

# INSOLVENCY AND RESTRUCTURING

*discussing the latest legal, regulatory and business challenges facing companies and individuals in an ever evolving landscape*



## Cross Border Recognition/ Greater International Cooperation

Under the new insolvency legislation the statute now provides for cross-border recognition of liquidation proceedings in order to gain 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 is a power which has been recently recognized by the Privy Council in the decision of *Singularis Holdings Ltd. v Price Waterhouse Coopers* [2014] UKPC 36 as being one which applies to only a limited number of countries, one of which is The Bahamas. Decisions of the Privy Council are binding on Bahamian courts.

## Ancillary relief available

Foreign Representatives such as 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 the 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 realization of assets outside The Bahamas and pursuit of causes of action against debtors or persons outside The Bahamas.

## Powers of Liquidators

The new legislation also permits liquidators to obtain the sanction of the court in circumstances where liquidators may wish to exercise their commercial judgment by allowing the court to ratify the sale of an asset of the company see the approach taken by the United States Court of Appeal in *In Re Fairfield Sentry Limited, Kenneth Krys v Farnum Place LLC* No. 13-3000, 26 September 2014.

## Jurisdiction to wind up Foreign Companies

Furthermore, the jurisdiction of Bahamian courts has been extended to wind up of a foreign company. In

the case of *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 of 2012* it was held in applying the statute that there is now jurisdiction to make winding up orders in respect of a foreign company which (i) has property located in The Bahamas, (ii) is carrying on business in The Bahamas, (iii) is registered under Part VI of the Companies Act.

## Challenges despite Legislative Developments

Although bankruptcy proceedings have been traditionally based upon the concept of universalism, that bankruptcy should be unitary and universal so that there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and which applies universally to all the bankrupt's assets, case law has held that is not the reality. Despite the court's discretion to provide for recognition of liquidation proceedings there remain obstacles which may hinder the process for the recovery of assets.

One such example of the subsisting challenges was noted in the decision of *In the Matter of AWH Fund Ltd. ('In Compulsory Liquidation')* and *In the Matter of the International Business Companies Act, 2000 COM/bnk/2120 of 2002*. In that case the Supreme Court of The Bahamas found that under the existing legislation, there was 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 the decision is not overruled on appeal (although one is pending) an amendment to the legislation will need to be considered.

A similar challenge was noted in *Picard v Primeo Fund Ltd.* 16 April 2014 CICA 1/2013 in which the Cayman Islands Court of Appeal determined that the Court does not have power pursuant to its Company Law statutory provisions to apply avoidance provisions of foreign insolvency law and

The legislative changes made to the laws relating to insolvency 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 intention of 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 has as its primary focus: access, recognition, relief, cooperation and coordination. Here, Sophia T. Rolle from LennoxPaton gives us an insight into this with an exclusive article.

provisions of US Bankruptcy Law in aid of foreign insolvency proceedings seeking ancillary relief.

The remaining challenges of cross-border insolvency and policy ramifications were also considered by the United Kingdom Supreme Court in *Rubin and Another v Eurofinance SA and Others* [2012] UKSC 46. In that case it was determined that courts ought not to apply a more liberal rule for avoidance judgments in the interests of the universality of bankruptcy and similar procedures. Decisions of the United Kingdom Supreme Court are highly persuasive and generally not deviated from by Bahamian courts.

## Conclusion

Overall, the recent developments made to the insolvency legislation in The Bahamas serve the purpose of providing a more comprehensive and practical legal framework for the better administration of liquidations in order to seek the necessary relief in areas where the statute previously failed to provide any recourse. Although there are still areas which 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, similarly to the UNCITRAL Model Law. **LM**

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