

UPDATE

# Cayman Islands to introduce a dedicated 'restructuring officer'

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The Cayman Islands' legislature has recently gazetted the Companies (Amendment) Bill, 2021 (the **Amendment Bill**), proposing the introduction of a new corporate restructuring process and the concept of a dedicated 'restructuring officer' into the Cayman Islands Companies Act (2021 Revision). Under the Amendment Bill, the filing of a petition for the appointment of a restructuring officer would trigger an automatic global moratorium on claims against the company, giving it the opportunity to seek to implement a restructuring.

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## Restructuring regime in the Cayman Islands

The Cayman Islands has facilitated a number of high-value, complex corporate restructurings in recent years<sup>1</sup> but, like some other English common law jurisdictions, has done so through the use of provisional liquidation rather than through a bespoke restructuring regime similar to UK administration or US Chapter 11.

Although the courts have been adept at adapting the provisional liquidation process for the purposes of restructuring, liquidation proceedings have been less than ideal for these purposes. Before being able to apply for the appointment of a provisional liquidator, it is necessary for a winding up petition to be presented against the company. The presentation of a winding up petition has tended to be perceived in a negative light and this has limited its use as a restructuring process. Further, the presentation of a petition is not in itself treated as the commencement of insolvency proceedings for the purposes of foreign recognition and does not give rise to any moratorium on claims being brought against the company. This only occurs when the court makes an order appointing a provisional liquidator. This has led to timing issues around the foreign recognition of the restructuring proceedings and has left a window during which third parties, in some cases investment managers suspected of fraudulent activity, could seek to frustrate the proceedings.

A further difficulty was highlighted by *China Shanshui Cement Group Ltd 2015 (2) CILR 255*, where it was held that a company's directors could not present a winding up petition without either shareholder sanction or an express provision in the articles of association of the company authorising the directors to present a petition on the company's behalf. Whilst most modern articles do contain such an authorisation, where it is absent this could be an obstacle to timely action being taken to commence restructuring proceedings.

## The Companies (Amendment) Bill, 2021

As set out below, the Amendment Bill addresses the issues identified above relating to the use of provisional liquidations to implement restructurings.

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<sup>1</sup> These include the cases of *Ocean Rig UDW, Inc*, *LDK Solar Co Ltd*, *Suntech Power Holdings Co Ltd*, *Arcapita Investment Holdings Limited*, *ATU Cayman Holdco Limited* and *Tailored Brands Worldwide Purchasing Co*.

## Ability of directors to commence a restructuring

Under the Amendment Bill, a petition for the appointment of a restructuring officer can be presented by the directors of a company without a resolution of its members or an express power in its articles of association. Whilst it would remain possible for members to include an express provision in the articles restraining the directors from doing so, the trend in modern articles has been to allow directors these powers. It should therefore generally be possible for the directors to commence a restructuring.

## Appointment of a restructuring officer

Under the Amendment Bill, a company would have the ability to present a petition to the court for the appointment of a restructuring officer on grounds that the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors (or classes thereof), either pursuant to the Companies Act (2021 Revision) or a foreign law or by way of a consensual restructuring. Importantly, this is not a petition for its own winding up.

A restructuring officer appointed by the court shall carry out such functions as the court may confer on the restructuring officer and may have his or her powers limited by the court. This allows for debtor in possession restructuring proceedings, subject to the oversight of the restructuring officer.

A restructuring officer is required to be a qualified insolvency practitioner in the Cayman Islands but the court may appoint a foreign practitioner to act together with the Cayman insolvency practitioner.

The company may also apply *ex parte* to the court for the immediate appointment of an interim restructuring officer, pending the hearing of its petition for the appointment of a full restructuring officer.

## Automatic moratorium on creditor claims

The filing of a petition for the appointment of a restructuring officer would give rise to an automatic global moratorium on claims against the company. No suit, action, other proceeding or resolution for the winding up of the company shall be commenced or proceeded with except with leave of the court. This prohibition has extraterritorial reach and expressly applies to proceedings brought against a company in a foreign jurisdiction.

The moratorium would not affect security interests. A secured creditor with security over the whole or part of the assets of the company is entitled to enforce their security without the leave of the court.

## Variation and discharge of order appointing a restructuring officer

The Amendment Bill also proposes a certain amount of flexibility in this regime and provides that, any time after the appointment of a restructuring officer, the company, the restructuring officer, a creditor or any contributory may apply to the court for the variation or discharge of the order appointing the restructuring officer.

## Form of restructuring

The Amendment Bill proposes no substantive changes to the forms of restructuring, which have worked well historically.

Under the Amendment Bill, a binding restructuring can be effected without any court involvement if all affected parties agree to it. However, if unanimous consent cannot be achieved, a restructuring can be achieved by the use of a scheme of arrangement. A scheme of arrangement can be adopted to vary the rights of creditors or shareholders under the supervision of the court. The scheme process involves the approval of the scheme by each class of the affected creditors or shareholders (by a majority in number representing 75% in value of those voting at the relevant meeting) and the subsequent approval of the scheme by the court. Under the Amendment Bill, a scheme can now be negotiated and implemented under the supervision of an appointed restructuring officer.

## Conclusion

The proposed changes provide the Cayman Islands with a modern, flexible restructuring process, which includes the best tools available in onshore jurisdictions such as the UK and US. The enhancements – including the ability for the company to easily commence restructuring proceedings, an immediate global moratorium on claims, easier earlier foreign recognition of the restructuring proceedings, the ability to have a debtor in possession process and the safeguards afforded in the legislation and through the restructuring officer – should enable the Cayman Islands to continue to facilitate high value, complex corporate restructurings.

## Contacts

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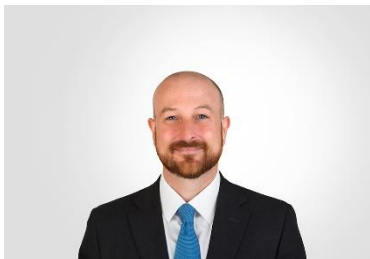
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