

Navigating Offshore Insolvencies and Restructuring

A Practical Guide

Presented by

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6 December 2023

CAREY OLSEN



Our global network



Our credentials

INVESTMENT FUNDS CLIENTS

We advise more investment funds in the Channel Islands than any other offshore law firm.

 1800+

BANKING CLIENTS

We advise 10/10 of the world's largest banks.

 10/10

LSE-LISTED CLIENTS

We advise 90+ LSE-listed clients – more than double the number of the next nearest offshore law firm.

 1st

PRIVATE EQUITY CLIENTS

We advise 9/10 of the world's largest private equity firms.

 9/10

TISE

We are the leading adviser for listings on The International Stock Exchange.

 No.1

INVESTMENT FUNDS

We advise more Channel Islands funds by asset value than any other offshore law firm.

US\$680+bn

TIER ONE RANKINGS

We have 20/20 Tier One rankings in The Legal 500 UK – more than any other offshore law firm.

 1st

LAW FIRMS

We work with all of the world's top 25 law firms.

 25

PRIVATE EQUITY REAL ESTATE

We advise 8/10 of the world's largest private equity real estate firms.

 8/10

Our people

74

Partners

300+

Lawyers

600+

People

Our firm

9

Locations

5

Offshore Laws

BERMUDA

BRITISH VIRGIN ISLANDS

CAYMAN ISLANDS

GUERNSEY

JERSEY

1898

Founded

Agenda

- 1) Uncovering information about assets, directors and shareholders of offshore entities**
- 2) Overview of offshore insolvency and restructuring regime**
- 3) Key Updates**
 - Cayman Islands restructuring officer regime**
 - Changes to BVI Companies Act**

(1) Uncovering information about offshore entities

How do I obtain information about offshore companies?

Publicly available information

Company registers are the primary sources of publicly available information and contain information about:

- Name of the company
- Date of Incorporation
- Registered Office Provider / Registered Agent
- Registered Address
- Status of company
- Memorandum and Articles of Association (BVI only)

How do I obtain information about offshore companies?

Publicly available information

- Cayman Islands and BVI: the names of current directors are now publicly searchable.
- Latest development in Cayman Islands: Beneficial Ownership Transparency Bill 2023
 - (1) A corporate services provider shall establish and maintain a register
 - (2) Beneficial owner – owns or controls (direct or indirect) 25% or more of the shares
 - (3) Nationality and nature of ownership
 - (4) Access to information – Registrar of Companies to maintain a search platform accessible by regulators
 - (5) Public access?

How do I obtain information about offshore companies?

Publicly available information

Court Searches

- **In the Cayman Islands**
 - Any person can obtain a copy of the originating process. An application must also be made to inspect other documents on file.
 - Liquidation proceedings: only certain individuals can inspect case file.
- **In BVI**
 - On payment of prescribed fee, any person can obtain a copy of the claim form, notice of appeal or a judgment /order made in court.
 - To inspect other documents on file, an application is required.

How do I obtain information about offshore companies?

Statutory rights to information

In the Cayman Islands

- S 64 of the Companies Act:
 - 20% shareholder may apply to Court to appoint inspectors to report on affairs of the company.
 - Officers and agents have to disclose books and documents in their custody for inspection.

How do I obtain information about offshore companies?

Statutory rights to information

In BVI – S 100 of the Business Companies Act:

- Director is entitled to inspect and make copies of documents and records of the company
- Member is entitled to inspect and make copies of:
 - Memorandum and articles
 - Register of members
 - Register of directors
 - Minutes of meetings and resolutions of members

(2) Overview of offshore insolvency and restructuring regime

Overview of offshore insolvency and restructuring regime

BVI and Cayman Islands

Appointment of Liquidators	Appointment of Provisional Liquidators	Scheme of Arrangements
<ul style="list-style-type: none">• Voluntary (solvency statement required)• Court appointed (if insolvent)	<ul style="list-style-type: none">• To prevent dissipation or misuse of assets, or mismanagement / misconduct on the part of directors pending winding up• “Light touch” provisional liquidators appointed in context of consensual overseas restructuring with support of secured and unsecured creditors.	<ul style="list-style-type: none">• Compromise or arrangement between company and creditors / members• No automatic moratorium• Implemented together with a “light touch” provisional liquidation• Convening Hearing followed by Sanction Hearing• Commonly used in parallel with foreign schemes where necessary

Overview of offshore insolvency and restructuring regime

Recognition of foreign insolvency proceedings

- BVI and Cayman Islands have not adopted the UNCITRAL Model Law on Cross Border Insolvency
- Legislations providing for recognition and assistance
 - Part XIX of the BVI Insolvency Act gives the court broad statutory powers to make various orders in aid of foreign proceedings, such as the power to grant a stay of execution against debtor property in the BVI, delivery up of property, or the examination of a person, however applies only to a “relevant foreign country”
 - Sections 240 and 241 of the Cayman Islands Companies Act allow the Court to grant recognition and ancillary relief to foreign representatives who are appointed over foreign debtors in their place of incorporation

Overview of offshore insolvency and restructuring regime

Recognition of foreign insolvency proceedings

- Common law principles on recognition and assistance will apply: *In the matter of China Agrotech Holdings Limited* -
 1. The court is to be treated as having a power to recognise and grant assistance to foreign proceedings and liquidators. If the circumstances justify its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its office holders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its power.
 2. Suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist.

Overview of offshore insolvency and restructuring regime

Recognition of foreign insolvency proceedings

3. Sometimes the foreign liquidator would be asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There might well be no need to rely on the common law power in such a case.
4. Sometimes, the liquidator would be asking the requested court to exercise its case management powers in proceedings before it by adjourning or staying them or the execution of a domestic judgment arising therefrom (the exercise of such case management powers could be said to involve an exercise of the common law power).

Overview of offshore insolvency and restructuring regime

Recognition of foreign insolvency proceedings

- Not without difficulty:
 - In the BVI (*Net International*): it was clarified that there exist a common law right of recognition but not assistance (as Part XIX is a complete statutory code for assistance)
 - Cayman Islands: Issues relating to foreign insolvency proceedings over offshore entities and restructuring efforts in the place of incorporation often come into the spotlight

(3) Key updates on recent developments

Key Updates – Cayman Islands

The changes to the Cayman restructuring regime

- ✓ New restructuring officer regime under section 91B of the Cayman Companies Act (2023 Revision): -
 - Formal standalone restructuring procedure for companies outside the traditional winding up regime
 - Able to present a petition to appoint restructuring officer
 - Directors empowered to present the petition without shareholders' resolution unless M&AA prohibits this
 - Automatic moratorium is triggered upon presentation of petition

Key Updates – Cayman Islands

The changes to the Cayman restructuring regime

- ✓ New restructuring officer regime: -
 - The petitioner must satisfy the Court that it:
 - (a) is or is likely to become unable to pay its debts; and
 - (b) it intends to present a restructuring plan to its creditors (or classes thereof).

Key Updates – Cayman Islands

The changes to the Cayman restructuring regime

- ✓ Cases on the new restructuring officer regime: -
 - *Oriente Group Limited* (FSD unreported judgment 8 December 2022)
 - The Court was persuaded that it was appropriate to appoint restructuring officers:
 - The Company had a coherent restructuring proposal which had already been put to the Noteholders, and nearly 50% of all Noteholders had already communicated positive support for the idea of a restructuring and appointment of ROs.
 - This preliminary support of the creditors lent further credence to the Company's management's view that value for creditors would be best served by ensuring that the Company was a going concern rather than being wound up.

Key Updates – Cayman Islands

The changes to the Cayman restructuring regime

- ✓ Cases on the new restructuring officer regime: -
 - *Re Aubit International* (FSD 240 of 2023 (DDJ))
 - The Court dismissed the petition to appoint restructuring officers:
 - There was no credible or meaningful restructuring plan put before the Court.
 - The proposed “very outline plan” required, first, that information be gathered before a restructuring proposal could be formulated.
 - The Company admitted that it did not have sufficient evidence as to its financial position.
 - The Court concluded that the Company could not satisfy the requirement that there was a real prospect of a restructuring being effected for the benefit of the general body of creditors.

Key Updates – Cayman Islands

The changes to the Cayman restructuring regime

- ✓ New regime: -
 - Removal of headcount requirement for a member schemes – only 75% in nominal value of members present and voting at scheme meeting is required
 - Additional powers for directors to present winding up petition

Key Updates – BVI

Changes to the BVI Companies Act

✓ Changes took effect on 1 January 2023

- 1. Company searches** – Introduce searches that disclose the names of current directors
- 2. Liquidators** – Create a new residency requirement for voluntary liquidators
- 3. Bearer shares** – Abolish bearer shares
- 4. Record keeping** – Additional record keeping requirements, including annual returns
- 5. Resignation process** – Change the resignation process for registered agents
- 6. Strike-off regime** – Change in strike-off and restoration regime

Questions



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