



Insolvency and restructuring – challenges facing companies and individuals



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Introduction

Legislative changes to the insolvency regime in the Bahamas now provide for greater international cooperation and increased mechanisms for liquidators to pursue relief against debtors. Such provisions seek to emulate the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which provides for a wide range of assistance to foreign courts and office holders, and focus on:

- access;
- recognition;
- relief;
- cooperation; and
- coordination.

Cross-border recognition

The new insolvency legislation provides for cross-border recognition of liquidation proceedings in order to gain the assistance of foreign courts where assets may be held.

Assistance may be given to courts which have corresponding jurisdiction in any relevant country or territory. This power which was recognised recently by the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers* ([2014] UKPC 36) as applying to a limited number of countries only, including the Bahamas. Privy Council decisions are binding on Bahamian courts.

Ancillary relief

Foreign representatives (eg, trustees and liquidators) may apply to the court for ancillary orders against relevant persons, whether within or outside the jurisdiction. Such orders may permit the examination of relevant persons, and the court may order the transfer or delivery up to the liquidator of any property or documents belonging to the company. The court

also has jurisdiction to issue letters of request to foreign courts for the purpose of seeking the assistance of a foreign court in obtaining evidence. The scope of international protocols extends to the preservation and realisation of assets outside the Bahamas and the pursuit of causes of action against debtors or persons outside the Bahamas.

Liquidators' powers

The new legislation also permits liquidators to obtain the court's permission where liquidators may wish to exercise their commercial judgement by allowing the court to ratify the sale of a company asset. **(1)**

Jurisdiction to wind up foreign companies

The jurisdiction of Bahamian courts has been extended to include the winding up of a foreign company. In *In the Matter of the Companies Winding up Amendment Act 2011* and *In the Matter of BC Capital Group SA (in liquidation)* (COM/com/00087 2012), it was held that in applying the statute, there is now 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 under Part VI of the Companies Act.

Challenges

Bankruptcy proceedings have traditionally been based on the concept of universalism. However, case law demonstrates that this is not the reality. Despite the court's discretion to provide for recognition of liquidation proceedings, obstacles remain which may hinder the process of asset recovery.

One such example of the subsisting challenges was noted in *In the Matter of AWH Fund Ltd (in compulsory liquidation)* and *In the Matter of the International Business Companies Act 2000* (COM/bnk/2120, 2002). The Bahamas Supreme Court found that under existing legislation, there is no jurisdiction for the court to order service outside of the Bahamas in relation to a claw-back claim. The court traced the history of the relevant legislation in the Bahamas and supported the ruling by reference to legislative changes in the United Kingdom which have not yet occurred in the Bahamas to overcome the present obstacle. No doubt, provided that the decision is not overruled on appeal (although one is pending), an amendment to the legislation will need to be considered.

Comment

The recent developments made to the insolvency regime in the Bahamas provide a more comprehensive and practical legal framework for improved administration of liquidations in order to seek the necessary relief in areas where the statute previously failed to provide any recourse. Although some areas still require amplification and clarification, the amendments made to the legislation to date clearly seek to provide a wide range of assistance to foreign courts and office holders through international cooperation and other efforts to assist in cross-border insolvency, similar to the UNCITRAL Model Law.

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Endnotes

(1) See the approach taken by the US Court of Appeal in *In Re Fairfield Sentry Limited, Kenneth Krys v Farnum Place LLC*, 13-3000, September 26 2014.

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