INSOL GLOBAL INSOLVENCY PRACTICE COURSE

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A Comparative Analysis of The Balance Between Liquidation and Restructuring Goalsand Proceedings in Australia and Cayman Islands

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1. Introduction

Restructuring is one or both of a financial restructuring, fundamentally adjusting the liabilities of the enterprise and an operational restructuring for the adjustment of the assets or operations of the enterprise in respect of either the procedure or its outcome. Judicial Reorganization is a restructuring with the full process subject to court supervision.

2. Liquidation and Restructuring Scenarios for Enterprise

<table>
<tr><th>Solvent /
Balance Sheet Test</th><th>Insolvent /
Default Payment /
Cash-flow Test</th><th>By Who, When, Grounds,
Pre-conditions</th></tr>
<tr><td>Assets > Liabilities</td><td>Assets < Liabilities</td><td rowspan="4">(a) Debtor (D)
(b) Directors of Debtor (BOD)
(c) Shareholders of Debtor (S)
(d) Secured Creditors (SC)
(e) Unsecured Creditors (UC)
(f) Employees (E)
(g) Pension Creditors (PC)
(h) Insolvency Practitioners (PIP)
(i) Court</td></tr>
<tr><td>Current Assets >
Current Liabilities</td><td>Current Assets <
Current Liabilities</td></tr>
<tr><td colspan="2">Debtor-in-possession (DIP), Creditor-in-possession (CIP), Judicial Reorganization (JR)</td></tr>
<tr><td colspan="2">Type of Liquidation and Restructuring
• Informal/Out-of-court Workouts (OCW)
• Formal Restructuring</td></tr>
<tr><td colspan="3">Local Entity vs Cross-border Group
• Debtor(s) and Creditor(s) relationship
• Model Law and Centre of Main Interests (COMI) (onshore/offshore jurisdictions)</td></tr>
<tr><td colspan="3">Type of Lenders, Cost of Finance, DIP Finance and Goals
• Banks, larger secured lenders, non-bank lenders.
• Goals: achieving growth; maintaining economic stability; reducing dependence of other businesses; complying government policies; global competitiveness; access to new technology; debt restructuring to maximise return to creditors.</td></tr>
<tr><td colspan="3">Formal Restructuring in Australia and Cayman Islands
• Australia: Receivership (R) - SC enforcement security interest Receivership; Debtor's (no Shareholders approval) Voluntary Creditors Scheme of Arrangement (CSOA); Debtor's (no Shareholders approval) Voluntary Deed of Company Arrangement (DOCA); Voluntary Liquidation (VL); Compulsory Liquidation (CL); Small Business Restructuring (SBR).
• Cayman Islands: (M4.1, M4.2) - Scheme of Arrangement (SOA) with or without the appointment of Restructuring Officers (RO)/Provisional Liquidator (PL); Voluntary Liquidations (VL), Official Liquidation (OL).</td></tr>
</table>

3. Four Types of Workout procedures

- Out-of-court workout: OCW is a privately negotiated restructuring. The process is adopted by the parties for this to happen. All stakeholders are bound by the terms of a restructuring plan that is in their best commercial interests. INSOL International published the "Statement of Principles for a Global Approach to Multi-Creditor Workouts" are an example of OCW guidelines. INSOL's Statement of Principles bring out many considerations that apply to workouts in general.
- Enhanced workout: An OCW is enhanced through the involvement of an administrative authority including insolvency regulator to encourage stakeholders to reach restructuring plans. Enhanced workouts are restructurings that participants are bound by law, regulation, or contract to follow specific standards offered by an administrative authority in accordance with an expectation or requirement without the court's involvement.
- Hybrid workout: during the workout processes, the debtor may seek court's supervision to develop or implement a restructuring plan. This occurs when the debtor cannot continue to operate without the benefit of a stay on creditor action or when certain stakeholders are:

  (1) unwilling to vote in favour of a plan, and

  (2) not bound by the required majority creditor's consent in accordance with current contractual terms. Thus, a restructuring may combine negotiations using the OCW approach with court-supervised reorganization in part of the procedure.
- Preventative workout: the formal procedures carry a certain level of informality; or the informal procedures carry a certain level of formality. The European Commission adopted the Restructuring and Second Chance Directive in 2019 aiming to ensure that viable enterprises in financial difficulties have the effective national preventative workout frameworks to carry on operating.

4. Informal workouts in Australia

Informal workouts are available to companies in Australia. They are recognised tools to address financial difficulties and 'hold-out' creditors cannot be bound. Australia is very strict to impose insolvent trading liability on directors and the 'safe harbour' regime has

been adopted. Debtors have the choice to adopt informal or formal restructuring with the help of insolvency practitioners.

Successful informal workouts provide debtors with an opportunity to continue trading and for BODs to retain control of the company to maximise company's value and minimise the interruption of a formal restructuring or insolvency proceeding. The 'safe harbour' regime provides additional comfort for directors when negotiating a workout to avoid personal liability on insolvent trading.

Informal workouts lack the structure of formal restructuring processes and are generally less transparent to creditors. The lack of moratorium or stay may undercut the success of informal workouts.

5. Informal workouts in Cayman Islands

The Cayman Islands as an offshore jurisdiction. Restructuring practitioners, debtor's BODs and lenders are primarily based in other jurisdictions. Their views and preferences on consensual workouts tend to reflect the prevailing market conditions and preferences in the other jurisdictions.

Cayman insolvency law and creditors' rights may not offer informal consensual workout strategies. The Cayman legislation is silent on consensual restructuring and does not require informal negotiations before the commencement of a formal restructuring proceeding. If a debtor requires a stay while it negotiates a SOA or other form of compromise, it is required to appoint restructuring officers/provisional liquidators. The Grand Court expects to see evidence from BODs to state the reasons that the debtor's affairs are capable of being restructured to continue trading as a going concern. Although the consensual restructuring negotiations is not a prerequisite, positive restructuring negotiations is helpful to underpin their belief or creditors' agreement in restructuring.

If a debtor is insolvent, then its directors have a fiduciary duty to act in the interests of creditors.

When a debtor in financial distress is unable to reach a consensual agreement with creditors, the BODs may initiate a SOA and , upon approval, is binding on all creditors and is able to "cram down" a dissenting or silent minority. A SOA may provide a better return to creditors than liquidation.

6. Domestic Legislation in Australia

Australia has a very well-established legal regime and infrastructure relevant to insolvency and restructuring under both federal and state legislations with the most recent wholesale legislative changes made over the past 30 years. An extensive body of judge-made or common law supports the comprehensive legislative framework to protect creditors' rights governed by the Corporations Act 2001 (Cth) and the Corporations Regulations 2001 (Cth). The Corporations Act contains a 'cash-flow' test for solvency that a debtor is insolvent if it is unable to pay its debts as and when they are due and payable. Chapter 5 of the Corporations Act contains the legislative framework for CSOA, R, VA and DOCA, and VL and CL. Other parts of the Corporations Act contain the statutory rules that govern the conduct of BODs and shareholders' rights.

7. Domestic Legislation in Cayman Islands

The Financial Services Division (FSD) of the Grand Court was created in 2009, recognising the need for special procedures and skills in dealing with the more complex civil cases that arise from the financial sector in the Cayman Islands. The procedures of the FSD reflect the need for urgent action to be taken in some cases and are designed to balance the need for justice to be administered in public with the potential harm to businesses if sensitive information is publicly available at too early a stage. The jurisdiction is constantly adapting; video conferencing is now widely used (with the leave of the court) in response to the global spread of parties doing business in the Cayman Islands and to allow litigation to be conducted in the most cost-efficient way.

Corporate insolvency in the Cayman Islands is governed by Part V of the Companies Act (2021 Revision) and the Companies Winding-up Rules 2018. They apply to the winding up of debtors including certain foreign companies and, pursuant to Section 36 of the

Exempted Limited Partnership Law (2021 Revision), to the winding up of Cayman Islands exempted limited partnerships.

In addition to Part IV of the Act, SOA is governed by Grand Court Practice Direction (2021 Consolidation). Cayman Islands also adopts common law and decisions of other Commonwealth jurisdictions are also of persuasive, but not binding authority.

The Cayman Court also considered 3 primary methods by which a foreign receiver may be recognized in the Cayman Court: (i) the statutory route - the receiver must be a foreign representative of a distinct legal entity, (ii) the modified universalism route – four distinct legal consequences [1] must be present and (iii) the common law route - "Sufficient Connection" must be established and four tests applied to determine if Sufficient Connection exists.

8. The Recent Development in Australia

The Insolvency Law Reform Act 2016 (Cth) was introduced in February 2016 and had the effect of harmonising the procedures for corporate insolvency and personal bankruptcy in Australia. Importantly, the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth) introduced a '**safe harbour**' regime which provides directors of financially distressed companies with greater protection from laws that impose personal liability on the director for the debts incurred by the company while insolvent. It also introduced a moratorium on the ability to rely on '*ipso-facto*' provisions in agreements which give counterparties certain rights (eg, termination rights) where a company is undertaking a formal restructure or is in receivership.

The legislation the Code anticipates will apply to commercial tenants with annual turnover of up to AUD 50 million (SMEs) and is intended to result in reduced rents proportionate to the tenant's COVID-19 reduced revenues, up to 100%. This is intended to be achieved at least 50% by rent waivers, with the balance permitted to be by deferral, with any government concessions (such as reduced land tax) to be passed through to the tenant.

[1] noted in the Privy Council ruling Singularis Holdings Limited v. PriceWaterhouseCoopers [2014] UKPC 36

The Code anticipates a range of other protections, such as freezes on rent increases, extensions to leases reflecting the period of the waiver/deferral of rent and preventing landlords acting on reduced opening hours by tenants.

Small Business Restructuring (**SBR**): A new "COVID-19" defense to the insolvent trading prohibition has been introduced, where debts are incurred in the period from 25 March 2020 to 24 September. The changes are effective from 1 January 2021 that allow eligible small businesses to quickly restructure their debt while remaining in control of their companies and improving their opportunity to survive the economic impact of COVID-19.

1. Restructuring relief for incorporated small businesses under the Corporations Amendment (Corporations Insolvency Reforms) Act 2020:
   - extends the temporary relief for eligible companies for accessment before 31 March 2021.
   - provides up to four months additional relief for companies seeking to appoint a restructuring practitioner.

   The measures extend only to the directors of companies eligible for temporary restructuring relief to take steps to access the temporary restructuring relief:
   - increase the amount that must be owed to a creditor from $2,000 to $20,000 before the creditor can issue a statutory demand.
   - increase the time a company is required to respond to a statutory demand from 21 days to 6 months.
   - provide a director with a temporary safe harbour from personal liability for insolvent trading for debts incurred in the ordinary course of business.
2. simplified liquidation process for incorporated small businesses - applicable only to a CVL of a debtor where the event that triggers the start of the winding up occurs on or after 1 January 2021.
   - the debtor must be in a CVL that the winding up occurs on or after 1 January 2021;
   - liabilities of the company on the day a liquidator is first appointed in the CVL must not exceed $1 million;
   - the company will not be able to pay its debts in full within 12 months;
   - the directors must within five business days to provide the liquidator:

    - a report on the company's business affairs;
    - a declaration that they believe, on reasonable grounds, the company meets the eligibility criteria for the simplified liquidation process will be met.
  - no person who is a director of the company, or who has been a director of the company within the 12 months before the date a liquidator was first appointed, has been a director of another company that has been under restructuring or subject to the simplified liquidation process within the period of the preceding seven years;
  - the company has not undergone restructuring or been the subject of a simplified liquidation process in the preceding seven years
  - the company has given returns, notices, statements, applications and other documents required under the *Income Tax Assessment Act 1997*.
3. Small Business Restructuring Practitioners (**SBRP**), a new 'class' of registered liquidator who can only undertake the debt-restructuring process for eligible small companies.

As to the proposal to pay creditors:

A. it must be made within 20 business days of appointing the SBRP (can be extended by 10 days, if necessary);
B. creditors must vote on it within 15 business days;
C. more than 50% of creditors in value must agree to it before it can be passed. Creditors related to the company are ineligible to vote; and
D. if approved, it binds all unsecured creditors of the company.

9. The Recent Development in Cayman Islands

In 2021, 51 winding up petitions were presented that comprised of 22 **creditors' petitions** (43%), 14 companies/debtors' voluntary liquidation petitions **(supervision petitions)** seeking an order to bring the liquidation under the supervision of the court on the ground of insolvency (27%), 9 shareholders' or limited partners' petitions **(member petitions)** seeking a winding up order on just and equitable grounds (18%) and 6

companies/debtors' petitions for the primary purpose of appointing restructuring officers/ provisional liquidators to facilitate a **debt restructuring** (12%).

- **Creditor petitions**: 15 of the 22 creditor petitions concerned companies or funds with their primary operations in Asia (68%), predominantly in the PRC, with the remainder companies operating in the US or the Middle East.
- **Supervision petitions**: all the 14 petitions filed by companies in voluntary liquidation for an order to bring the liquidation under the supervision of the court cited the absence of a declaration of solvency from a director of the company within the prescribed period of 28 days of the commencement of voluntary liquidation.
- **Member petitions:** Each of the 9 petitions alleged (amongst other grounds) a loss of trust and confidence in management arising from complaints as to conduct. Just and equitable petitions are typically disputed and can take 9-12 months (and potentially longer) to be determined.
- **Schemes of arrangement**: An additional 16 petitions were filed in 2021 seeking the court's approval of a scheme of arrangement. Of those schemes, 9 related to take private transactions of Cayman companies listed on the Hong Kong Stock Exchange with their primary operations in the PRC (56%) and 6 schemes related to debt restructurings of companies with their primary operations in the PRC (38%).

Various legislative reforms have been proposed in Cayman Islands with a view to making it easier for directors of distressed Cayman companies to commence restructuring proceedings, with the protection of a statutory moratorium, without first having to obtain shareholder approval.

In December 2021, the Companies (Amendment) Act, 2021 was gazetted which seeks to address 3 principal areas for improvement in the current restructuring regime:

Cayman's Restructuring Officers instead of Provisional Liquidators

Under the current regime, where a company considers that a moratorium on claims is essential to the success of the restructuring it will need to present a winding up petition and obtain an order appointing provisional liquidators with a restructuring mandate in

order to invoke the moratorium. However, there has sometimes been a reluctance on the part of companies in the past to take these steps due to the negative connotations associated with the appointment of “liquidators” (albeit provisional) and the impact that can have on how the company is perceived by its current and future stakeholders. To address this issue, the proposed amendments will allow a Cayman company to restructure under the supervision of a “restructuring officer” and provide for an automatic stay on creditor action in the restructuring period. The proposed amendments should operate in a way similar (although not identical) to the administration procedure in England or Chapter 11 proceedings in the United States.

Cayman’s Empowering the Board to act without a member’s resolution

Under the current regime, the presentation by a company of a winding up petition is necessary in order to apply for the appointment of provisional liquidators to invoke a moratorium on claims.

Cayman’s Abolishing the headcount test for shareholder schemes

Under the current regime, both creditor and member schemes require the approval of a simple majority in number representing 75% in nominal value of those present and voting at the scheme meeting, either in person or by proxy. Under the proposed amendments the headcount test for creditor schemes will remain but be abolished for member schemes which going forward will only require the approval of 75% in nominal value of those members present and voting at the scheme meeting.

10. "DIP Financing" in Australia

An administrator is personally liable for any borrowings in the administration and enjoys an indemnity out of the assets of the company in respect of such liability, supported by a lien over those assets. This potentially enables the administrator to borrow funds with a super-priority, although subject to the rights of existing secured creditors.

Part 5.3A of the Corporations Act (which deals with voluntary administration and DOCAs) provides a framework which allows the funding of companies in administration and specifies that administrators will be held personally liable for any funds borrowed. The administrator has a right of indemnity from the company for these funds which is secured by a statutory lien over circulating assets. However, the statutory lien does not take priority over existing secured creditors (unless they consent). The same position applies to CSOA and there is no statutory framework for the provision of such 'debtor-in-possession style' lending.

11. "DIP Financing" in Cayman Islands

The company can borrow money during a scheme process, but this will require Grand Court approval if the company is in provisional liquidation. New money can be given priority by the company granting security to the lender or by subordinating the claims of scheme creditors through the scheme itself. Pre-existing security over an asset will take priority over any new security which was granted to the lender.

Cayman's Litigation Funding**:** The Private Funding of Legal Services Act, 2020 came into force on 1 May 2021 abolishing the outdated torts of maintenance and champerty in the Cayman Islands and paving the way for a new age of litigation funding and contingency fee arrangements in the jurisdiction.

12. Debtor in Restructuring Process in Australia

A parent company may be held liable for the debts of an insolvent subsidiary in the event that the directors of the holding company were aware, or ought to have been aware, that the subsidiary was insolvent at the time of entering into the relevant transaction. This also requires that the parent company control at least 50% of the shares in the subsidiary. Shareholder liability is generally limited to the capital invested into the company by the respective shareholder.

There is no insolvency requirement for the appointment of a receiver. A receiver can be appointed by the SC over the property the subject of their security when permitted by the terms of that security and it is often resulting from payment default. The receiver has management of the assets of the company subject to the terms of appointing SC's security. This is usually the entire assets and undertaking of the company (in which case the receiver will have full management control of the company). In relation to the property over which the receiver is appointed by the SC, the debtor will no longer have management control of that property. Management of the debtor does continue in control over any remaining property of the debtor provided the receivership is not ongoing with a concurrent VA or liquidation (but it is common for a receiver to be appointed by the SC when the debtor is also in liquidation or VA). The business is often carried on by the receiver to the extent necessary to realize the secured assets. In instances of concurrent VA or liquidation and receivership, the BODs of the debtor will cease to be in control of the debtor.

Australia's Dual Insolvency Appointments Over the Same Debtor

In the case of a receivership that takes place concurrently with an VA, the receiver will effectively have the benefit of some of the administration moratorium provisions (such as that any landlord of premises occupied by the company cannot take possession of the premises during the period of the administration without the consent of the administrator or the leave of the court), the receiver being personally liable for post-appointment rent if they elect to cause the company to remain in possession.
If there are dual appointments, the most common combinations are:

- Voluntary administrator + Receiver
- Liquidator + Receiver

A debtor proposing a CSOA continues under the control of its BOD - it is the only "debtor-in-possession" insolvency procedure in Australia. A debtor in VA or liquidation proposes a CSOA - the administrator or liquidator will have control of the company to the exclusion of the BODs.

There is no insolvency requirement to commence the required VA process but only Australian incorporated companies may be placed into Australian VA. The administrator continues to trade the company's business during VA, unless the administrator determines that it is not profitable or practicable (given available funding etc) to do so; as such, the business or part of it may shut down by the administrator.

Creditor’s VA and DOCA or Liquidation: the claims are progressed by way of the required processes. Meetings of creditors will be held by the administrator, deed administrator or liquidator, and accordingly proofs of debt and proxies are lodged with the administrator, deed administrator or liquidator, who will adjudicate on creditors' claims. The administrator manages the debtor company during the VA. If a DOCA is approved, control of the debtor usually returns to the directors and the DOCA administrator is responsible for effectuating the terms of the DOCA. The liquidator manages the debtor from the time of the appointment, with director and shareholder power superseded. A liquidator will only carry on a debtor's business so far as it is facilitating its sale or winding-up.

Other than the administrative trajectory and associated costs, stakeholders can be preoccupied with whether a dual appointment is circumventing the best outcome being either a higher dividend in the liquidation or in a DOCA. If a Receiver is acting for a secured creditor that is a mainstay of the company e.g. the company's principal financial institution that inherently funds and underpins all company operations, then their interests are likely to supersede all other creditors' by the sheer quantum of secured debt owing.

Both solvent and insolvent debtors can be placed into liquidation (albeit different kinds of liquidation). A solvent debtor can be placed into liquidation by resolution of its shareholders and may also be wound up by court order in certain circumstances (for instance, where the relationship amongst the shareholders has entirely broken down).
An insolvent debtor can be placed into either VL or CL (i.e., by court order). For cross-border restructuring, Australia is party to the Model Law which allows for insolvency

proceedings to be classified as a "foreign non-main proceeding" or a "foreign main proceeding."

Insolvent Trading Restrictions and Liability Risks in Australia

Although insolvent trading claims can only be pursued by a liquidator and not a receiver, the Australian insolvent trading prohibition drives director behaviour when a company is approaching insolvency. Under the Corporations Act, BODs have a positive duty to prevent the company from trading while insolvent. The risk of insolvent trading liability often drives directors to place a debtor into voluntary administration promptly, and the risk of such liability in a liquidation scenario often encourages directors to propose a DOCA for the company (in order to avoid a liquidator being appointed who may then pursue insolvent trading claims).

There are only limited defenses available to an insolvent trading claim, including that, when the debt was incurred, the BODs:

- had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent
- had reasonable grounds to believe that a competent and reliable person was fulfilling their obligation to provide adequate information as to whether the company was solvent and would remain solvent, and expected, on the basis of this information, that the company was solvent and would remain solvent
- did not take part in the management of the company
- took all reasonable steps to prevent the company incurring the debt (including whether the person took steps to appoint an administrator to the company)
- is able to rely on the safe harbour provision, section 588 GA of the Corporations Act
- the debt was incurred between 25 March 2020 and 24 September 2020 in the ordinary course of the company's business

13. Debtor in Restructuring Process in Cayman Islands:

A Cayman company is a legal entity that is separate and distinct from the individual members of the company. The court will pierce the corporate veil only in exceptional circumstances, where it is shown that it is a mere facade concealing the true facts.

If the debtor entity is a partnership, then its partners may be liable for the partnership's debts. Further, parties (eg, other group entities) may be liable for the debtor's debts pursuant to any contractual agreements that have been entered into.

The BODs remain in control of the company if the SOA is proposed outside of provisional liquidation. BODs and employees will be treated in the same way as other creditors for determining whether they form part of a separate class.

If the SOA is promoted within a provisional liquidation, then the management of the scheme process will depend on the terms of the order appointing the restructuring officers/provisional liquidators. In some cases, the restructuring officers/provisional liquidators will be given only the powers necessary to supervise the BODs' promotion and implementation of the SOA. In other cases, the restructuring officers/provisional liquidators will displace the BODs entirely for the duration of the restructuring. The restructuring officers/provisional liquidators are subject to the court's supervision, and the court's involvement in the SOA process will be the same irrespective of whether the company is in provisional liquidation. If the SOA is supported by more than 50% by number and 75% by value of those attending and voting in each scheme class, and is subsequently approved by the Grand Court, it will bind all scheme creditors/shareholders.

Cayman's Dual Insolvency Proceedings Over the Same Debtor

The Cayman entity may have foreign operations and the registration as a foreign company in another jurisdiction(s), this may lead to local creditors in another jurisdiction to file restructuring and liquidation proceedings while the BODs of the debtor may also file SOA with restructuring officers/provisional liquidators leading to Dual Insolvency Proceedings of the same debtor.

14. UNCITRAL Model Law - Recognition in Australia and Foreign Proceedings

As a common law jurisdiction, Australia inherited the English concept of a letter of request, incorporating it into Section 581 of the Corporations Act, which permits courts to act in aid of each other. Under Section 581, if a foreign court issues a letter of request to an Australian court, the Australian court may exercise such powers as it could exercise if the matter had originally arisen in the Australian court's jurisdiction. Similarly, an Australian court may request a foreign court that has jurisdiction in external administration matters to act in aid of and be auxiliary to it in an external administration matter.

Receivership in Australia is not recognised abroad but receivers may be recognized abroad at common law, as being effectively appointed agents of the debtor.

CSOA, VA and Liquidation in Australia are recognised aboard under the Model Law.

The Cross-Border Insolvency Act 2008 (Cth) implements the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency. The Model Law provides a process for representatives of foreign restructuring and insolvency proceedings to request and receive assistance so they can essentially exercise the rights and powers available under Australian law. The Model Law applies only to jurisdictions that have ratified it (including the United States, the United Kingdom, Canada, Singapore and New Zealand), however it is not based on reciprocity. Australian courts must assist liquidators and administrators appointed by foreign courts, even if those foreign courts would not assist liquidators and administrators appointed by Australian courts.

It also sets out the requirements for recognition of a foreign proceeding. These requirements generally relate to the form which an application for recognition should take. For example, it should be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative making the application. If a foreign proceeding complies with the requirements for recognition, an Australian court must recognise it, unless to do so would be 'manifestly contrary' to public policy (Article 6 of the Model Law). The threshold of 'manifestly contrary' is very high. The Enactment Guide to the Model Law states that the exception should be limited to matters "of fundamental importance for the enacting State".

Section 581 of Corporations Act provides an alternative basis for recognition of foreign proceedings. This section relates to the receipt of a letter of request by Australian courts from the court of a foreign jurisdiction in which insolvency proceedings have been commenced.

Foreign companies that are registered under the Corporations Act or carrying on business in Australia fall within the classification of a 'Part 5.7 body' under the Corporations Act. Such entities may avail themselves of Australian insolvency processes. Foreign entities may wish to utilise Australian insolvency processes if it is more convenient or if the Australian processes offer more favourable features than other jurisdictions.

15. UNCITRAL Model Law – Recognition in Cayman and Foreign Proceedings

Cayman Islands has not adopted the UNCITRAL Model Law. Accordingly, a foreign insolvency or restructuring proceeding of a Cayman Islands incorporated company or any resulting stay on proceedings, absent highly limited circumstances, will not be recognised by the Cayman Islands Court. SC will always be entitled to enforce their security in the Cayman Islands (e.g. security over Cayman Islands shares) regardless of any domestic or foreign restructuring or insolvency proceeding.

Accordingly, if the Cayman Islands debtor holds valuable assets that are not protected by the foreign proceeding, BODs may need to consider instituting parallel liquidation or restructuring proceedings in the Cayman Islands. Failing to do so risks dissenting creditors filing competing proceedings in the Cayman Islands Court. It may also expose BODs to claims for breach of duty.

Cayman Islands is not a signatory to any international treaties relating to bankruptcy or insolvency. However, there are two main sets of guidelines for court-to-court communications and cooperation, which may be used and adopted in cases pending before the Grand Court where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction:

- the American Law Institute/International Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases; and
- the Judicial Insolvency Network ("JIN") Guidelines for Communication and Cooperation between Courts in Courts in Cross-Border Insolvency Matters. JIN adopted the Modalities of Court-to-Court Communications on 25 July 2019 and the Financial Services Division of the Grand Court adopted them by was of a Practice Direction with effect from 1 August 2019.

Cayman's winding-up petitions and provisional liquidation applications may be presented against foreign companies which:

- carry on business or have property located in the Cayman Islands;
- are the general partner of a limited partnership registered in the Cayman Islands; or
- are registered as foreign companies under Part IX of the Companies Act.

Pursuant to Part XVII of the Companies Act, on an application by a foreign representative, the Grand Court can make orders ancillary to the foreign bankruptcy proceedings to:

1. recognise the foreign representative's right to act in the Cayman Islands on behalf, or in the name, of the debtor;
2. grant a stay of proceedings or the enforcement of a judgment against the debtor;
3. require certain persons with information concerning the debtor's business or affairs to be examined by, and produce documents to, the foreign representative; and
4. order the turnover of the debtor's property to the foreign representative.

It is common for international bankruptcies and liquidations to involve the Cayman Islands.

16. Commencement of Proceedings and Court Involvements in Australia

A secured creditor can appoint a receiver over the property subject to their security in order to discharge the outstanding debt. Receivers will take control of such portion of the debtor's assets and business which are subject to the security interest of the secured

creditor appointing the receiver and may be empowered by the terms of their appointment to operate the business of the debtor. A creditor is able to take security over all types of assets, including working capital.

In limited circumstances, the court may appoint a receiver. Usually, private receiverships will not have any court involvement.

The company acting by its directors initiates the creditors' scheme of arrangement. This may be consequent to an agreement reached with of the company's creditors. CSOA are usually proposed by the company. The company will make an application to the court for orders to convene a meeting of creditors to vote upon the proposal. If the creditors vote in favour of the scheme, the matter will again be listed before the court for a hearing to determine whether the scheme should be approved.

There are two court hearings to effect a creditors' scheme of arrangement as follows.

First Court Hearing

The court may, if satisfied, make orders on the application of the company for the convening of meetings of the relevant class or classes of creditors for the purpose of considering the proposed creditors' scheme of arrangement ("**First Court Hearing**").

After the First Court Hearing the company will facilitate the holding of the meeting or meetings ("**Scheme Meetings**") of the class or classes of relevant creditors, as the case may be, to vote on the proposed creditors' scheme of arrangement.

Second Court Hearing

Assuming the requisite creditor approvals are obtained at the Scheme Meetings (and other conditions precedent are satisfied), the court conducts a second hearing at which the court makes orders effecting the creditors' scheme of approval ("**Second Court Hearing**"). The Second Court Hearing involves (broadly speaking) the satisfaction of the technical requirements including the voting thresholds and a consideration of the "fairness" of the creditors' scheme of arrangement.

CSOAs are agreements approved by the court and shareholders of a company, which bind the company's creditors to an arrangement reorganising their existing obligations and rights. Schemes are generally used only for large restructurings, as they are more expensive, require court approval and take longer to implement than DOCAs. Schemes can bind secured creditors if 50% in number and 75% in value of each class vote in favour of the scheme.

The directors of the company, a liquidator appointed to the company or a secured creditor with security over the whole or substantially the whole of the company's property that has become and remains enforceable can commence a voluntary administration of the company. Once the company is in administration, a DOCA proposal can be made by any party interested in the rehabilitation of the company (commonly a creditor, director or shareholder but also potentially a third party).

A DOCA can be proposed by anyone with an interest in the company, but will not bind any secured creditors unless they vote in favour of the DOCA. It need not be approved by the court, but rather by a majority in number and value of creditors that vote. There is only one class of creditor, but secured creditors are not required to vote unless they elect to do so. DOCAs are usually quicker and cheaper to implement than schemes and must protect certain employee entitlements.

A range of outcomes are possible through a DOCA, including:

- a debt-for-equity swap;
- a transfer of equity with the consent of existing shareholders; or
- with the leave of the court, a moratorium on secured creditor enforcement.

Generally, once a DOCA has achieved its purpose it will be terminated. DOCAs do not affect any rights of future creditors if the company continues to trade, which will occur if the DOCA achieves its aims and the company has been returned to the directors and officers.

Voluntary administrators can be appointed to a company by its directors if they believe the company is, or is likely to become, insolvent; or by a secured creditor with security over the whole or substantially the whole of the company's property, where the security interest has become enforceable. The voluntary administrator must consider the proposed DOCA and compare the likely outcome of the DOCA for creditors as against the likely dividend in a hypothetical liquidation. The voluntary administrator must prepare a report to creditors recommending whether each DOCA will likely result in better outcomes for creditors than a liquidation (or any alternate DOCAs).

The main precondition to success of both DOCAs and schemes is the readiness of secured creditors to work with the company to formulate a plan to restructure and/or recapitalise the company, because secured creditors cannot generally be crammed down in Australia. Whether a secured creditor would be willing to cooperate will largely depend on whether such cooperation is in its best interests. The other main precondition to success is ensuring the directors of the company act early enough to institute a restructuring so as to preserve maximum enterprise value.

Unsecured creditors will be subject to the moratorium. The effect of voluntary administration on employees and others will depend upon whether the business is continuing to trade.

In Australia, where an insolvent company is unable to come to agreement with its creditors through a restructuring process, it can be wound up through a CVL or a compulsory liquidation. These processes are largely identical and are both governed by the Corporations Act, with the key difference being the party initiating the appointment. The liquidation process provides an orderly mechanism for the preservation, realisation and distribution of the assets of the debtor in the order prescribed by the Corporations Act. A liquidator is empowered to investigate the conduct of the affairs of the company prior to his or her appointment and set aside certain antecedent transactions to recover assets for the benefit of the debtor's creditors. While liquidators are required to act in the best interests of the debtor's creditors as a whole.

A CVL is initiated by a special resolution of the shareholders of a company in circumstances where there is no declaration of solvency made by the directors of the company. Alternatively, a CVL can be initiated by creditors of the company at the second meeting of creditors of a company in voluntary administration.

A creditor, director, shareholder, liquidator or ASIC can apply to a court to have a company placed into involuntary court-ordered liquidation. An involuntary court-ordered liquidation is commenced by an order of the court and is then supervised by the court. The court is empowered to make such an order where the debtor is insolvent or on other grounds as set out in Section 461 of the Corporations Act.

Generally, during voluntary administration, the debtor will be under the control of the administrators (directors remain in office, but their powers are suspended). There is no automatic termination of contracts. In fact, the relatively recent prohibition on the enforcement of *ipso facto* provisions precludes termination of contracts on the basis of debtor insolvency or the appointment of administrators or receivers.

Once appointed, a liquidator will ordinarily cease trading the business operations of the debtor. However, where it is necessary for the beneficial disposal or winding up of the business, the liquidator has the power to and may trade the business for a period of time to enable the sale of the debtor's business as a going concern, or the sale of assets.

17. Commencement of Proceedings and Court Involvements in Cayman Islands

The principal restructuring tool in the Cayman Islands is the SOA under Section 86 of the Law. Cayman schemes are substantively very similar to schemes in England and Wales, although there are certain procedural differences.

SOA proceedings can be commenced by the company, by any creditor or shareholder of the company or (where the company is being wound up) by a liquidator. Scheme

proceedings commenced by a creditor or shareholder will, however, require the company's support.

The commencement of a scheme outside a provisional liquidation will have no formal effect on the company or its creditors. The company can and will continue to operate its business during the restructuring process. If the company is not in provisional liquidation, then incumbent management will continue to manage the company.

A scheme is a statutory form of compromise or arrangement between a company and its creditors (or any class thereof) or its shareholders (or any class thereof). There is no statutory definition of the terms 'compromise' or 'arrangement'. The Grand Court will construe them broadly, but they must involve some element of accommodation or 'give and take' between the company and the scheme creditors or shareholders.
The principal uses of Cayman schemes are:

- to reorganise the company's share capital;
- to enable a company to restructure its liabilities and avoid an insolvent liquidation; or
- to alter the distribution rights of creditors and/or shareholders in the company's liquidation.

Cayman's Provisional liquidation: A provisional liquidation will commence on the making of the appointment order; however, if a winding-up order is subsequently made, the winding-up will be deemed to have commenced at the time of presentation of the winding-up petition.

The effects of a provisional liquidation will depend on the terms of the appointment order, as provisional liquidators have only the powers granted to them in the appointment order. The scope of those powers will depend on the reason for their appointment. If a restructuring is proposed, then in some cases existing management will be allowed to remain in control of the company, in what are known as 'light touch' provisional liquidations. In other restructuring cases, the directors' powers may be displaced entirely

by the powers given to the provisional liquidators for the duration of the provisional liquidation.

Provisional liquidators are appointed and supervised by the Grand Court. The consent of stakeholders is not required, but their views on whether an appointment should be made and who should be appointed will or may (depending on the circumstances) be given weight by the Grand Court in the exercise of its discretion.

Provisional liquidation is available to companies liable to be wound up under the Companies Act, following the presentation of a winding-up petition. A creditor or shareholder can apply on the grounds that there is a *prima facie* case for making a winding-up order and the appointment of provisional liquidators is necessary.

Applications by creditors, shareholders or the CIMA are therefore made for the purpose of preserving and protecting the company's assets until the hearing of a winding-up petition and the appointment of official liquidators.

A company (if properly authorised) can also petition for its own winding up and apply for the appointment of provisional liquidators in order to present a compromise or arrangement to creditors with the protection of an automatic stay.

Cayman's Official liquidation: Pursuant to Section 100 of the Companies Act, the winding-up of a company is deemed to commence at the time of the presentation of the winding-up petition, unless:

- a resolution has been passed by the company for voluntary winding up;
- the period, if any, fixed for the duration of the company by the articles of association has expired; or
- the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred.

In the above cases, the winding up is deemed to have commenced at the time of passing of the resolution, the expiry of the relevant period or the occurrence of the relevant event.

The deemed commencement of a company's winding up is relevant for calculating the relevant time periods for claims under brought pursuant to Section 99 and Section 145 of the Companies Act.

It allows the company's affairs and the cause of its failure to be investigated by an independent, court-appointed liquidator, and for any claims that the company may have arising from the same to be pursued for the benefit of its stakeholders.

Official liquidation is available to:

- companies incorporated and registered under the Companies Act;
- bodies incorporated under any other law; and
- foreign companies which:
    - carry on business or have property located in the Cayman Islands;
    - are the general partner of a limited partnership registered in the Cayman Islands; or
    - are registered as foreign companies under the law.

Cayman's Voluntary liquidation: Pursuant to Section 117 of the Companies Act, a voluntary winding up is deemed to commence:

- at the time of passing of the resolution for winding up; or
- on the expiry of the period or the occurrence of the event specified in the company's memorandum or articles of association.

The directors are displaced by the voluntary liquidator on the commencement of a voluntary liquidation, except to the extent (if any) that the company (through a general meeting) or the voluntary liquidator sanctions the continuance of the directors' powers. The directors may, however, be appointed as the voluntary liquidators, as there are no qualification requirements for the role.

A voluntary liquidator must apply to the Grand Court for an order that the liquidation continue under the court's supervision unless, within 28 days of the voluntary liquidation commencing, the directors sign a declaration that the company will be able to pay its

debts in full (with interest) within a period not exceeding 12 months after commencement of the voluntary liquidation.

Voluntary liquidation can be used by companies incorporated and registered under the Companies Act, in order to wind up a solvent company's business and affairs (and ultimately dissolve the company) without the cost and expense of court supervision.

18. Foreign Creditors in Australia

Under the UNCITRAL Model Law on Cross-Border Insolvency, enforced under the Corporations Act 2001, foreign creditors have the same rights as domestic creditors in the commencement of, and participation in, court proceedings. This requires compliance by administrators with all substantive and procedural protections afforded to creditors, such as the requirement that foreign representatives be provided the same notification as any creditor afforded in Australia, to the extent that their address is known.

Further, foreign unsecured creditors rank equally with Australian unsecured creditors in the absence of any priority specified under the Corporations Act, other than for claims concerning foreign tax and social security obligations. This effectively excludes foreign revenue claims from recognition in domestic insolvency proceedings altogether.

19. Foreign Creditors in Cayman Islands

There are no alternative procedures that apply to foreign creditors. All creditors are treated equally regardless of where they are domiciled.

20. Moratorium and Stay in Australia

During the voluntary administration process, there is a general moratorium which prevents, among other things:

- the enforcement of unsecured creditors’ claims;
- repossession of equipment or contract termination by lessors;
- the enforcement of directors’ guarantees; and
- the commencement or continuation of litigation against the company.

The moratorium does not apply if the administrator consents or the court grants leave.

If a secured creditor has security over the whole or substantially the whole of the company's property, it may enforce its security without the consent of the administrator or leave of the court within 13 business days of being notified of the administrator's appointment. However, it is common for the 13 business days to be extended by consent.

For contracts entered into from 1 July 2018, a stay applies which prevents counterparties from exercising '*ipso facto*' termination rights because of the company's insolvency or because the company has or proposes to enter into receivership, voluntary administration or a scheme of arrangement, and which lasts for the length of those processes. The stay does not apply to liquidation or DOCAs. While the stay operates to prevent counterparties from terminating contracts, another stay operates in parallel to excuse counterparties from obligations to make further advances of money to the company. There are some exceptions to the stay in favour of the company, including certain types of contracts and contractual rights, such as non-payment or failure to perform, syndicated loans, securities, bonds, promissory notes, financial products, derivatives and certain contracts involving special purpose vehicles.

A company in liquidation is subject to a comprehensive moratorium in respect of enforcement of judgments or the continuation or commencement of litigation against it without the consent of the liquidator or leave of the court, though there is no stay on the enforcement of securities.

In the case of a CVL, any execution, sequestration or attachment in relation to the property of the debtor is declared void by the Corporations Act.

Where an application has been made for a debtor to be placed into liquidation by the court and that application is yet to be determined, the debtor, a creditor or a contributory (ie, a person that is liable as a member or past member to contribute to the property of the debtor if it is wound up, or a holder of fully paid shares in the debtor) may apply to the court to stay or restrain any further action in a proceeding or action against the debtor.

21. Moratorium and Stay in Cayman Islands

No moratorium is available if the scheme is initiated when the company is not in liquidation.

If a moratorium is required during the scheme process, then the company will need to present a winding-up petition and apply for an order appointing provisional liquidators prior to filing the scheme petition. If the scheme is initiated during a provisional liquidation, then an automatic stay prohibits the commencement or continuance of any suit, action or other proceeding against the company without the Grand Court's leave.

On the appointment of provisional liquidators, a statutory stay takes effect automatically pursuant to Section 97 of the Companies Act. No suit, action or other proceeding may be proceeded with or commenced against the company without the leave of the Grand Court. The stay does not prohibit secured creditors from enforcing their security.

At any time between the presentation of a winding-up petition and the making of a winding-up order, the company or any creditor or shareholder may apply for an injunction to restrain further proceedings in any action or proceeding pending against the company in a foreign court. A winding-up order carry an automatic stay prohibiting any suit, action or other proceeding from being proceeded with, or commenced against, the company without the leave of the Grand Court. These stays and injunctions do not prohibit secured creditors from enforcing their security.

No protection from the company's creditors is available during a voluntary liquidation. Voluntary liquidators are required to pay debts owed to creditors as they fall due. If they fail to do so, there is nothing to stop a secured creditor from enforcing its security or to prevent any creditor from commencing ordinary litigation or winding-up proceedings against the company.

22. "Cram Down" and "Cross-class Cram Down" in Australia

Once approved, a DOCA will bind the company, directors, shareholders, unsecured creditors and any secured creditor that has voted in favour of the DOCA. In order for a DOCA to be approved, a bare majority of all creditors, being 50% of creditors in value and number, must vote in favour of the DOCA. There are no separate classes of creditors that vote on the DOCA proposal. If the resolution to creditors proposing the DOCA is not passed by the requisite 'double majority', the administrator has a casting vote and will usually exercise that vote according to their recommendation in the report to creditors. This voting process allows for dissenting creditors, excluding secured creditors who did not vote in favour of the DOCA, to be bound by the wishes of the majority. 'Cross-class cramdown' is available to the extent that there is only one class, excluding secured creditors, which did not vote in favour.

Secured creditors that do not vote in favour of the DOCA are not 'crammed down' by the DOCA vote and cannot be compelled to release their security, although the court can prevent them from enforcing their security. Nonetheless, a common way for non-consenting secured creditors to be defeated is for the first-ranking secured creditor to appoint a receiver, who will often run a sale process. The receiver has the ability to sell through any subsequent ranking security.

Schemes can also facilitate 'cramdown' of creditors, as approval requires 75% by value and 50% by number in each class. However, unlike in a DOCA which only has one class, schemes can have multiple classes of creditors and the threshold in a scheme must be met within each creditor class.

23. "Cram Down" and "Cross-class Cram Down" in Cayman Islands

The Grand Court will consider class composition at the scheme convening hearing. The basic test is whether the members in each class have rights which are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

If the company is not in liquidation, there are no statutory provisions regarding creditor committees, although in practice *ad hoc* committees may be formed. If the company is in provisional liquidation, the Grand Court will decide whether a committee should be established and if so, how that should be done. If a committee is established, its role will be to act as a sounding board for the provisional liquidators and to review their fees. The committee may be authorised to retain counsel at the company's expense.

At the scheme convening hearing, the Grand Court will need to be satisfied that the scheme document and supporting explanatory statement contain all information reasonably necessary to enable the scheme creditors (and/or shareholders, as applicable) to make an informed decision about the merits of the proposed scheme. If the company is in provisional liquidation, it is likely that the Grand Court will also require the provisional liquidators to report to the court and the creditors periodically.

If the scheme is supported by more than 50% by number and 75% by value of those attending and voting in each scheme class, and is subsequently approved by the Grand Court, it will bind all scheme creditors/shareholders (including those who did not vote or who voted against the scheme) in accordance with its terms.

Dissenting creditors' rights will be ‘crammed down' in accordance with the terms of the scheme if the statutory majorities are obtained in each class and the scheme is sanctioned by the Grand Court.

24. Centre of Main Interests (COMI) in Australia

The Cross-Border Insolvency Act 2008 (Cth) does not define ‘centre of main interests’.
COMI is not required in Receivership as any corporation (domestic or foreign) can have its Australian assets placed into Australian-regulated receivership.

COMI is not required in CSOA as only Australian incorporated companies or foreign companies that are registered in Australia may be the subject of a scheme of arrangement. COMI is not required in VA as only Australian incorporated companies may be placed into Australian voluntary administration. Australia is party to the UNCITRAL Model Law on

Cross- Border Insolvency - this facilitates recognition of foreign rehabilitation proceedings in this jurisdiction.

COMI is not required in litigation as only Australian incorporated companies or foreign companies registered or conducting business in Australia may be placed into Australian liquidation.

25. Centre of Main Interests (COMI) in Cayman Islands

The Cayman Islands has elected not to adopt the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, which uses the concept of 'centre of main interests'. As such, the question of centre of main interests is not directly relevant in the Cayman Islands. Under Part XVII of the Law, the Grand Court has a statutory jurisdiction to recognise and assist foreign representatives appointed in the place of a company's incorporation. In addition, the Grand Court has a common law power to recognise and assist foreign court-appointed representatives

Conclusions

Australia has been one of the friendliest jurisdictions in the world for secured creditors. Australia's restructuring and insolvency regime is largely perceived as protecting the rights and interests of creditors over debtors, and particularly those creditors with security over the whole or substantially the whole of a debtor's property. For instance, this is reflected in the robust rights and priority generally afforded to secured creditors regarding the enforcement and distribution of assets (with some exceptions regarding circulating assets, which give priority to certain remuneration and expenses of voluntary administrators and certain employee entitlements. Secured creditors are generally not subject to the stays on enforcement contained in the voluntary administration and liquidation regimes and broadly speaking are not bound by formal insolvency processes. Ordinary unsecured creditors also have an active role in formal restructuring and insolvency processes and are afforded extensive rights to receive information and participate at meetings that can determine the future of the debtor. However, small shifts

in favour of the debtor have recently been made with the introduction of the ‘safe harbour’ regime and the prohibition on the exercise of ‘ipso facto’ rights which provide greater protection to a debtor and its directors in situations of financial distress. A new "COVID-19" defense to the insolvent trading prohibition has been introduced to support small business restructuring (SBR).

As in many other jurisdictions, delays in implementing a restructuring plan can occur where there is a significant difference in the value attributed by different stakeholders to the debtor and its assets. In Australia, this issue can be somewhat ameliorated by the use of independent insolvency practitioners, who are appointed to review and opine on the best options available to creditors.

The Cayman Islands has traditionally been regarded as a creditor-friendly jurisdiction and creditors of the same class are treated equally irrespective of where they are domiciled. The proposed amendments of Provisional Liquidators will allow a Cayman company to restructure under the supervision of a “restructuring officer” and provide for an automatic stay on creditor action in the restructuring period. The proposed amendments should operate in a way similar (although not identical) to the administration procedure in England or Chapter 11 proceedings in the United States.

Also, the enactment of the amendments empowering the Board to act without a member’s resolution for the appointment of a “restructuring officer” on the ground that the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors is a good step forward.

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