



**INSOL**  
INTERNATIONAL



# Corporate rescue and protective measures / mechanisms: provisional liquidation

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# 5.1 Introduction

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### 1. Provisional liquidation

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## 5.2 Informal Creditor Workouts

1. The benefits and risks of informal creditor workouts – efficiency and cost v exposure
2. INSOL International's International Statement of Principles for a Global Approach to Multi-Creditor Workouts (INSOL Principles)

# Section 5.3.1 Provisional Liquidation

- Section 104(3) Companies Act (as revised)
- Formal process available under Part V of the Companies Act
- Any corporate vehicle liable to be wound up under the jurisdiction of the Grand Court
- Requires the prior filing of a winding up petition
- Primary focus of asset protection, but no prohibition against use of provisional liquidation for the purpose of restructuring if appropriate.

# Section 5.3.1.2 – Standing

- Creditors, contributories and where relevant the Cayman Islands Monetary Authority (CIMA) may seek the appointment of provisional liquidators.
- *Prima Facie Hurdle* – there must be a prima facie case for making a winding up order.
- *Necessity Hurdle* – the appointment of provisional liquidators must be necessary to prevent:
  - *The misuse or dissipation of assets of the company*
  - *The oppression of minority shareholders of the company*
  - *Mismanagement or misconduct on the part of directors of the company*

## Section 5.3.2.1 – Standing II

- The Necessity Hurdle is strictly applied, and the Court requires clear and strong evidence showing the need to appoint provisional liquidators.
- The requirement of a need to investigate certain affairs of the company is not itself sufficient to warrant the appointment of provisional liquidators (*In the Matter of Al Najah Education Limited* Cause No. FSD 119 of 2021 (unreported, 9 August 2021, para. 9).
- It is not sufficient to demonstrate an historic need for the appointment of provisional liquidators (*In the Matter of ICG I* Cause no FSD 192 of 2021 (DDJ) (Unreported, 4 August 2021, paras. 23 and 36).
- Option to make alternative orders

# Section 5.3.2.1 – Standing III

- Company is not limited by the Prima Facie or Necessity Hurdle
  - Directors must provide evidence and be of the view that the appointment of provisional liquidators is in the best interests of the company
  - Court may appoint provisional liquidators it consider its appropriate to do so, and the appointment of provisional liquidators to support or facilitate a restructuring is not precluded.
  - First guidance from the Grand Court indicates that where a company is unable to function as a result of ongoing disputes within management, it may be appropriate to appoint provisional liquidators rather than restructuring officers (*In the matter of Re Kingkey International Financial (Holdings) Limited(Unreported, Asif J, 19 April 2024)*).

## Section 5.3.2 – Procedural requirements

- All applications must be made by Summons and include a supporting affidavit outlining the basis for the appointment of provisional liquidators.
- Unless expedited, the application is generally listed to be heard immediately prior to the winding up petition. Should provisional liquidators be appointed, the winding up petition will be adjourned.
- Creditors may make the application on an *ex parte* basis if giving notice of the application would defeat the purpose of that application (*In the Matter of Principal Investing Fund I Limited*).



# Section 5.3.2.3 – Appointment and Orders

- Provisional liquidation is inherently flexible and the terms of appointment can be curtailed to address the requirements of a case.
- Provisional liquidators do not:
  - have the ability to bring antecedent transaction actions on behalf of a company's estate.
  - Have an obligation to adjudicate proofs of debt
- Appointment of provisional liquidators takes effect from the date of appointment, and a stay of proceedings under Section 97 of the Companies Act takes effect from that same date.

# Section 5.4.1 - Restructuring Officers

1. Under the Companies (Amendment) Act, 2021 and the Companies Winding Up (Amendment) Rules, 2022 a company may now petition the Court for the appointment of a restructuring officer under the supervision of the Court.
2. First formal restructuring regime in the Cayman Islands where (a) presentation of a winding up petition is not required; (b) automatic stay takes effect as soon as the petition is presented; and (c) no need for the company to pass any special resolutions.
3. Section 91B (1)

*A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company — (a) is or is likely to become unable to pay its debts within the meaning of section 93; and (b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Act, the law of a foreign country or by way of a consensual restructuring*

# Section 5.4.2 – Test/who can apply?

## 1. Who can apply? the Company.

## 2. Test?

- Satisfaction of a two-limb test; that (a) a company is or is likely to become unable to pay its debts as they fall due; and (b) the company intends to present a compromise or arrangement to its creditors.
- *In the Matter of Oriente Group Limited* (FSD 231 of 2022 (IKJ), 8 December 2022):  
“*The jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction to be exercised where the Court is satisfied that:*
  - *the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;*
  - *the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and*
  - *the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company petitioning for the appointment of restructuring officers”*
- *In the Matter of Aubit International* (FSD 240 of 2023 (DDJ), 5 October 2023)
  - Company failed to satisfy the second limb of the test.
  - The Court would normally expect to see evidence of some form of engagement with creditors prior to the petition being presented with a view to developing the terms of a proposed restructuring.
  - The intention to present a restructuring plan must be a realistic, genuine, bona fide held intention on adequate grounds. The Court does not have to be provided with the finished fully grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long.

# Section 5.4.2 – Test Continued

- There may be circumstances where other relief is obtained in preference to the appointment of restructuring officers depending on the circumstances of the case: *In the Matter of Kingkey Financial International (Holdings) Ltd* (FSD 56 of 2024 (JAJ) 12 April 2024)
  - Retention of powers by the board of directors
  - Recognition in foreign jurisdictions
  - Dispute within the board of a company
- *In the Matter of Holt Fund SPC* (FSD 309 of 2023 (IKJ), 26 January 2024):
  - Appointment of ROs over segregated portfolios
  - Following reasoning in *Performance Insurance Company SPC (In official liquidation)* - company had been placed in liquidation under this Court's supervision based on the insolvency of some (but not all) of its segregated accounts.

# Section 5.4.3 – Procedure

## 1. Documents

- Petition and filing fee
- Supporting Affidavit
- Affidavit by persons nominated for the appointment as restructuring officers

## 2. Process

- Advertisement and timing

## 3. Hearing

- Within 21 days of presentation unless ordered otherwise
- Relief that the Court may grant upon hearing

# 5.4.4 - Appointment

## 1. Qualifications

- Insolvency Practitioner's Regulations
- Independence requirements

## 2. Powers

- Flexible financial condition of the company
- and defined by the terms of the appointment order
- Comments by Asif J in Kingsley
- Certain requirements are however set out in the Amendment Rules and include:
  - entry into an international protocol
  - convening meetings of creditors and members;
  - validation of dispositions, and
  - the provision of reports about the

## 5.4.5 – Creditor/shareholder rights

1. Creditors and contributories have standing to appear on the hearing of a Restructuring Petition
  - Variation or discharge of an order appointing RO
  - Removal or replacement of an RO
  - Rights of secured creditors remain unchanged and can be exercised without reference to the ROs
2. Concurrent Petitions

## 5.4.6 – Termination

1. Successful – where the order has served its purpose
2. Unsuccessful – viability and procedure