

International Comparative Legal Guides



Restructuring & Insolvency 2020

A practical cross-border insight into restructuring and insolvency law

14th Edition

Published by Global Legal Group, in partnership with INSOL International and the International Insolvency Institute (III), with contributions from:

Allen & Gledhill LLP

Cleary Gottlieb Steen & Hamilton LLP

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Vassilev & Partners Law Firm

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INSOL International™



ICLG.com



ISBN 978-1-83918-040-8
ISSN 1754-0097

Published by

glg global legal group

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London SE1 3PL
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Printed by
Stephens & George Print Group

Cover image
www.istockphoto.com

Strategic Partners



International **Comparative** Legal Guides

Restructuring & Insolvency **2020**

14th Edition

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Sophia Rolle-Kapousouzoglou

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

The Bahamas is a more creditor-friendly jurisdiction.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

Informal work-outs are available, to the extent that provisional liquidation and receiverships are available.

There is no restructuring procedure in the form of a corporate rescue (e.g., US Chapter 11 proceedings) in the Bahamas. However, a Bahamian company in liquidation through its provisional liquidators may cooperate with foreign court-appointed office holders to the extent it is not contrary to public policy to facilitate a restructuring.

Under the legislative framework, the primary restructuring procedure is an arrangement involving: the reorganisation or reconstruction of a company; the separation of two or more businesses carried on by a company, where the directors of the company determine that it is in the best interests of the company; or the creditors, members or directors, by resolution, approving a plan of arrangement containing details of the proposed arrangement.

The procedure for insolvency proceedings is provided for under the legislative framework and is the most commonly used.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The directors and managers should have regard to any potential exposure due to carrying on insolvent trading, fraudulent trading or making payments liable to be set aside as voidable preferences if a preference is given to one creditor over others and the payment is made during a time period when a company may be unable to pay its debts.

In order to limit liability, directors should ensure that they take every reasonable step to minimise potential losses to the

company's creditors as soon as it becomes apparent that there is no reasonable prospect that the company will avoid being wound up by reason of insolvency.

Directors should also ensure that the steps taken are within the scope of that which a director of a company ought to know or ascertain, and that the general knowledge, skill and experience that may reasonably be expected of a director carrying out the same functions are exercised.

The test of the general knowledge, skill and experience of a director is generally that which a reasonably diligent person would have known, ascertained, reached or taken.

A company may enter a restructuring or insolvency process if the company appears to be of doubtful solvency or if a company is unable to pay its debts.

The test for inability to pay debts is if: a) a creditor (by assignment or otherwise) to which the company is indebted in the prescribed minimum has served a statutory demand on the company requiring that it pay the sum due and, for three weeks following the demand, the company has neglected to pay the sum or to secure or compound for it to the creditor's satisfaction; b) the execution of another process issued on a judgment, decree or order – obtained either in the Court in favour of any creditor at law or in equity in any proceedings instituted by the creditor against the company – is returned unsatisfied in whole or in part; or c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

A company can also be liquidated voluntarily by a majority of its shareholders where the company resolves by resolution to be wound up voluntarily because it is insolvent; or based on the articles of association.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Shareholders may inject capital to prevent a company's insolvency but once a company has been put into liquidation, shareholders' rights are subordinated to the rights of creditors.

Creditors may seek to enter judgment against a company and serve a Statutory Demand prior to petitioning the Court to place the company into liquidation. Contracts may be rescinded by the Court and damages may be paid for non-performance of the contract.

There is a preferential charge on goods distrained, and a landlord or other person entitled to receive rent distraining or having distrained on any goods or effects of the company within three months preceding the date of the winding up order of the debts to which priority is given, have a first charge on the goods or effects so distrained on or the proceeds of sale thereof.

Employees are treated as preferential creditors in a liquidation, subordination, set-off and netting agreements are capable of being enforced notwithstanding the company with whom a creditor has such an agreement going into liquidation.

Once a company has been put into liquidation, no proceedings can be continued or commenced as against a company save for with leave of the Court. A liquidator can apply to stay proceedings against a company in liquidation. Where a creditor has issued execution against the goods or land of a company and the company is wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the commencement of the winding up.

Secured creditors are entitled to enforce their security without leave of the Court and without reference to the liquidator.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

A transaction may be set aside as a voidable preference. A 'voidable preference' is a conveyance or transfer of property, or charge, payment obligation or judicial proceeding, which is made, incurred, taken or suffered by a company in favour of a creditor at a time when the company is unable to pay its debts, to give the creditor preference over other creditors, within the six months before the commencement of liquidation. Such transactions may be deemed invalid.

Transactions made at an undervalue can also be set aside if it is found that the transaction amounts to a disposition of property made at an undervalue by or on behalf of the company with intent to defraud its creditors.

The burden of establishing intent to defraud rests with the official liquidator. A defence is that the payment was received in good faith for valuable consideration by a purchaser, payee or incumbrancer and not in preference to other creditors.

A director can be held liable for a company's insolvency where:

- the company has carried out insolvent or fraudulent trading;
- fraud has been committed in anticipation of winding up, with the intent to defraud the company's creditors or contributories, in the 12 months preceding commencement of the winding up;
- creditors or contributories (i.e., persons liable under the Companies Winding Up Amendment Act to contribute to the assets of the company in the event that it is wound up and every holder of a company's fully paid-up shares) have been defrauded in the course of the winding up; or
- misconduct has occurred in relation to the company's liquidators in the course of winding up, including material omissions to a company's statement of affairs.

The following defences are available to a director or parent company:

- There was no intent to defraud the company's creditors or contributories.
- The director disclosed the relevant information concerning the company to its liquidators, to the best of his or her knowledge and belief.

- There was no intent to conceal the state of affairs of the company or to defeat the law.
- The director did not know – or could not have concluded – that there was a reasonable prospect that the company could avoid being wound up by reason of insolvency at any time before commencement of the winding up.
- After the director first knew – or ought to have concluded – that there was a reasonable prospect that the company could avoid being wound up by reason of insolvency, he or she took every step reasonably available to minimise the loss to the company's creditors.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

A provisional liquidator may be appointed to present a compromise or arrangement to creditors, while a receiver may continue to carry on the business and seek to arrange a sale of the company or its secured assets.

Some creditors may also reach a compromise with the company, rather than commence liquidation proceedings.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

Restructuring procedures in the Bahamas are limited to companies incorporated under the Companies Act and the International Business Companies Act. As described below, restructuring procedures are based solely on a reorganisation of a company's share capital, merger with a subsidiary company or consolidation with a foreign company.

We do not have pre-packaged sales. However, in the context of a reorganisation of a company, members may dissent from any proposed arrangement and may be entitled to payment of the fair value of their shares upon dissenting from a merger, consolidation, sale, transfer, lease exchange or other disposition of more than 50% of the company's assets or business.

Restructuring plans are formally approved by the directors who may, by resolution, approve a plan of arrangement containing details of the proposed arrangement. Upon approval of the plan, the company applies to the Court for approval of the proposed arrangement. The plan of arrangement is then executed with the articles.

There is no provision for dissenting creditors to be crammed down. However, members may dissent from any proposed arrangement and may be entitled to payment of the fair value of their shares upon dissenting from a merger, consolidation, sale, transfer, lease exchange or other disposition of more than 50% of the company's assets or business.

A company may also seek to appoint a provisional liquidator on the grounds that the company intends to present a compromise or arrangement to its creditors.

3.3 What are the criteria for entry into each restructuring procedure?

Directors are responsible for submitting any relevant plan of arrangement once the resolution to do so has been passed.

The primary restructuring procedure is an arrangement involving the reorganisation or reconstruction of a company, or the separation of two or more businesses carried on by a company, where: the directors of the company determine that it is in the best interests of the company; or the creditors, members or directors, by resolution, approve a plan of arrangement containing details of the proposed arrangement.

3.4 Who manages each process? Is there any court involvement?

Restructuring plans are formally approved by the directors who may, by resolution, approve a plan of arrangement containing details of the proposed arrangement. Upon approval of the plan, the company applies to the Court for approval of the proposed arrangement. The plan of arrangement is then executed with the articles.

The Court may conduct a hearing and permit any interested persons to appear. It may approve or reject the plan of arrangement as proposed or with amendments. Creditors may be notified of the proposed arrangement and are permitted to appear and approve or reject the plan of arrangement as proposed.

In the case of an arrangement, the company applies to the Court for approval of the arrangement. The Court may make an interim or final order and determine:

- what notice (if any) of the proposed arrangement must be given to any person;
- whether approval of the proposed arrangement by any person should be obtained and the manner of obtaining it; and
- whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of shares, debt obligations or other securities.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

When an arrangement is carried out, any transfer of a contract is treated as a transfer by law. Transfers by law do not constitute breach of contract, as arrangements will also be approved by the Court. In insolvency proceedings, contracts may be rescinded and damages may be awarded if an application to Court is made. Termination and set-off provisions will be upheld.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

The process is usually by the Shareholders of a Company. Protection is not given to rescue financing.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The primary procedure to liquidate an insolvent company in the Bahamas is either compulsory liquidation or voluntary liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

In a compulsory liquidation, a company is wound up by a creditor of the company if a creditor is owed debts by the company or if the company is unable to pay its debts. The key feature is that, after taking into account the rights of secured and preferred creditors, unsecured creditors can recover equally with other creditors proportionately to the value of their debt, provided that there are sufficient assets to meet their claims.

A compulsory liquidation or winding up commences with a petition being presented to the Court to wind up the company. The process is then overseen by the Court.

A company can also be liquidated voluntarily: by majority of its shareholders; where the company resolves by resolution to be wound up voluntarily because it is insolvent; or based on the articles of association.

A voluntary liquidation commences with the passing of a shareholders' resolution to wind up the company voluntarily.

A company may also be liquidated voluntarily if a fixed period has terminated or a winding up event has occurred.

4.3 Who manages each winding up process? Is there any court involvement?

A compulsory liquidation would be managed by the liquidator who would be required to report to the Court. There may also be a creditors committee to whom the liquidator should report. In a voluntary liquidation, the process may be managed by the liquidator who may be selected by the shareholders of the company and if it is a solvent liquidation, there is no requirement for Court involvement. If, however, the voluntary liquidation is insolvent, Court supervision is required and an official liquidator is appointed under Court supervision.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

Secured creditors may enforce their security without reference to the liquidator and without leave of the Court. As it relates to unsecured creditors, creditors may be involved in liquidation procedures by joining the liquidation committee which is appointed at the first creditors' meeting.

Creditors may also be involved by attending creditors' meetings. These are held in the first instance within 90 days of the winding up order and are thereafter called as the liquidator sees fit or as otherwise directed by the Court.

The Court encourages creditors' involvement in liquidation procedures and must have regard to the wishes of creditors or

contributories. It may also call creditors' meetings and direct that liquidators prepare reports for that purpose.

Creditors and contributories may also call meetings, for which notice must be circulated to all known creditors of the company.

In a voluntary winding up, the liquidator, creditors or contributories may apply to the Court for the determination of any questions arising in the winding up. If the Court considers that the determination of the question or the required exercise of power is just and beneficial, it may accede wholly or partly to the application.

Shareholders' rights are subordinated to creditors' rights in a winding up.

In a voluntary winding up, shareholders may call contributories' meetings. Contributories are notified of the winding up proceedings and have the right to be heard. Where there is a solvent liquidation, a liquidation committee is also appointed at the first contributories' meeting.

Liquidators report to contributories on the affairs of the company and the manner in which it has been wound up. Liquidators or contributories may convene contributories' meetings.

Contributories may also be part of the liquidation committee where a company is of doubtful solvency.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Existing contracts may be rescinded by the Court when an application is made by the party entitled to the benefit or subject to the burden of the contract. If a contract is rescinded, damages can be recovered as a debt in the liquidation. Otherwise, an existing contract may be continued if it is beneficial to the company's creditors. Some contracts (e.g., contracts of employment) are automatically terminated on liquidation of the company.

Set-off provisions are upheld.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

In insolvency proceedings, all creditors' claims are ranked *pari passu* (i.e., equally), subject to taking into consideration and giving effect to the rights of preferred and secured creditors, which take priority. The legal rights of creditors with mortgages or charges over a company's assets (i.e., secured creditors) are unaffected by the ranking of creditors, because secured creditors are entitled to enforce their security without leave of the Court.

After the claims of secured creditors have been satisfied, the order of creditors' claims in insolvency proceedings is as follows:

- the expenses of the liquidation, insofar as there are sufficient assets to meet them, including the liquidator's fees and disbursements;
- preferential debts, which are all rates, taxes, assessments or impositions imposed or made under the provisions of any act;
- sums due by the company to employees – whether employed in the Bahamas or elsewhere – for salaries, wages and gratuities accrued in the four months preceding commencement of the winding up;
- wages due to any worker or labourer for services rendered to the company in the two months preceding the relevant date (i.e., the date of commencement of the winding

up or, in the case of a company ordered to be compulsorily wound up and which had not commenced winding up voluntarily, the date of the winding up order);

- sums due and payable by the company on behalf of employees in respect of medical health insurance premiums or pension fund contributions;
- sums due by the company to former employees in respect of severance pay and earned vacation leave, where employment contracts have been terminated as a consequence of the company being wound up; and
- sums due to workers for personal injury accrued before the relevant date, unless:
 - the company has, on commencement of the winding up, an insurance contract with rights capable of being transferred to – and vested in – the workers; or
 - the company is being wound up voluntarily merely for the purpose of reconstruction or amalgamation with another company.

4.7 Is it possible for the company to be revived in the future?

If a company has been dissolved and it is later determined that there are assets remaining which were not liquidated, an application to the Court can be made for the Court to be restored.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

The Bahamas is a tax-free jurisdiction so it is therefore unlikely that there would be tax implications in a restructuring or insolvency proceeding governed by Bahamian law.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

Employment contracts are automatically terminated by the onset of insolvency proceedings. In the case of a voluntary winding up, the company will cease to carry on its business from the commencement of winding up, except insofar as it may be beneficial for its winding up. Some employees may therefore be retained if necessary for the winding up of the company.

Employees rank as preferential creditors in an insolvency procedure.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

The Court has jurisdiction to make winding up orders in respect of a foreign company which: has property located in the Bahamas; is carrying on business in the Bahamas; or is registered as a foreign company in accordance with the Companies Act.

The Bahamian Court may make an order recognising the right of a foreign representative to act in the Bahamas on behalf of or in the name of a debtor and, at the Court's discretion, to

do so jointly with a qualified insolvency practitioner. Once recognised, the Court may also make ancillary orders, such as: granting a stay of proceedings or enforcing a judgment against a debtor; requiring certain persons with information concerning the debtor's business or affairs to be examined or to produce documents; or ordering the turnover of the debtor's property to the foreign representative.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

The Bahamian Court will recognise a 'foreign representative' (defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding) appointed in a foreign proceeding – including an interim proceeding – in a relevant foreign country, pursuant to a law relating to liquidation or insolvency, in which the property and affairs of the 'debtor' (defined as the foreign corporation or other foreign legal entity subject to foreign proceedings in the country in which it is incorporated or established) are subject to control or supervision by a foreign Court, for the purpose of reorganisation, rehabilitation, liquidation or bankruptcy of an insolvent debtor.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

The Bahamian Courts seek to encourage international cooperation and can grant recognition to foreign representatives appointed in foreign proceedings in 142 countries. Yes, there

is jurisdiction for the Bahamian companies to enter into insolvency proceedings in other jurisdictions and it is common practice.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Yes, there is scope for cooperation between officeholders where there is a group of companies subject to insolvency proceedings. Liquidators have a statutory duty to consider whether to enter into international protocols with foreign officeholders where a Bahamian company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

9 Reform

9.1 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

Yes, at this time there is a Companies Liquidation Rules Committee which has been assembled to propose amendments to the Companies Liquidation Rules.



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