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Relevance of New Company Liquidation Provisions in the Cayman Islands to Cross-Border Insolvencies

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In May of this year, the corporate liquidation procedures in the Cayman Islands were substantially overhauled. The entire section of the Companies Law (2007 Revision) dealing with liquidations was replaced; a new section on international cooperation was added; Companies Winding Up Rules were introduced for the first time and related rules and regulations came into effect.

The nature of the economy in the Cayman Islands is such that purely domestic insolvency proceedings and even individual bankruptcy proceedings are rarities. The new provisions take into account the international factors which are so often found in liquidations of Cayman Islands companies and seek to ensure that cross-border insolvencies are dealt with economically and expeditiously.

Although the changes and the clarity which they bring are welcome, they are not so radical that company liquidations have changed beyond recognition. There are no major changes to the grounds on which a company may be wound up, either compulsorily (namely, by the court), or voluntarily (namely, following a shareholder resolution). To a large extent, even the new international provisions simply codify the existing common law.

The Companies Winding Up Rules 2008 provide clarity for Cayman Islands insolvency procedures. Previously, reference was made to the English Insolvency Rules 1986 so long as there was no inconsistency between those rules and Cayman Islands law. Much of the English rules were, however, irrelevant as the English insolvency regime incorporates processes which have not been adopted in the Cayman Islands, such as company voluntary arrangements, administration and administrative receivership. Many of the rules found in the Companies Winding Up Rules will be familiar to English practitioners, but the rules are not by any means the same, so care must be taken by those accustomed to applying the English rules to a Cayman Islands company in liquidation.

Who may act as liquidator?

Any person may be appointed to act as a voluntary liquidator (this position is unchanged from the previous practice). This enables foreign insolvency practitioners to take appointments in relation to solvent companies if the shareholders consent. In a compulsory liquidation on the other hand, at least one insolvency practitioner, qualified under the new Insolvency Practitioner's Regulations 2008, must be appointed. These regulations contain a Cayman Islands residency requirement as well as professional qualification and other requirements. The amendments to the Companies Law do however permit a foreign insolvency practitioner to be appointed to act jointly with a Cayman Islands insolvency practitioner (a practice which was regularly adopted even before the revisions to the law).

A new provision, which any person who takes appointment in a voluntary liquidation needs to be aware of, requires that for a voluntary liquidation to continue as such, the directors of the company must file a solvency declaration within 28 days of the resolutions appointing the voluntary liquidator. In the absence of such a declaration, the liquidator must make application to the court for the winding up to be continued

subject to the supervision of the court. An order that a winding up be continued subject to the supervision of the court effectively converts the liquidation into a compulsory liquidation. This means that a Cayman Islands qualified insolvency practitioner needs to be appointed as liquidator.

International Cooperation offered to Foreign Bankruptcies

The international cooperation provisions which have been inserted as a new Part XVI of the Companies Law apply where a foreign entity is subject to some form of bankruptcy in its country of incorporation and the appointed insolvency practitioner seeks assistance from the Grand Court of the Cayman Islands. The Grand Court may make orders ancillary to the foreign bankruptcy proceeding for the purposes of (among other things) recognising the foreign representative to act in the Cayman Islands on behalf of the debtor; preventing or staying proceedings or enforcement against the debtor in the Cayman Islands; requiring the examination of persons in possession of information relating to the affairs of the debtor; and turning over the property belonging to the debtor. In determining whether to make an ancillary order, the Grand Court will be guided by matters which will best assure the economic and expeditious administration of the debtor's estate.

In the case of a debtor which is registered in the Cayman Islands as a foreign company, the Grand Court must consider whether it should make a winding up order in respect of the local branch.

International Protocols in Concurrent Bankruptcies

Order 21 of The Companies Winding Up Rules applies where a Cayman Islands registered company is in official liquidation pursuant to the Companies Law and is subject to a concurrent bankruptcy proceeding in a foreign country, or its assets located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country. In such circumstances, it is the duty of the liquidator to consider whether an international protocol with the foreign officeholder is appropriate to promote the orderly administration of the estate and avoid duplication of work and conflict between the two officeholders.

The scope of an international protocol may allocate responsibilities between the two officeholders including in respect of formulating a scheme of arrangement; preservation and realisation of assets outside the Cayman Islands; commencing proceedings outside the Cayman islands; exchange of information; reporting to stakeholders in the bankrupt's estate; adjudicating proofs of debt; paying claims; and the remission of funds between the officeholders. Any international protocol must be approved both by the Grand Court and the foreign court or authority.

Conclusion

The Cayman Islands legislature has not enacted the UNCITRAL Model Law on Cross-Border Insolvency, but even prior to the changes made this year, the insolvency laws and practice of the Cayman Islands met substantially all of the benchmarks contained in the Model Law. The changes have enhanced the position and demonstrate that the Cayman Islands is one of the most progressive jurisdictions in the world as far as adopting a cooperative and unified approach in multi-jurisdictional insolvencies is concerned.