secured creditors from enforcing their security.

Completion of the provisional liquidation

Once the restructuring is completed, the provisional liquidator can apply to have his appointment discontinued and the petitioner (whether company or creditor) can then apply to have the winding-up petition withdrawn so that the company can continue to trade.

However, it may be that the company no longer wishes to trade and the restructuring instead involves the liquidation of that company following the distribution of its assets to its creditors or members, through cash or equity in a 'newco'.

On that basis, the most common mechanism to conduct an orderly liquidation of the company is a scheme of arrangement. This can be effected within the ambit of the provisional liquidation and may be part of the overall pre-pack arrangements.

Schemes of arrangement

A scheme is a court-sanctioned arrangement made between a company[12] and its creditors or members (or any class of them). The essence of a scheme is that it represents a true compromise between the company and its stakeholders (whether creditors or members) or any class of them.[13] There must be some element of 'give and take' and the company proposing the scheme must be able to demonstrate that its creditors or members receive some benefit (even if of nominal value only) in exchange for the surrender of their existing rights in or against the company.

However, despite needing to demonstrate that there is a benefit to creditors or members by virtue of the scheme, this is not assessed by reference to an individual creditor or member. Instead, the court will group creditors or members by class[14] and will need to be satisfied that the class as a whole will benefit. Whether such benefit is sufficient is a commercial matter for the creditors or members, and is not a matter for the court to determine. Accordingly, so long as each class of creditors or members are in support of the scheme, all creditors or members will be bound by it, irrespective of whether they voted for it.

Statutory regime

The jurisdiction of the Cayman court to consider and approve a scheme is found in Sections 86 and 87 of the Law[15] with the procedure for entering into a scheme of arrangement being set out in Section 86 of the Law and Grand Court Rules (GCR) Order 102, Rule 20.[16]

12 The Grand Court may approve a scheme of arrangement in respect of any company that is liable to be wound up in the Cayman Islands.

13 Importantly, a scheme can be entered into with all or some of the members or creditors of a company.

14 The Court requires that creditors be grouped based upon their rights against the company which must be 'not so dissimilar as to make it impossible for them to consult together with a view to their common interest'. These rights are not their private interests but those that they have against the company that may be affected by the scheme.

15 Generally, these provisions are materially the same as those set out in the UK Companies Act.

16 There is also a practice direction dealing with schemes of arrangement, Practice Direction 2 of 2010 – Schemes of Arrangement and Compromise under Section 86 of the Companies Law, which has been recently relied upon in *In Re Uni-Asia Holdings Ltd* (Unreported, 16 May 2017).

Section 86 of the Law provides for court sanction of schemes of arrangement or a reconstruction agreed between a company and its members or a company and its creditors. Further, Section 87 expressly provides that the scheme may involve the transfer of assets belonging to the subject company to a third party:

> *Where an application is made to the Court under section 86 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies . . . and that under the scheme the whole or any part of the undertaking or the property of [the transferor company] is to be transferred to [the transferee company] the Court may . . . make provision for . . . the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.*

The application for sanction can be made by the company, a creditor or, if the company is in liquidation, by the company's liquidator.

Procedure

To initiate a scheme, the company, or the liquidator if the company is in liquidation, will issue:

- a petition seeking the sanction of the proposed scheme; and
- a summons seeking a direction from the court convening a meeting of the class of creditors or members.

The summons is supported by an affidavit setting out the information necessary to allow the court to assess whether it should allow the proposed meetings to be convened. As such, the affidavit should describe the purpose and effect of the proposed scheme, the manner in which the various classes of creditors or members have been composed and any other relevant information. To ensure the court has a full understanding of the scheme, the affidavit should also exhibit the proposed scheme together with any supplementary documents to which it refers, the voting instructions and an explanatory memorandum describing the merits of the proposed scheme.[17]

It is for the company promoting the scheme to determine how classes are to be constituted.

If the court hearing the scheme application is satisfied on the evidence that (1) the class is properly constituted and (2) the explanatory memorandum contains sufficient information to enable the stakeholders to make an informed decision as to the merits of the proposed scheme, it will make an order convening the meeting of creditors or members and give directions regarding the procedure and timetable for doing so.

At the convened meetings, the class of creditors or members will be asked to approve the scheme based on the information provided to them. The voting process itself is straightforward, usually done by way of poll, but the way in which the votes are taken is not necessarily so as, in the context of a members' meeting, a simple head count of those present and voting

17 All documents with which a creditor or member should be provided so that it can make a fully informed vote in meeting.

at the meeting is not always appropriate. For example, a single investor may be acting in several different capacities, such as a proxy, nominee or custodian for multiple underlying investors at the meeting.

Given that the aim of the meeting is to reflect the wishes of those persons with the real economic interest in the company, the Grand Court has held that it will be permitted to 'look through the register' for voting purposes and that a single custodian or nominee will be entitled to vote separately on behalf of each underlying investor,[18] and, to the extent necessary, the court may require the scheme documents to be modified to protect an individual underlying investor's right to be counted.

For the scheme to be approved by the various classes of creditors or members of the company, a majority of 75 per cent in value of the stakeholders voting, whether in person or by proxy, must be obtained. The chairman of the meeting will report the outcome of the meeting to the court and, if the required levels of approval have been obtained, issue a second summons seeking sanction of the scheme.

The Law does not set out the test to be applied by the court when considering whether the proposed scheme will be sanctioned. However, the court must be satisfied that the necessary procedures have been complied with and the interests of all classes of relevant parties, including creditors and shareholders, have been considered. The court will usually consider that the members are the best judges of their own commercial interests and creditors or members who voted at the convened class meetings are entitled to attend and be heard at the sanction hearing.

If the scheme is sanctioned by the court at the sanction hearing, the scheme only becomes effective and binding on creditors or members and against the company itself (or if the company is in liquidation, on the liquidator and contributories of the company) once the order approving the scheme has been filed with the Registrar of Companies in the Cayman Islands.

Using provisional liquidations to implement pre-packaged restructurings

Given the absence of any bespoke legislation dealing with pre-packaged restructurings, there are no specific guidelines such as SIP 16 that a company and its advisers must follow when making the decision to undertake a pre-pack restructuring. However, as a matter of practice, it is always advisable for a company to undertake a similarly rigorous analysis of its position and options before seeking to restructure on a pre-packaged basis so it can defend both the marketing process and price obtained against any subsequent attack or criticism.

This might involve, for example, the appointment of financial advisers to advise on the sale, to market the assets or negotiate with potential third-party buyers (if a newco is not being used to purchase the assets). Perhaps most importantly, it will be critical to engage in advance with the insolvency practitioners who will ultimately seek appointment as provisional liquidators to ensure that they agree with the strategy being deployed and the terms of the restructuring.

Directors of the company should also satisfy themselves that they have discharged their general and fiduciary duties in relation to the sale to avoid any subsequent attack or criticism against them personally in relation to their involvement in the sale process.

18 See *Re Uni-Asia Holdings Limited*, which affirmed the practice set out in *Re Little Sheep Group Limited* [2012] (1) CILR 34.

Once the decision to restructure has been made, and terms of the restructuring (including any pre-packaged proposed sales) have been agreed between all relevant stakeholders (such as secured creditors and proposed provisional liquidators), a winding-up petition would be filed with the Grand Court, whether by the company (with any necessary shareholder sanction) or a friendly creditor as discussed above. An application for the appointment of the insolvency practitioners (who have confirmed that, if appointed, would support the restructuring plan and any pre-packaged sale) as provisional liquidators ought to be filed at the same time.

As part of the affidavit required to be filed in support of that application, the court should be made aware that:

- the company intends to pursue a restructuring;
- the terms of a restructuring, including the pre-packaged sale, have already been agreed with all relevant stakeholders such as secured creditors, unsecured creditors (if they would expect a return upon a sale of the assets) and the proposed purchaser of the assets;
- the company, as part of the agreement of such terms, has considered all of the available options and considers that the terms agreed represent the best deal available to the company in the circumstances and will be for the benefit of creditors;
- the company requires the appointment of a provisional liquidator to obtain the benefit of the moratorium on the enforcement of claims to enable the restructuring to be completed; and
- upon appointment, the provisional liquidators will enter into and complete the various transactions (e.g., the sale of assets or business) required by the terms of the agreed restructuring.

If the court is satisfied that the company has acted appropriately, obtained the necessary advice and undertaken the required steps to ensure that the proposed restructuring is in the best interests of the company's creditors or other stakeholders, it will generally exercise its discretion to appoint the provisional liquidators proposed and, in the terms of its order, expressly provide the appointees with the power to do all acts and take all steps necessary to complete the proposed restructuring including expressly the power to enter into and complete the pre-packaged sale.

Once the restructuring is completed, the petition can either be withdrawn or the company liquidated (with or without the use of a scheme of arrangement to compromise any residual creditor or member claims).

Relevant authorities or examples

To date, there have been no reported cases in the Cayman Islands in which the use of a pre-pack has been expressly approved by the Cayman courts, although a pre-packaged sale of the whole of the company's assets in the context of a restructuring effected through a provisional liquidation (which also involved a scheme of arrangement as part of the restructuring) was approved by McMillan J in the unreported case of *ATU Cayman Holdco Limited* in October 2017.

This case concerned the restructuring of the German tire and motor accessory chain, the Auto-Teile-Unger (ATU) group. The ATU group was headquartered in Germany and had a significant presence in a number of European companies, with approximately 650 branches and several thousand employees. During the mid 2010s, the ATU group began to experience

significant financial difficulties and, as a result, had undergone a number of restructurings that involved, *inter alia*, the 'flip up' of one of the group's UK companies higher in the group hierarchy and then a pre-packaged administration, pursuant to which all of the company's assets were sold to a lender-led vehicle.

Notwithstanding this restructuring, the group again experienced financial difficulty and required further restructuring. This restructuring would involve a solvent sale of the direct or indirect owner of the group's operating companies, Christophorus, to a third-party buyer, the French Mobivia Groupe, clear of all liabilities and encumbrances.

In summary, the proposed restructuring would involve ATU Cayman Holdco Limited (Holdco), the indirect parent of Christophorus, facilitating the sale of Christophorus to Mobivia, while retaining the significant liabilities it held on behalf of the group pursuant to various security documents throughout the group structure.

It was determined that this restructuring would best be done on a pre-pack basis. As a result, the group began a robust mergers and acquisitions process, which resulted in Mobivia being selected as a strategic buyer with terms of the sale being agreed.

However, to ensure a solvent sale to Mobivia, the claims of a number of senior lenders against the ATU group, and Holdco in particular, had to be compromised. Agreements were entered into with the relevant creditors and it was agreed that Holdco would also seek sanction for a scheme of arrangement with those creditors whereby the net sale proceeds of the sale to Mobivia would be used to compromise their claims.

In the circumstances, which involved potential claims from creditors who may have been out of the money, as the break in value was among the senior lenders, it was considered appropriate that the sale and the scheme of arrangement be conducted with the protection of the statutory moratorium on claims using a Cayman Islands provisional liquidation of Holdco.

Insolvency practitioners were engaged and assisted in advising on the restructuring, who prepared a comparison between the return to creditors on a liquidation basis and the return in the proposed restructuring, so that they could confirm to the court that the implementation of the restructuring and the scheme of arrangement were in the best interests of Holdco, the ATU group as a whole and their creditors. Holdco then filed a petition against itself and sought the appointment of provisional liquidators for the purpose of implementing the pre-packaged sale of the group's business and the subsequent scheme of arrangement.

Although apparently unprecedented, the court had no difficulty in the factual circumstances of that case with the provisional liquidators' use of a pre-packaged sale of the company's assets and business with the potential return to creditors and the saving of the group's business being a weighty factor. The court, therefore, made an order appointing the provisional liquidators with the power to take all steps necessary to complete the pre-packaged sale.

Shortly after receipt of the appointment order, in a manner similar to a pre-pack administration, the provisional liquidators took steps to complete the restructuring, including the sale to Mobivia, as agreed prior to their appointment. The provisional liquidators subsequently applied for, and received, sanction for the scheme of arrangements with Holdco's creditors.

As Holdco was returned to solvency as a result of the successful scheme, the winding-up petition was withdrawn and Holdco went into voluntary liquidation thereafter.

Conclusion

Although the Cayman Islands currently has no formal rehabilitation process akin to Chapter 11 in the United States or English law administration procedures, it has filled this gap by making statutory changes to the Law to enable provisional liquidations to be used creatively and flexibly to implement restructurings. As demonstrated by the *ATU* restructuring referred to above, this flexibility can, in factually appropriate circumstances, be extended to permit a pre-packaged sale of some or all of the company's assets or business.

The Cayman Islands has recognised the desirability of a bespoke restructuring regime that would allow the company, a shareholder or a creditor to commence restructuring proceedings, without having to prove the company's insolvency, which would trigger an automatic moratorium preventing the enforcement of claims against the company and the appointment of a restructuring officer to oversee the implementation of the restructuring. The necessary legislation has been drafted but not yet approved or implemented. It is currently unknown if and when the legislation will be passed.

Appendix 1

About the Authors

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Christopher is a partner in the litigation and insolvency department at Mourant in the Cayman Islands. He joined the firm in 2014, having previously been the head of corporate recovery and insolvency at a top-30 London law firm. He specialises in contentious insolvency and restructuring, acting for insolvency practitioners and office holders, directors, shareholders and other stakeholders in distressed situations. Christopher is recognised in both *Legal 500* and *Chambers*.

Christopher Levers
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Christopher is a counsel in our Cayman litigation practice. He joined Mourant in 2014, having practised in the Cayman Islands for the previous three years. Prior to this, he practised in Jamaica and in chambers in London. His practice covers all areas of international commercial, insolvency and contentious trust litigation, acting for office holders, directors, trustees and high net worth individuals. He frequently appears as an advocate or instructing counsel before all levels of the Cayman judicial system, including the Grand Court, the Court of Appeal and the Privy Council. Christopher is recognised as a Rising Star in *Legal 500*.

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