Legal Guide

HARNEYS

The Cayman Islands insolvency reform: Restructuring officer and refined scheme of arrangement

In a highly welcomed modernisation, the Cayman Islands Government has introduced the Companies Amendment Act 2021 which will commence on 31 August 2022, allowing a debtor to seek the appointment of a restructuring officer, supported by a worldwide moratorium (viz unsecured creditors), with a view to restructuring its debts through a "refined" scheme of arrangement.

The regime should qualify as a "collective insolvency proceeding" for recognition and assistance by Model Law and similar jurisdictions. The refined scheme will be available to both Cayman Islands and foreign debtors (with qualifications) and will, so long as "efficacy" is likely, compromise both Cayman Islands and foreign law governed debt. It creates the necessary ecosystem for the Cayman Islands to become a global restructuring hub.

The following is our house view about this exciting new regime that promotes global cross border co-operation and reduces transactional costs for stakeholders of distressed companies with multi-jurisdictional capital structures. We believe that professionals have an important positive role to play in creating the necessary consensus and environment for efficient co-operative global restructuring. Private investors are understandably more likely to invest where the rules are predictable, transparent, and broadly consistent across jurisdictions, since this gives reassurance of a fair and efficient exit in distress situations.

Introduction

A rescue regime

- The first ingenuity is the provision of an automatic moratorium, with express worldwide effect at the time of filing, in support of the rescue process, namely the restructuring officer (***RO***).
- Like the present "light touch" regime, the RO may be appointed, alongside the management, in support of a company intending to present a compromise or arrangement pursuant to the law of the Cayman Islands and/or a foreign country.
- The RO regime is intended, for the purposes of foreign recognition and assistance, to be a collective insolvency proceeding under the supervision of the Grand Court that has a financial difficulty threshold, unlike a standard scheme of arrangement without a RO.
- The RO regime does not require the company to be the subject of a winding up petition. It should be noted that the Cayman Islands already had a rescue process: debtors, if insolvent or facing insolvency, were able to petition to appoint a "light touch" provisional liquidator for the purpose of compromising debt with the important caveat that management could stay in place. However, the new regime seeks to decouple rescue from liquidation such that the debtor now seeks the appointment of a "restructuring officer". All formal public insolvency proceedings entail the stigma of insolvency. However, nomenclature is important, and if a debtor has a realistic prospect of rescue, it should be allowed to say so, by name. One cannot generally enter a rescue process without being insolvent, or facing insolvency.

The steps to promoting a refined scheme of arrangement are:

- The company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors, either pursuant to the Act, the law of a foreign country, or by way of a consensual restructuring.
- The company files an application to appoint a RO and the automatic extraterritorial moratorium takes immediate

effect.

- There is a first hearing to determine whether to appoint the RO.
- If appointed, the RO may wish to seek for the appointment (and concomitant moratorium) to be recognised by Model Law and similar jurisdictions as a collective insolvency proceeding. This means that the moratorium's extraterritorial effect as a matter of Cayman Islands law, also (hopefully) has extraterritorial effect in the places "that matter" ie where the debtor has assets, the creditors are located and/or the place of the governing law of the debt.
- Significant consultation and negotiation yields a restructuring plan and the usual scheme of arrangement process begins: (1) convening meeting hearing; and (2) sanction hearing.
- If foreign law is the subject of the compromise then the Grand Court will need expert evidence to prove that in jurisdictions "that matter", the scheme will be recognised ie have "efficacy".
- The RO may wish to seek for the scheme itself to be recognised by Model Law and similar jurisdictions so that dissentient creditors cannot wreck the scheme.

Step 1: Filing the RO application with the Grand Court Registrar

Who can file?

The appointment of a RO by the Court can be applied for by the debtor company, where the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors, either pursuant to the Act, the law of a foreign country, or by way of a consensual restructuring. The power to present such a petition is given to the company acting by its directors and most significantly without the requirement of a resolution of its members or an express power in its articles of association.

The new regime does not allow a creditor to file an application to appoint a RO. It is therefore a company-led process.

Automatic moratorium

Immediately upon the filing of the application for the appointment of a RO, no proceedings shall be proceeded with or commenced against the company (including in foreign countries), no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with leave of the Court, and subject to such terms as the Court may impose. Proceedings include any Court supervised insolvency or restructuring proceedings against the company. In *Re Olympia & York Canary Wharf Ltd* [1993] BCC 154 "legal process" has been defined as a process which requires the assistance of a court, not some self-help remedy or contract default notice. Arbitration proceedings would be caught.

This means that even before the application for the appointment of a RO is heard by the Court, a protective moratorium, upon filing, will give the debtor the necessary breathing space worldwide (subject to local recognition). Debtors would be advised to ensure that they receive a time and date stamped sealed copy of their filing, although it should be noted that even enforcement action filed before the moratorium commences "may not be proceeded with".

The stay is expressed to be extra-territorial. This of course will be subject to other territories recognising the same, but one can envision most common law and Model Law jurisdictions applying legal principles which favour recognition. One exception may arise as to the terms of a stay over a foreign suit if the debt is governed by that foreign law, by reason of the rule in *Gibbs* (see *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509 where an English Court refused to allow a debtor to rely upon a Greek moratorium as a defence to an action for payment of interest on bearer bonds governed by English law and payable in England). It will depend if the suitor is subject to the jurisdiction of the Cayman Islands Court and can therefore be effectively restrained.

Further, in *The Wimbledon Fund, SPC (In Official Liquidation)* (unreported, Justice Parker, FSD 111 of 2019), the Grand Court considered an application for leave pursuant to section 97 of the Cayman Islands Companies Law to commence proceedings in New York against a Cayman Islands company (in liquidation). The threshold question on an application for leave under section 97 is whether the applicant has a claim worth entertaining. The rationale for this is that the company and its liquidator should not be burdened by having to defend a plainly futile claim. The court then goes on to consider whether it is fair to grant leave. Fairness means fairness in the context of the liquidation of the whole, and necessarily involves a consideration of the interests of the creditors and the capacity of the liquidator to deal with the proposed litigation. If the claim can be conveniently decided through the proof of debt process then leave is usually refused.

Automatic moratorium does not apply to secured creditors

Notwithstanding the presentation of a petition for the appointment of a restructuring officer or the appointment of a restructuring officer by the Court under proposed section 91B or 91C, a creditor who has security over the whole or part of the assets of the company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer appointed under proposed section 91B or 91C.

If a breathing space is sought from this group, forbearance agreements should be sought and negotiated.

Step 2: At the first hearing

At the first hearing, the automatic moratorium already in place, the Grand Court will consider whether to grant the application to appoint a RO.

In an analogous area, Cayman Islands law as to the appointment of "light touch" restructuring provisional liquidators (***PLs***), has not traditionally required extensive scrutiny of the viability of the restructuring plan at the early stage of seeking an appointment of a PL. It is likely that this will remain the case for the appointment of ROs. The practical reality at the early stages is that any restructuring plan will change in the future, depending on the outcome of dialogue with stakeholders.

It is likely that the Grand Court will consider in each case whether to add conditions to the debtor by limiting the ongoing moratorium for initial periods such as 30 days and requiring periodic reviews of the same. In some cases, depending on the facts, the Grand Court may well take the view that the filing was timely, sensible, and conducive to a restructuring. Debtors may wish to be proactive in managing stakeholder engagement, communications, and the provision of financial information so that by the time of the first hearing, there is a demonstrably high level of engagement.

It is also likely to be a condition of any standard order that the moratorium will only be continued if the debtor still intends to propose a scheme or other compromise. If it is concluded that this is no longer viable, debtors will undoubtedly be expected to draw this to the Court's attention promptly.

Debtors will need to consider whether they additionally ask the Court for the protection of a moratorium over the debtor's holding company and/or subsidiary in order to facilitate a more comprehensive group restructuring, if they are integral to any proposed compromise and arrangement and any action taken against them might frustrate the scheme. Complexities will no doubt arise. Debtors will need to further consider whether to apply for letters of request to the places "that matter". In practice, implementation of the same will be significantly aided by Chapter 15 assistance.

Frontloading

Although as yet untested, a debtor company that does not avail itself of the RO regime, but then later finds itself in a more traditional insolvency process, is likely to find itself having to answer whether in fact there are reasons to believe that either the company is not viable and/or the creditors simply cannot trust the management. In either case, it may well be that the company will not be able to justify being reorganised subsequently, and that a company-led process simply will not do. This may be a reason for allowing a creditor led RO process in future legislative changes.

Rights of creditors in the RO regime

Creditors have standing to seek the removal or replacement of the RO. Further, when the Court appoints a RO it is required to set out:

- "the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors" (s91B(5)(b)); and
- "any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions" (s91B(5)(c)).

Variation or discharge

The proposed section 91E provides for the variation or discharge of the order appointing a RO by the Court on an application made by the company, a restructuring officer, a creditor or contributory of the company or the authority in respect of a company carrying on a regulated business. An important example of such an application is likely to be where creditors are seeking to remove, or curtail the authority of, some or all of the board of directors.

The proposed section 91F provides for the removal and replacement of a restructuring officer by the Court on an application made by the company, a creditor or contributory of the company or the authority in respect of a company carrying on a regulated business. A RO who has been removed and replaced must prepare a report and accounts for the RO replacing the removed restructuring officer, within 21 days of the date of removal and replacement.

These are sensible protections enabling creditors to seek the *de facto* removal of the board or more precisely the cessation of its powers viz the restructuring.

Seeking a winding up instead

A creditor may take the view that a restructuring is not viable, that any RO should be discharged, and that the company should be wound up. By reason of the automatic moratorium, leave of Court is required to present a winding up petition against the company.

Parrying cross-applications

Since creditors cannot apply to appoint a RO, we anticipate that companies that are not trusted, but have value, will inevitably be encouraged by creditors to apply to appoint a RO, but will find that creditors then seek to denude the board subsequently by Court order. Alternatively, creditors may petition to wind up a company, causing the company to respond by filing a RO application, which will then result in cross applications by creditors seeking to appoint their own RO and have the board's powers curtailed.

Further in the alternative, creditors may file a winding up petition, the company may respond with a RO application, and the creditors may nevertheless move their winding up petition on the basis that there is no viable restructuring of the capital structure of the company in light of its future revenues.

It is to be expected that the Cayman Islands Courts will very much require that the company had fully ventilated the proposed restructuring, such that it is, and the identity of any RO, with the creditors and stakeholders before the first hearing. That is not to say that a detailed restructuring plan would have been presented to the creditors at this stage, since it is precisely because the debtor needs a breathing space that a moratorium is automatic.

Step 3: Recognition and assistance

The UNCITRAL Model Law on Cross Border Insolvency 1997 for those jurisdictions that have signed-up, makes it compulsory to give "recognition and assistance" to a foreign insolvency process based in the Centre of Main Interest (***COMI***) of the debtor; and allows for "discretionary" assistance to be given to "non-main" centres of interest. In either case, there is a strong normative framework for, in essence, "being helpful".

The most efficient recovery for creditors is in theory a single Court dealing with the assets of the debtor universally – saving costs of multiple layers of professionals. It is increasingly the view of insolvency judges that there is an element of "good citizenry" in recognising foreign insolvency processes. The practical and parochial realties that come from the sovereignty of nation states can, on occasion, justifiably impede this judicial ambition.

For those jurisdictions that have not signed up to the Model Law, remarkably innovative and ingenious ways have been found to "be helpful" in using the old common law power to recognise foreign insolvency processes, largely achieving the same result as the Model Law. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. In Hong Kong, a new "common law COMI test" would appear to be applied to recognition to bring itself in line with the Model Law, but the law in Hong Kong as to recognition of offshore insolvency processes is complex. Assistance should be sought from Hong Kong lawyers.

The refined Cayman Islands scheme with its RO, is likely to be recognised by Model Law countries as a "a process of collective enforcement of debts for the benefit of the general body of creditors" since it is a process under the supervision of a RO of a company in financial difficulty seeking to compromise debt under a scheme protected by a moratorium. Whether it is considered a "main" or "non-main proceeding" will depend on the facts of each case and may make little practical difference to the assistance afforded.

Step 4: Refining the scheme of arrangement

The new Act elevates the potency of the traditional scheme of arrangement giving it significant jurisdictional competitive advantages. It is hoped that foreign companies will avail themselves of the Cayman Islands scheme and that it becomes a favourite tool for debtors. It is hoped that the Act will spur legitimate forum shopping to the Cayman Islands by, for example:

- Consensually amending the governing law of the debt to the Cayman Islands

- Migrating a company's place of incorporation from, for example the BVI to the Cayman Islands
- Transferring intra-group liabilities to Cayman Islands obligors, including a co-obligor new co, for bond restructuring;
- Shifting COMI to the Cayman Islands for the purpose of recognition and assistance

The "elevation" of the traditional scheme manifests itself in the following ways:

- It is protected by an extraterritorial automatic moratorium
- It is "supervised" by a Court appointed RO
- It removes the "numerosity" or "headcount" test for members' schemes (only)
- It is likely to obtain Chapter 15 and/or other "recognition and assistance", thereby having "efficacy" (even when, and especially where, foreign law debt is schemed)
- It is available to both Cayman Islands and foreign companies – creating a Cayman Islands restructuring hub

What can be compromised?

The proposed section 91J provides for the powers of the Court when considering an application for the sanctioning of a compromise or arrangement and introduces express provisions to facilitate the reconstruction and amalgamation of companies. The Court may make provision for — (a) 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; (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person; (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company; (d) the dissolution, without winding up, of any transferor company; (e) the provisions to be made for any person who within such time and in such manner as the Court directs dissents from the compromise or arrangement; and (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

The proposed section 91J also provides that where an order provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company. The proposed section 91J further provides that any such property shall, if the order so directs, be freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

Scheming foreign debt – Cayman Islands still follows the "rule in Gibbs"

The appointment of a RO by the Court can be applied for by the debtor company, where the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors, either pursuant to the Act, the law of a foreign country or by way of a consensual restructuring. In relation to foreign debt, Cayman Islands schemes very often scheme foreign debt if the Court can be persuaded that it will be given "efficacy" in that foreign jurisdiction. The "rule in *Gibbs*" is sometimes misunderstood in that it is thought that a "*Gibbs* rule" jurisdiction cannot compromise foreign debt. In fact, it is only that a "*Gibbs* rule" jurisdiction is not permitted to recognise the compromise of foreign debt. For example, the Cayman Islands Grand Court could not recognise the compromise of Hong Kong law governed debt by a Singapore Court. The Cayman Islands Courts are perfectly entitled to compromise foreign debt if that foreign state permits it, recognises it or is immaterial to "efficacy" since it is not a place "that matters" (no assets, no creditors and/or no governing law).

A Cayman Islands Court will not wish to act in vain, and will require expert evidence that the scheme will be recognised and/or effective in the place of the foreign debt.

Another method of "efficacy" is not about the law at all. Rather, it is about pragmatism and enforcement. Of course in the situation where there might well be a right for dissentient creditors to take wrecking action in a jurisdiction, such as the place of the governing law, but for practical reasons, for example, there are no debtor assets there, and so no creditor would bother, since it wouldn't matter even if they did.

Varying New York law debt

A Cayman Islands scheme of arrangement could seek to vary the New York law governed contractual obligations of a company incorporated in the Cayman Islands and the company could obtain recognition of the scheme in New York pursuant to US Chapter 15. Our understanding of the position under US law, based on our experience in cross-border restructurings, is that recognition of a foreign scheme of arrangement takes place under US Chapter 15, which gives

effect to, and extends, the Model law. We understand that recognition, as a procedural matter, results in the commencement of a US Chapter 15 case for the scheme, which then provides the basis for the US Bankruptcy Court to consider a request to extend comity by recognising and enforcing the compromises effected by the scheme. It is our understanding that the effect of such "recognition" and "enforcement" is a variation, as a matter of New York law, of the New York law governed rights and obligations. This is because the variation of New York law governed obligations by operation of New York law will be effective in places which apply the "rule in *Gibbs*". However, these matters should be confirmed with New York lawyers.

Varying English law

Where a Cayman Islands scheme of arrangement includes a variation of English law governed contractual obligations of a company incorporated in the Cayman Islands, the scheme will of course be effective in the Cayman Islands. It may be necessary to take further steps, this *may* include a parallel scheme of arrangement, to ensure that the restructuring has practical effect in any material "*Gibbs* rule" jurisdictions. The scheme company will want to ensure that the compromises are effective not only in the Cayman Islands (as the jurisdiction of incorporation) but in other jurisdictions where its assets are located.

In order to seek recognition of a Cayman Islands RO scheme of arrangement, the RO is likely to avail itself of s426 of the English Insolvency Act 1986 which allows certain jurisdictions, such as the Cayman Islands to be given recognition and assistance of its collective insolvency regimes.

If the English Court agrees to grant the request, Section 426 provides it with the flexibility to choose whether to apply English insolvency law or the insolvency law of the requesting state. This allows officeholders to potentially access powers which are available under English law that they would not have had in their home jurisdiction or to exercise in England powers which they have in their home jurisdiction but which a UK officeholder would not. However, these matters should be confirmed with English lawyers.

Varying Hong Kong law

A Cayman Islands scheme which purported to scheme Hong Kong law governed debt, we understand, would not be recognised in Hong Kong since Hong Kong is a "*Gibbs* rule" jurisdiction. The next question is whether the scheme could nevertheless have practical "efficacy" viz the Hong Kong law governed debt. One would have to consider whether there were dissentient creditors in Hong Kong who would take action (ie vote against or not participate), and whether even if they did so, there are any assets and/or some other connection in Hong Kong making it liable, as a foreign company to being wound up in Hong Kong under the "sufficiency of connection" test. If the scheme included Chapter 15 recognition, where a Cayman Islands Court compromise of Hong Kong law would be recognised and given full effect as a discharge (a non "*Gibbs* rule" jurisdiction), then any Hong Kong dissenters would have to carefully consider whether to do so, if they had exposure to the US. However, these matters should be confirmed with Hong Kong lawyers. The law of recognition in Hong Kong is complex.

Who can act as RO?

Proposed section 91D provides for the requirements related to and functions of restructuring officers and the remuneration of restructuring officers. The proposed section provides that a restructuring officer is an officer of the Court who shall be a qualified insolvency practitioner. The proposed section further provides for the appointment of two or more persons as restructuring officers under section 91B or 91C who shall be authorised to act jointly and severally, unless their powers are expressly limited by an order of the Court.

The proposed section 91D also provides for the appointment by the Court of a foreign practitioner to act as a restructuring officer but shall not act as the sole restructuring officer of a company. The proposed section 91D further provides for an application to be made to the Court by a restructuring officer, a creditor of the company or contributory of the company, in order to determine any question arising in the course of carrying out the restructuring officer's functions.

What is the role of the RO?

A RO must be a qualified insolvency practitioner. This is hardly surprising since the role of the RO is to:

- Provide periodic and detailed reports as to the debtor's financial position and likely restructuring to the Court and stakeholders
- Investigate the affairs of the company, verify the accuracy of financial statements and report any issues to all stakeholders
- Report any failure by the board to provide it with full information

- Robustly advise the board (if it still remains in power) as to behaving in a manner consistent with open, transparent and communicative restructuring principles
- Act as liaison between the company and the creditors and other stakeholders
- Monitor the company's affairs to keep under review whether it remains likely that the moratorium will result in the rescue of the company as a going concern
- Alert stakeholders if the Company no longer intends to compromise its debts so that the automatic moratorium can be terminated and a winding up ensue
- Negotiate, perhaps alongside the board, with creditors to facilitate a debt restructuring at the various levels of debt and interest
- Act as "an honest broker" between stakeholders

What is the role of the board of directors?

The board of directors is permitted to file the application to appoint the RO, and thereby obtain an automatic moratorium, without shareholder approval. Consistent with a "debtor in possession" type regime, the board remains in control of the company and is expected in the period of the moratorium to be actively considering how best to restructure the debts of the company and its operational aspects, to be proposed to creditors. A prudent board will have alerted creditors to the application, the identity of the RO and had early discussions with creditors to outline any nascent plan of restructuring.

The regime is flexible in that any order appointing the RO is required to set out the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors. Much consideration will be given to this, bearing in mind the behaviour of the board and its attitude to open and communicative restructuring processes, as well as its role in the debtor's current demise. Further, an important possible variation application will inevitably be made by creditors seeking to remove, or curtail the authority of, some or all of the board of directors.

RO remuneration

The proposed amendments to section 109, provide for the expenses incurred in a petition for a restructuring officer and during the term of appointment of a restructuring officer to be payable out of the company's assets in priority to all other claims.

Regulated business

The proposed section 91B further requires that where a company which is carrying on a regulated business presents a petition under section 91B(1), the directors of the company shall immediately serve notice of the petition on the authority.

Relation back period

Clause six amends section 100 of the principal Act to provide for any subsequent winding up of a company to be deemed to have commenced at the time of the presentation of the petition to appoint a restructuring officer pursuant to section 91B in circumstances where the order appointing the restructuring officer has not been discharged.

Providing for the appointment of an interim restructuring officer on an *ex parte* application by a company

The proposed section 91C provides for the appointment of an interim restructuring officer by the Court on an *ex parte* application by a company, pending the hearing of the petition. An application under this proposed section may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

It would be unusual to seek the appointment of an interim RO for the following reasons:

- There is an automatic moratorium on filing with the board of directors still remaining in office. There is no obvious situation where the formal appointment of the RO is additionally required on an interim basis before the first hearing – especially since there is no provision for pre-packs.
- Restructuring in an open and transparent process unlikely to win support or trust if proceeded with clandestinely *ex parte*.

- The filing of the RO application – achieving a moratorium straightaway - is in essence *ex parte*.

Shareholder approval not necessary

A petition seeking to appoint a RO may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

Reforms to authority to wind up a company by the BoD

For a company incorporated before the commencement of the new regime, the rule in *The Matter of China Shanshui Cement Group Limited* [2015] (2) CILR still applies to the presentation of winding up petitions and express authority in the articles of association or shareholder approval is required to petition to wind up a company.

For a company incorporated after the commencement of the new regime no express power is required in the articles of association to enable a company to petition to wind up itself; however, the company's articles of association may expressly remove or modify the directors' authority to present such petitions.

Appendix 1: Comparison between new English and proposed Cayman Islands standalone restructuring tools

	English Corporate Insolvency and Governance Act 2020	Proposed Caymans Islands Companies Act amendments
Debtor in possession type tool	Introduces a new standalone moratorium procedure which leaves the directors in control while they implement a plan to rescue the company as a going concern.	Introducing a new standalone moratorium procedure which leaves the directors in control while they implement a plan to rescue the company as a going concern, but director control may be varies at first hearing.
Who can apply?	Directors can apply to go into a moratorium. "Monitor" must be appointed.	Directors obtain a moratorium immediately upon filing for a "Restructuring Officer".
How long is the moratorium?	For an initial period of 20 business days.	Not fixed duration, but applications can be made to lift the moratorium.
Can the moratorium be extended or abridged?	Initial period can be extended without creditor consent after the first 15 business days, by the directors filing. With creditor consent, the moratorium can be extended up to one year by filing at court.	May be amended at the first hearing to give prescribed limits, perhaps periods of extension.
Is the moratorium applied for by Court order?	For English companies with no outstanding winding up petition against it, no Court application is necessary to obtain moratorium. Otherwise Court application needed.	No Court order needed. Moratorium immediately upon filing for a "Restructuring Officer".
When does the moratorium take effect?	Beginning with the business day after the moratorium application is filed at Court.	Immediately upon filing.
Does the moratorium cover all debts/claims?	No. Does not apply to: monitor's remuneration or expenses, goods or services supplied during the moratorium, rent in respect of a period during the moratorium, wages or salary, redundancy payments, certain "financial services" contracts.	Yes. No proceedings shall be proceeded with or commenced against the company (including in foreign countries), no winding up petition may be presented against the company, except with leave of the Court, and subject to such terms as the Court may impose. Proceedings include any Court supervised insolvency or restructuring proceedings against the company. However, notices of crystalisation of a floating charge or notices of acceleration or default are not caught by the moratorium.
Does the moratorium include security?	Yes, the moratorium means that no enforcement of security over the company's property may take place except for certain financial markets collateral security charges. No notice of the crystalisation of a floating charge may be given. However, payments falling due to lenders during the moratorium need to be made.	No, secured creditors are not precluded from enforcing their security by the moratorium.
Can directors end the moratorium by winding up the debtor?	The directors can end the moratorium in the event they consider the rescue of the company as a going concern is no longer viable, by putting the company into administration or liquidation. They must give notice of this to the monitor who will then file a notice of termination of the moratorium.	If directors wanted to end the moratorium in the event they consider the rescue of the company as a going concern is no longer viable, by putting the company into liquidation, they would need leave of Court, since no resolution shall be passed for the company to be wound

	English Corporate Insolvency and Governance Act 2020	Proposed Caymans Islands Companies Act amendments
		up except with leave of the Court, and subject to such terms as the Court may impose.
What is the role of the Monitor/RO?	Monitor the company's affairs to keep under review whether it remains likely that the moratorium will result in the rescue of the company as a going concern.	Not prescribed. Flexibility as to the powers that the board of directors will have in each case and so role may vary. Likely to be: as Officer to the Court: confirming that debtor still intends to propose a scheme or other compromise and that it is viable to do so; investigations and verifications; liaison between creditors and debtors, active role in restructuring process.
Is the board of directors still authorised?	Yes.	Yes, initially upon filing when automatic moratorium is immediately obtained. At first hearing as to whether to appoint RO, Court must "set out the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors".
Eligibility?	Debtor must be or likely to become unable to pay its debts. No application can be made if the company has entered into a moratorium in the previous 12 months without an order of the court. Not available for insurers, banks and certain capital markets arrangements.	Debtor: "is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors".
IS DIP finance available?	The company may take on new finance so long as it discloses that there is a moratorium, and it may grant security over property if the monitor consents. Any new money security can be enforced during the moratorium.	The Court is used to granting orders allowing for DIP finance in certain circumstances, and this will be done by a Court application.
Ipso facto clauses?	"*Ipso facto*" clauses allowing suppliers/creditors to cease supplying in the event of insolvency become unenforceable and suppliers can be forced to continue to supply the company.	No change. *Ipso facto* clauses remain a matter of contract.
Cross-class cram-downs?	Yes. Court may sanction the plan even if one or more classes fail to approve the plan by the requisite majority, and a dissenting class of voters cannot block the plan.	Not available.
Numerosity test for schemes?	No majority in number, or numerosity test, required for Part 26A CA 2006 plans.	Numerosity or headcount test removed for members' schemes only.

Appendix 2: What is not included in the new regime?

There are a number of recent improvements made to the English scheme of arrangement, such as (a) creating a "plan" (Part 26A of the 2006 Act, implemented by the Corporate Governance and Insolvency Act 2020) which allows for cross-class cram-downs; and (b) abolishing the numerosity (or headcount) test. These have not been adopted in the new Cayman Islands regime. Equally there are further amendments in England viz *ipso facto* clauses that for the Cayman Islands have not been introduced. Finally, there is no express provision in the new Act for "DIP" finance allowing new money to be loaned to the debtor company on a super priority basis with no penalty for "preference".

Cross-class cram-downs

The legislation does not modernise the scheme of arrangement to allow for cross-class cram-downs. The tool has been lauded since its adoption in England, is available in Singapore, and clearly improves the chances of a scheme being approved. In England, the Court may sanction a "plan" even if one or more classes fail to approve the plan by the requisite majority, and a dissenting class of voters cannot block the plan (a cross-class cram-down) if the Court is satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and the compromise or arrangement has been agreed by a number representing 75 per cent in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.

We believe that cross-class cram-downs should be legislated for in the future not only to improve schemes in the Cayman Islands but also to better facilitate recognition of foreign schemes that do utilise them.

Numerosity (or headcount) test for creditors' schemes

Unlike the new English legislation, the Cayman Islands Act does not remove the numerosity test for creditors' schemes, only members' schemes. Removal of the numerosity test would lessen the chance of unwarranted "hold out" and improve the chances of many beneficial schemes being approved. We believe that the numerosity test should also be removed for creditors' schemes in the Cayman Islands and should be legislated for in the future.

"Debtor in possession" finance in support of a Cayman Islands scheme

Debtors that have filed for the RO protection will often need access to new credit in order to continue operating as going-concerns and to fund their restructuring. Indeed, the prospect of access to new financing may well be a motivation for filing for the RO application. There are numerous examples of the Cayman Islands Courts allowing DIP type financing ie allowing new money to be loaned to the debtor company, previously in a PL process, on a super priority basis with no penalty for "preference". However, this is an *ad hoc* process.

We believe that "scheme finance" should be legislated for in the future not only to improve schemes in the Cayman Islands but also to encourage debtors to enter RO in the first place to have access to new finance.

Non-enforceability of *ipso facto* clauses

Non-enforceability of *ipso facto* clauses. It is not possible to disclaim onerous contracts in Cayman Islands insolvency proceedings. Generally, Cayman Courts would be expected to give effect to the terms of the relevant lease regarding repossession of an aircraft.

Contracts frequently contain clauses which terminate the contract automatically, or entitle a party to terminate the contract, in the event of the other party becoming insolvent. These are known as "*ipso facto*" clauses.

Such clauses are controversial since they allow one creditor to take priority over other creditors in relation to property that should otherwise form part of the insolvent estate.

Recent changes in England with the coming into force of amendments to the Insolvency Act 1986 introduced by the Corporate Insolvency & Governance Act 2020, make *ipso facto* clauses in contracts for the supply of goods and services unenforceable against an insolvent party. The Cayman Islands does not share this approach and views the operation of such clauses as being essentially a matter of contract.

We do not believe that the contracts that are typical for investments in Cayman Islands' companies should be fettered by *ipso facto* legislation.

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