A&O SHEARMAN

Restructuring across borders
Islands of Bermuda

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2025

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Introduction

Bermuda is a British Overseas Territory and its insolvency legislation draws on the principles of English law as set out in the Companies Act 1948 (now repealed) which have survived in the Insolvency Act 1986. For this reason, the insolvency procedures in Bermuda closely resemble those available in England, with the exception that under the laws of Bermuda there are no procedures akin to the administration or company voluntary arrangement procedures available in England.

From a creditor's perspective, the choice of procedure will depend on whether the borrower has granted security. If security has been granted, receivership may well be the most appropriate choice. Receivership may be classified as a self-help remedy for secured creditors.

If no security has been granted, the choice of procedure will depend on whether there is a viable business to be rescued. If there is a business to be rescued, an informal rescue or workout outside the formal insolvency procedures (i.e. the restructuring of the company on an informal, consensual basis by agreement between the company and its principal lenders or creditors) may be appropriate. Alternatively, a restructuring or rescue may be conducted via the formal scheme of arrangement process.

If there is no business to be rescued, it may be more appropriate to put the company into liquidation, the formal dissolution procedure for Bermudian companies.

THE THREE PRINCIPAL RESTRUCTURING REGIMES FOR COMPANIES UNDER BERMUDA LAW ARE:

- Receivership;
- Schemes of arrangement; and
- Liquidation (also known as winding-up).

Enforcement of security

THE MAIN FORMS OF SECURITY AVAILABLE UNDER BERMUDA LAW ARE:

- mortgage over immovable and movable property (such as real estate, shares, bank accounts, receivables, plant and machinery and contractual rights); and
- fixed and floating charge over immovable and movable property (such as shares, bank accounts, receivables, plant and machinery and contractual rights).

Bermuda law recognises the concept of trust.

Security interests are commonly evidenced by deed. Although registration of security is not required to perfect the security and ensure its validity, registration will determine priority between competing creditor interests.

Receivership

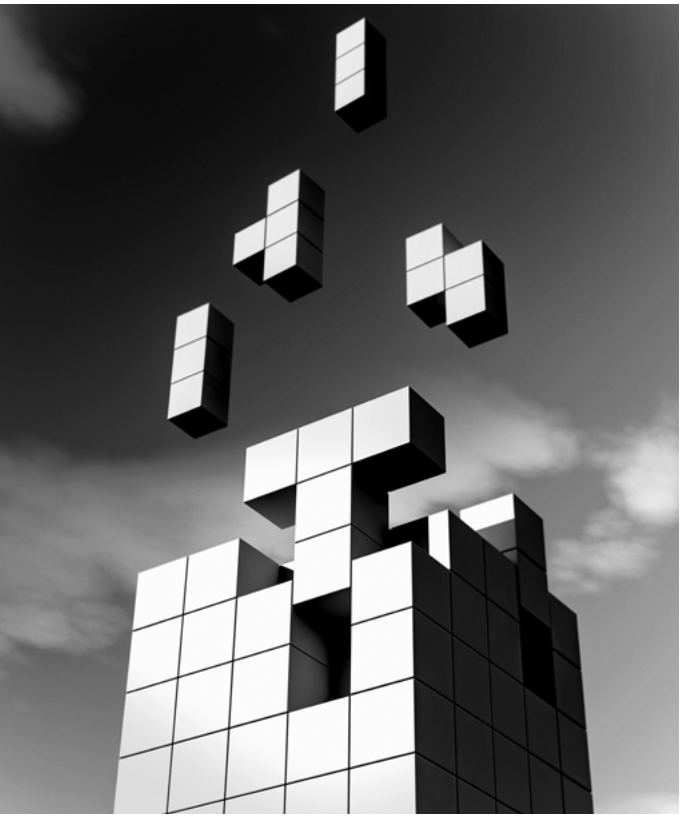
Receivership is essentially a self-help remedy available to secured creditors. It is not a collective insolvency procedure but a method by which a secured creditor can enforce its security, realise the assets secured and obtain repayment of the debt outstanding. The appointed receiver acts in the interests of their appointor and not for the general body of creditors.

A receiver may be appointed by the secured creditor in accordance with the terms of the security document pursuant to which the appointment is to be made and any legislative requirements.

The powers granted to a receiver are derived from the agreement creating the security pursuant to which they are appointed, as well as section 60 and Part XIV of the Companies Act 1981. The powers are normally wide and generally enable them to do all things necessary to realise the secured property for the benefit of the secured creditor.

Although it is more common for a receiver to be appointed pursuant to the terms of a security document, a receiver may also be appointed by the court. Section 19(c) of the Supreme Court Act 1905 provides that the court may appoint a receiver if it is just and expedient to do so.

Scheme of arrangement



A scheme of arrangement is a formal agreement between the company and its creditors and/or its members (or a class of its creditors or members) which requires the agreement of more than 50% in number and 75% in value of creditors and/or members (or classes of them) in order to become binding on all of them (including those that voted against the scheme) when sanctioned by the court.

The procedure is provided for under section 99 of the Companies Act 1981.

The terms of the scheme will vary from case to case; it is essentially a commercial agreement between the company and its creditors and/or members but will often require creditors to accept a percentage of the debts due to them and/or may involve a write-off of debt and/or a debt for equity swap.

The procedure is available to solvent and insolvent companies. It is the company who must initiate the procedure. A creditor or member may make an application; however, the company will need to concur with the proposal as it is the company that will be the entity which is promulgating the compromise or arrangement rather than the creditors. Where the company is in winding-up proceedings, the liquidator may initiate the procedure.

No protection is afforded by the scheme procedure whilst the scheme of arrangement is negotiated. For this reason, where a company is insolvent, it is common for a provisional liquidator to be appointed, who will then initiate the procedure with the protection of the statutory moratorium available to the company in liquidation.

Liquidation

Liquidation (or winding-up) is the dissolution procedure for companies under the laws of Bermuda. Liquidation can take one of two forms:

- voluntary winding-up (either a members' voluntary liquidation or a creditors' voluntary liquidation, both of which are commenced by a resolution of the shareholders); or
- compulsory winding-up (commenced by presentation of a winding-up petition in court and a winding-up order subsequently being made).

A members' voluntary liquidation is available only to a company that is solvent. A majority of the directors of a company are required to file a statutory declaration as to the company's solvency stating, in their opinion, that the company will be able to pay its debts in full within 12 months. Once the declaration(s) has been filed with the Registrar of Companies, the liquidation is initiated by the shareholders of the company passing a resolution that the company be placed into liquidation. The resolution requires a simple majority of shareholders present and voting and the members may nominate a liquidator.

Like a members' voluntary liquidation, a creditors' voluntary liquidation is initiated by the shareholders of a company passing a resolution that the company be placed into liquidation.

However, if the directors are unable to swear a statutory declaration of solvency (as is required for the liquidation to proceed as a members' voluntary liquidation), then a creditors' meeting must be convened, for the same day or the day immediately following the shareholders' meeting, to allow the creditors to nominate the liquidator.

Alternatively, the company, a creditor, contributory or the Registrar of Companies (and in the case of certain regulated companies, the Regulator) may present a petition to the court for a compulsory winding-up and if the company is insolvent or is likely to become insolvent, a winding-up order will be made by the court in due course.

The petition to the court has to be based on one or more specified grounds including the inability of the company to pay its debts. The court also retains a discretion to grant a winding-up order where it considers it is just and equitable to do so.

In limited circumstances, such as where a company's assets are under threat of being destroyed or dissipated, a court may appoint a provisional liquidator to protect the assets of a company between the date of the petition for winding-up and determination of the final order for winding-up. In certain cases, a provisional liquidator has been appointed as a precursor to a scheme of arrangement being proposed by a company.

Once the winding-up order has been made, or a provisional liquidator has been appointed, no action or proceedings can be commenced or continued against the company or its assets without the leave of the court. Secured creditors who do not need the assistance of the court are not prevented from enforcing their security. They remain entitled to exercise any enforcement rights in respect of the security held by them, notwithstanding the existence of the automatic stay. There is no statutory moratorium in the case of a voluntary liquidation, although the liquidator may apply to the court for a stay of proceedings.

Regardless of the whether the liquidation proceeds as a voluntary winding-up or a compulsory winding-up, the liquidator's role is to wind up the affairs of the company, realise the assets of the company, agree creditors' claims and distribute the assets in the statutory order of priority. The role of a provisional liquidator may be limited where their appointment is a precursor to a scheme of arrangement being proposed by the company. In such cases, the management of the company may continue under the supervision of the provisional liquidator and the court whilst a scheme of arrangement is negotiated.

A liquidator has the power to challenge and have set aside antecedent transactions (increasing the assets available for creditors). Such transactions include:

- fraudulent conveyances where a disposition of property by a company has been made with the dominant intention of putting such property beyond the reach of creditors and without valuable consideration (it is an open question as to whether this action is available to a liquidator or is limited to a creditor);
- fraudulent preferences where a disposition of a company's assets is made in favour of a creditor with the dominant intention to prefer that creditor;
- dispositions of property by the company, which have not been approved by the court, following presentation of a petition for winding-up; and
- a liquidator also has the power to bring proceedings against any director or officer of a company who has (i) misapplied any funds or property belonging to the company or has been guilty of any misfeasance or breach of trust in relation to the company; or (ii) been a party to the company continuing to trade at a time when that director/officer knew the company was insolvent and would not be able to pay its debts. In these circumstances, such director or officer of the company may be compelled to repay and compensate the company for losses incurred as a result of their actions.

Following realisation and distribution of all of the assets of a company (i.e. once a company's affairs have been wound up), in the case of a members' voluntary liquidation, a final meeting of shareholders will be called and the company is deemed dissolved thereafter. In the case of a creditors' voluntary winding-up, a final meeting of shareholders and creditors will be called following which a return will be filed with the Registrar of Companies. The company is automatically dissolved three months after the filing of the return. In the case of a compulsory liquidation, upon completion, the liquidators shall apply to the court for their release and the company's dissolution.

THE LIQUIDATOR IS REQUIRED TO DISTRIBUTE THE PROCEEDS FROM THE REALISATION OF ASSETS IN THE FOLLOWING ORDER:

- payments to secured creditors from the proceeds of secured assets;
- costs of the liquidation (including the liquidator's remuneration and expenses);
- debts due to employees;
- preferential debts (as set out under section 236 of the Companies Act 1981 including unpaid taxes, occupational pension scheme contributions, compensation payments pursuant to the Workers' Compensation Act 1970 and liabilities underinsurance contracts);
- floating charge creditors (fixed charge creditors will be paid from the proceeds of secured assets, as noted above);
- unsecured creditors (Bermuda law does not recognise the subordination of related-party loans such as shareholder loans); and
- shareholders (according to their rights and interests in the company, although in an insolvent liquidation shareholders will not receive anything).

Cross-border issues

Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. The insolvency legislation only applies to companies registered under the Bermuda Companies Act 1981 and will not apply to foreign companies even if they have a business presence in Bermuda. In the case of permit companies and non-resident insurance undertakings, such companies can be wound up by the court or by a creditors' voluntary liquidation, but not by a members' voluntary liquidation. In the case of life insurance companies carrying on long-term business, voluntary winding-up is not permitted.

The Privy Council decision in *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] UKPC 35 restricted the scope of international foreign assistance for insolvency practitioners which had previously been afforded in cases such as *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508. In Saad the Privy Council dealt with an attempt by a Cayman company's liquidators to obtain information about the company from the former auditors PwC. The liquidators considered the information which had been provided by PwC insufficient and sought further disclosure of information under Bermuda legislation. The Bermuda Supreme Court granted the application for further information. The Privy Council found the Bermuda Supreme Court had no jurisdiction to wind up the company given that the company was not incorporated in and did not carry on business in Bermuda, and held the Supreme Court should not have exercised its powers to require PwC to provide information.

However, in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, the Privy Council was unanimous that common law judicial assistance to foreign office holders was permissible, even where the company could not have been wound up in Bermuda. The Board accepted the general principle of modified universalism and the common law power (and in fact a duty) to assist foreign winding up proceedings so far as it properly can. As such, whilst a foreign company cannot be wound up in Bermuda in order to utilise statutory powers available to liquidators, the Bermuda Courts will give common law recognition in order to assist foreign winding up proceedings.

Some further assistance is provided to creditors by virtue of The Judgments Reciprocal Enforcement Act 1958 which provides that a foreign judgment obtained against a Bermuda company may be recognised and enforced by the courts in Bermuda if certain conditions are fulfilled, including that the judgment was a final and conclusive judgment in the foreign jurisdiction, is in respect of a sum of money (not being damages, a fine, penalty tax or similar charge), does not contravene public policy of Bermuda and was obtained in a territory under Her Majesty's protection or in respect of which trusteeship under the United Nations has been accepted by Her Majesty (as set out in Article 9). Judgments of superior courts in the United Kingdom will be recognised and enforced.

Reform

Reforms proposed by the Bermuda Restructuring & Insolvency Association (RISA) are under consideration by the Law Reform Committee. Anticipated reforms may include the introduction of a rescue procedure, recognition and assistance provisions for overseas office holders as well as modification to the numerosity and voting thresholds for the approval of schemes of arrangement.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

This factsheet has been prepared with assistance of Conyers Dill & Pearman. Any queries under Bermudian law may be addressed to the key contacts from Conyers Dill & Pearman listed below.

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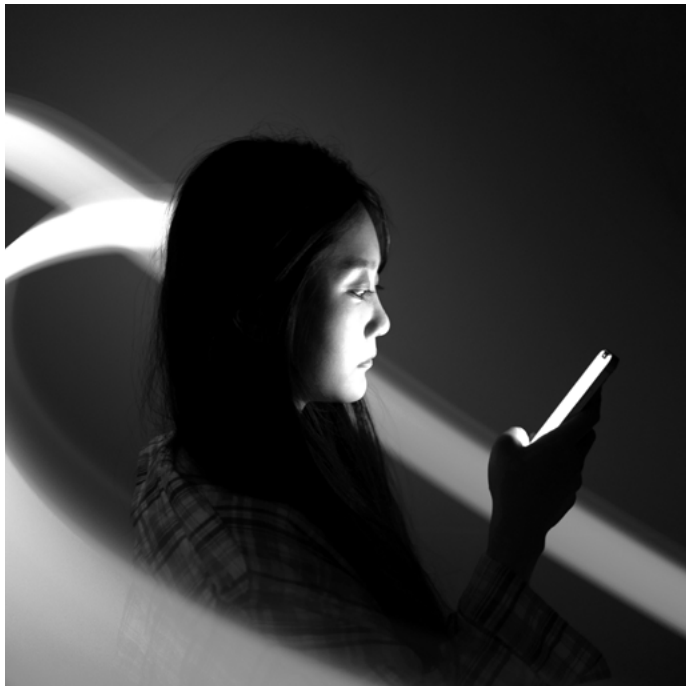
Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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