



An offshore overview: insolvency in the Caribbean

Jonathan Murphy provides an insight into the Caribbean offshore market, with particular reference to the Cayman Islands, British Virgin Islands, Bermuda and the Bahamas.

The aim of insolvency legislation, and, by extension, practice, is to identify, take control and protect the assets of the company pending the identification and agreement of creditor claims prior to distribution. This is by far the greatest common factor between 'traditional' and offshore jurisdictions. Another factor is that the UK Insolvency Act 1986 forms the basis for the law in insolvency matters in the Caribbean, with appropriate amendments for local conditions. The differences start when looking at each of these factors independently: the types of appointment, the firms involved, locations of assets and creditors, the methods of recovery of assets and the law involved.

practitioners and their staff are mostly chartered accountants from Commonwealth regions, with extensive experience in insolvency and offshore legal practices are brimming with qualified and experienced staff of similar origin.

Offshore jurisdictions have a relative lack of 'bricks and mortar' engagements and the majority of work involves court-supervised liquidations. It is rare that the operations, books and records or assets are located within the offshore jurisdiction where the liquidator is appointed.

Typical cases

A typical scenario in an offshore jurisdiction involves a foreign-owned company that is incorporated in the jurisdiction and has substantial assets and business activities located elsewhere. Aside from the

secure assets and establish a means of correspondence with the creditors/investors.

The appointments encountered in offshore jurisdictions generally have links to three distinct geographic regions: America, Europe and Asia. Appointments with American links are more common, particularly in Cayman and Bermuda. Of the funds registered in Cayman, over 50 per cent of the assets are being managed in the United States (primarily New York). On appointments such as these, the offshore appointee runs the liquidation from the jurisdiction of appointment utilising the staff and resources from that jurisdiction.

Joint appointments

Appointments originating from Asia usually involve a practitioner from the offshore jurisdiction, with a joint 'foreign' appointee from the jurisdiction where the company conducts business, often PRC, Singapore or Hong Kong. The liquidation strategy and most of the work at the 'coal face' is carried out by the onshore appointee. The offshore role is generally to assist with the statutory requirements and oversight so the liquidation is managed in line with the court's expectations.

Joint appointments may also be considered in cases where there are European assets and operations, particularly where there are actions to be pursued in the UK. In liquidations involving European elements, the offshore liquidator will work jointly with the onshore liquidator in developing the strategy for pursuing assets and dealing with creditors.

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The Caribbean set-up

Many of the 'big 4' and second tier accounting firms have a presence in the Caribbean, particularly in the Cayman Islands (Cayman) and the British Virgin Islands (BVI). The UK insolvency market is dominated by the 'big 4' firms with most high-profile appointments going to these firms. The markets in the Caribbean are more evenly shared between these firms and several large independent firms that specialise in offshore matters. Insolvency

incorporation of the company, there is little association within the jurisdiction. The financial services industry, from which the majority of appointments are made, is made up of hedge funds, international business companies (IBCs), captive insurance and reinsurance companies, all of which operate in any number of countries globally. Offshore liquidators have to commit a large amount of time and resource immediately following appointment to collect the books and records of the company, identify and

| | Cayman | BVI | Bermuda | Bahamas |
|---|---|---|--|--|
| Primary business within the financial services | Mutual funds | Holding companies | Reinsurance | Private banking & trust administration |
| Applicable law (all based on UK Insolvency Law 1986) | Companies Law 2010 and Companies Winding Up Rules 2010 | Insolvency Act 2003 | Bermuda Companies Act 1981 and Bermuda Companies (Winding-up) Rules 1982 | Companies Act 1992, International Business Companies Act 2000, and Supplemental Winding-Up Rules |
| Licensing / regulatory process | Defined in Insolvency Practitioners Regulations 2008. No licence required but minimum qualifications specified. | Licence issued by the Financial Services Commission | None | None |
| Local liquidator required | Yes | Yes | Not required | Not required |
| Court | Grand Court of the Cayman Islands, Financial Services Division. <i>5 judges</i> | Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division <i>1 judge</i> | Supreme Court of Bermuda <i>No special commercial court.</i> | The Supreme Court of the Bahamas. <i>No special commercial court.</i> |
| Local insolvency organisation | Insolvency Practitioners Committee (sub committee of CISPA) | RISA Insolvency Professional Association | None | None |
| No. of insolvency firms (estimated) | 12 | 7 | 4 | 8 |

For joint appointments of the type noted above, the regulations in Cayman and BVI allow for a foreign practitioner to be appointed, but it must be jointly with a resident qualified insolvency practitioner. In BVI the foreign practitioner also needs approval from the Financial Services Commission to accept a joint appointment. The foreign practitioner must meet the standards required for domestic insolvency practitioners including independence and minimum insurance. The regulations provide that a foreign practitioner seeking appointment must submit evidence of his qualifications and details of his experience. In practice this can serve as a highly effective method of ensuring that a co-operative and unified approach is adopted in multi-jurisdictional insolvencies.

The prevalence of fraud cases

There is little restructuring turnaround work performed in offshore jurisdictions as the majority of work stems from fraud having been committed against the company. As a result, insolvency practitioners in offshore centres have vast experience in forensic accounting, investigations and litigation, as they seek to recover losses from responsible parties in a variety of onshore jurisdictions. Much consideration needs to be given in formulating a strategy that will allow for the maximum recovery against third parties. Given the cross-border nature of many offshore appointments, insolvency practitioners often have to seek recognition of their appointment in onshore jurisdictions to give them standing to pursue third-party claims by litigation.

A significant boundary to an offshore insolvency practitioner is when seeking recognition in the EU. A UK-based

liquidator, appointed in the UK, is automatically recognised throughout the EU courts, once main proceedings have opened in the state of the debtor's centre of main interests. In circumstances where a foreign liquidator obtains recognition in the UK, he or she is not granted the same recognition throughout the EU. For this to be accomplished, he or she would have to apply to each court individually.

The role of the court

The court can play a different role in onshore and offshore liquidations. The UK court has a more 'stand-off' approach when dealing with liquidation and will generally only be involved in fee applications and in large disputes. The courts in offshore jurisdictions take a much more active role in agreeing a liquidation strategy and granting sanction to the liquidator for various actions, including pursuing litigation in other jurisdictions. Offshore liquidators will seek court directions more frequently than their onshore counterparts, for example, to settle disputed claims within the estate.

Above is a table that sets out the main differences in Cayman, BVI, Bermuda and the Bahamas.

A flexible approach

Many of the courts in the Caribbean have adopted a flexible and co-operative approach in cross-border insolvency matters. In the Cayman Islands and BVI recent changes to the law have codified such co-operation. In two recent judgments, involving Saad Investments and Kingate Global, the Supreme Court of Bermuda continued to demonstrate its willingness to provide recognition and assistance to foreign courts and to foreign

liquidators in the resolution of cross-border insolvency issues relating to Bermuda as a matter of common law. In Saad Investments, Mr Justice Kawaley recognised the appointment of liquidators made by an order of the Grand Court of the Cayman Islands, granting them the ability to conduct aspects of the liquidation in Bermuda. In the Kingate matter, Mr Justice Kawaley ordered two BVI companies (already in compulsory liquidation in the BVI) to be wound up in an ancillary compulsory liquidation under the supervision of the Supreme Court of Bermuda. Further orders were granted that provided the liquidators with the power to obtain documents from the auditors of the companies to continue their investigations.

Any offshore jurisdiction represents its own unique market as noted in the primary industries of each jurisdiction in the table above. While much of the insolvency law is based on the Insolvency Act 1986, offshore jurisdictions have matured to reflect the types of appointment and local conditions of the jurisdiction. Many onshore appointments involve a sole jurisdiction, although this is a rare occurrence offshore. The key to the success in any liquidation that involves offshore jurisdictions is strong relationships with insolvency practitioners and attorneys that can provide the required expertise and advice in relation to their own jurisdiction where necessary. ■



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Credit for article

This article first appeared in the Spring 2011 edition of *RECOVERY*, the magazine of R3, the Association of Business Recovery Professionals, published by GTI Media.