Restructuring & Insolvency

In 46 jurisdictions worldwide

Contributing editor
Bruce Leonard

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GETTING THE DEAL THROUGH

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Bruce Leonard

Cassels Brock & Blackwell LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

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Bahamas

Randol M Dorsett and Leif G Farquharson
Graham Thompson

Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Bahamas has recently undergone a major reform of its company liquidation regime. The Companies (Winding up Amendment) Act and the International Business Companies (Winding up Amendment) Act were enacted during late 2011 as part of a suit of reform initiatives to modernise our commercial legislation. The reform saw the introduction of new Rules (the Companies Liquidation Rules, 2012) applicable to all companies, which came into force on the 31 July 2012. Under the new Regime, the meaning of insolvency has been expanded beyond the traditional 'cash-flow test' to include the 'balance sheet test'. As such a company is insolvent not only if it is unable to pay its debts as they fall due, but also if the value of the company's liabilities exceeds its assets.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

The Supreme Court has exclusive jurisdiction over corporate insolvencies, from presentation of a winding-up petition to conclusion of the process. This is so for both ordinary companies and IBCs. There are practically no restrictions on the jurisdiction of the court as it relates to insolvencies. The Supreme Court may make winding-up orders in respect of 'an existing company', a company incorporated and registered under the Companies Act or the IBC Act, a body incorporated under any other law, and (now under the new regime) a foreign company that has property located in the Bahamas, is carrying on business in the Bahamas or is registered in the Bahamas.

Appeals against decisions and orders of the Supreme Court lie to the Bahamas Court of Appeal and, ultimately, to the Judicial Committee of Her Majesty's Privy Council, which sits in London, England.

Actions merely seeking the repayment of debts or damages of B$5,000 or less are heard in the magistrates (lower) court.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

No entitles are expressly excluded from the application of the general statutory provisions governing corporate insolvencies. However, there are modifications in their application with respect to, for instance:

- insurance companies, which require the Insurance Commission to be a party to proceedings for winding-up and which may in certain circumstances be wound up on the application of policyholders;
- banks, which may be wound up on the application of the governor of the Central Bank for the purposes of protecting depositors and others; and
- investment funds, which must notify the Securities Commission in writing of the commencement of any winding-up, dissolution or other termination procedures.

Similarly, generally all assets of a company are subject to the winding-up process. This is obviously without prejudice to and after taking into account and giving effect to the rights of preferred (ie, taxes, employee entitlements, etc) and secured creditors. Indeed notwithstanding that a winding-up order has been made, a creditor who has security over assets of a company is entitled to enforce his or her security without the leave of the court and without reference to the liquidator. Similarly, property held on trust by a company, although subject to control of the liquidator, will not be available for general distribution. There is now, however, under the new regime, recovery of liquidator's costs in relation to assets held upon a trust. Assets available to satisfy creditors are now not burdened by such costs as they are borne by the persons who benefit from the trust asset.

Protection for large financial institutions

4 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

No.

Secured lending and credit (immoveables)

5 What principal types of security are taken on immoveable (real) property?

The legal mortgage constitutes the principal form of security taken over real property. This involves the transfer of the whole of the mortgagor's legal interest in the property to the mortgagee, subject to the mortgagor's right to redeem legal title upon repayment of the debt (known as the 'equity of redemption').

An equitable mortgage may also be taken over immoveable property. Unlike a legal mortgage, this involves no transfer of any legal estate or interest to the creditor but rather confers an equitable interest in the land. The holder is entitled to have the property subject to the mortgage sold by order of the court to realise the security.

The fixed charge is another form of security frequently taken over immoveable property in the Bahamas. Under this arrangement the asset in question (whether currently owned by the debtor or not) is charged with the satisfaction of the debt immediately upon the debtor acquiring an interest in it.

Secured lending and credit (moveables)

6 What principal types of security are taken on moveable (personal) property?

Various forms of security are taken on personal property. The form used is largely dependent upon the nature of the asset in question, the interest of the debtor therein and the objectives of the creditor in taking the security.

Mortgages and charges are frequently taken over specific assets such as ships, aircraft, vehicles and shares. Hypothecations of cash deposits are regularly used by lenders seeking protection against default on loan obligations, especially where overdraft facilities have been provided. Legal assignments of choses in action are also commonplace in the lending context, particularly as it relates to receivables and insurance policy proceeds. Debentures (incorporating both fixed and floating charges) are widely utilised as a security instrument over both specific assets and assets that may be changed from time to time, such as stock in trade, book debts, office equipment, furniture and raw materials.

There are no statutory formalities contained in the Companies Act or the IBC Act governing the creation of security interests generally. Under the IBC Act, however, a charge of shares of an IBC must indicate an

intention to create a charge and indicate the amount secured by the charge or how that amount is to be calculated. A charge of shares of an IBC may also be governed by the law of a jurisdiction other than the Bahamas.

The question whether an instrument has been effective to create a floating charge or a fixed charge is determined according to principles derived from English common law and will be based on:

- the terms of the security document;
- the nature of the rights created in favour of the charge-holder and those retained by the debtor; and
- the nature of the property being encumbered.

Liens essentially confer a legal right to retain possession of goods until money owed to the holder has been paid. They may arise by contract, statute or operation of law. This form of security commonly arises locally in favour of specific office holders, professionals and tradesmen who provide labour or incur expenses for which they are entitled to be remunerated. These include provisional liquidators, receivers and receiver managers, attorneys and workmen who expend labour and skill on improving or repairing chattels bailed to them.

Unsecured credit

7 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

An unsecured creditor generally has no special rights over the property and assets of a debtor until he or she obtains and enforces a judgment. Where there are concerns that assets belonging to the debtor may be dissipated or removed from the jurisdiction prior to judgment being given, the creditor may obtain *Mareva* injunctive relief to restrict dealings with the assets in question or other assets potentially capable of satisfying any judgment. This will often require the giving of an undertaking to repay the debtor for any financial losses suffered by reason of the restrictions imposed should the unsecured creditor's claim ultimately fail.

A range of enforcement procedures are available to an unsecured creditor who has obtained a judgment in his or her favour. These include:

- writs for the seizure and sale of the debtor's goods and assets;
- garnishee orders attaching money due to the judgment debtor by third parties;
- charging orders;
- receivership; and
- orders for committal.

The procedure to be invoked is primarily influenced by the amount of the debt owed and the nature of the goods available to satisfy the judgment.

Under the Rules of the Supreme Court, the court has the discretion to require a creditor who is not ordinarily resident within the jurisdiction to pay 'security for costs' as a precondition to pursuing legal proceedings in the Bahamas. The factors taken into consideration in making such an order normally include the estimated future legal costs of the defendant in resisting the proceedings, the legal costs already incurred by the defendant, whether the claimant has any property or assets within the jurisdiction and the overall merits of the substantive claim. The sum required will not normally provide a defendant with a full indemnity in respect of his or her likely legal costs, but it will make some funds available from which a defendant may recoup costs in the event that he or she successfully defends any legal proceedings pursued against him or her.

A straightforward debt collection action may be completed within a few months of the initial filing of the claim. The time taken to dispose of such claims usually depends on the complexity of the matter and the extent to which the debtor resists the proceedings.

Under the Reciprocal Enforcement of Judgments Act, judgments and arbitrators' awards from jurisdictions that accord similar recognition to Bahamian Supreme Court judgments may be registered and thereafter enforced locally. The preconditions to obtaining registration include:

- application to register must generally be made within 12 months from the date of the judgment;
- the foreign court must have acted with jurisdiction;
- the judgment must not have been obtained by fraud; and
- recognition of the foreign judgment must not be against public policy.

Voluntary liquidations

8 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A company may commence voluntary liquidation in the following situations:

- a period fixed for its duration by the articles of association expires or a specific event occurs after which it is to be dissolved under its articles;
- a resolution requiring the company to be wound up voluntarily has been passed by at least 75 per cent of its members; or
- if the company resolves by resolution that it be wound up voluntarily because it is insolvent.

Indeed a voluntary winding-up is deemed to commence:

- at the time of the 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, notwithstanding that a supervision order may be subsequently made by the court.

After commencing voluntary liquidation, the company must cease to carry on business except as required for its beneficial winding up, although the company's articles, its corporate state and powers continue until the company is dissolved. If the winding up has commenced in accordance with the occurrence of an event in the memorandum and articles of the company, then the person designated therein shall become liquidator (known as 'voluntary liquidator') automatically from the commencement of the winding up. If no such person is designated (or such designated person is unable or unwilling to act) then the directors shall convene a general meeting of the company for the purpose of appointing a liquidator. In this latter scenario, the appointment only takes effect upon the filing with the Registrar of the nominated liquidator's consent to so act. On the appointment of a voluntary liquidator all the powers of the directors cease, except so far as the company in a general meeting or the liquidator sanctions their continuance.

Within seven days of the commencement of the voluntary liquidation, the voluntary liquidator, or in his or her absence, the directors shall:

- file with the Registrar of Companies a notice of the winding up;
- file with the Registrar of Companies the voluntary liquidator's consent to act;
- in the case of a regulated company, send a copy of documents referenced above to the regulator; and
- publish a notice of the voluntary winding up in the Gazette.

A very important requirement for a voluntary liquidation is that within 35 days of the commencement of a voluntary liquidation, the voluntary liquidator shall file with the Registrar of Companies, a director's declaration of solvency, duly signed by all directors. Indeed in the absence of such a declaration, the voluntary liquidator must make an application to the court for a supervision order and must give notice of such application to the registrar.

Involuntary liquidations

9 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

A creditor (by assignment or otherwise) is entitled to petition the Supreme Court for an order that a company be wound up on the basis of its inability to pay its debts or on grounds that it is just and equitable to do so. A company may be deemed to be unable to pay its debts in the present context where:

- it is indebted in a sum exceeding B$1,000 and, after being served at its registered office with a demand requiring payment of the sum due, it has failed to do so for at least three weeks;
- enforcement of a judgment or order in favour of the creditor against the company is returned unsatisfied in whole or in part;
- it can be proved that the company is unable to pay its debts (this raises balance sheet considerations); or
- it can be proved that the value of the company's assets is less than the amount of its liabilities, having regard to its contingent and prospective liabilities (this raises liquidity considerations).

Prior to the first appointment of liquidators, the court may appoint a provisional liquidator to take charge of the estate and effects of the company pending the hearing of the petition. All dispositions of property, transfers

of shares and alterations in the status of members of the company between commencement of winding-up and the order for winding-up are void unless otherwise approved by the court.

Once a winding-up order has been made or a provisional liquidator has been appointed, no actions or proceedings against the company may be instituted or continued without the permission of the court. After winding up, the management powers of the directors come to an end and are exercisable by the liquidators.

Voluntary reorganisations

10 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

The Bahamas does not currently have comprehensive statutory procedures addressing financial reorganisations of insolvent companies. Reorganisations of IBCs are addressed in the IBC Act under the heading Merger, Consolidations etc. Under the Act, the directors of a company may, by a resolution of directors, approve a plan of arrangement. 'Arrangement' is defined as:

- a reorganisation or reconstruction of a company;
- a separation of two or more businesses carried on by a company; or
- any combination of any of the things specified above.

Upon approval of the plan of arrangement by the directors, the company shall make application to the court for approval of the proposed arrangement. The court may determine what notice, if any of the proposed arrangement is to be given to any person; determine whether approval of the proposed arrangement by any person should be obtained and the manner of obtaining the approval; determine whether any holder of shares, debt obligations or other securities in the company may dissent from the proposed arrangement and receive payment of the fair value of his or her shares, debt obligations or other securities. The court may also conduct a hearing and permit any interested persons to appear; and may approve or reject the plan of arrangement as proposed or with such amendments as it may direct.

Involuntary reorganisations

11 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

There are at present no procedures in either the Companies Act or the IBC Act expressly entitling a creditor to commence an involuntary reorganisation of an insolvent company.

Mandatory commencement of insolvency proceedings

12 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

There is no express obligation under Bahamian law requiring a company's board to commence insolvency proceedings. Directors are nonetheless under statutory duties to the company to act in good faith and with a view to its best interests, and to act with reasonable prudence in the discharge of their functions. They may also potentially be subject to criminal or civil sanctions for certain types of misconduct and omissions. Where winding up is clearly warranted and would be in the best interests of the company, a company's board would therefore be at risk in continuing to trade as normal.

Doing business in reorganisations

13 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

A liquidator may carry on the business of the company so far as is necessary for its beneficial winding up. The extent to which this power is exercisable will depend upon the terms of the liquidator's appointment. Outside of the insolvency context, the conditions and extent to which a company may carry on business during reorganisation will depend on the terms of the plan of arrangement approved by the court.

A company about to be wound up voluntarily may by resolution delegate to its creditors or to a committee of creditors the power of appointing liquidators or filling vacancies in the office of liquidator. It may also enter into similar arrangements concerning the powers to be exercised by liquidators and the manner of their exercise.

Under the Insurance Act 2005 the Supreme Court has the power to place a company that carries on insurance business under 'judicial management' instead or ordering it to be wound up. The application for such an order is made by the industry regulator (ie, the Insurance Commission) and is appropriate, for example, where winding up may have far-reaching negative consequences for policyholders or the general public. The judicial manager in such situations may be empowered to continue to carry on business with a view to its reorganisation even though the company may be technically insolvent. He or she would, however, be subject to court control in the performance of his or her duties at all times.

Stays of proceedings and moratoria

14 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

The making of an order for winding-up by the court or the appointment of a provisional liquidator triggers an automatic stay of all suits, actions and other proceedings against the company, both under the Companies Act and the IBC Act. The automatic stay is wide in scope and would apply to creditors' actions.

The continuation of any legal proceedings or the commencement of a new action in such circumstances may only be undertaken with the permission of the court. A creditor would accordingly have to make application to the court to commence or continue proceedings after winding up. Conditions may also be imposed on the grant of such permission.

There is no automatic stay of suits, actions and proceedings in a voluntary winding up as there is in a compulsory winding up. Application would therefore have to be made to the court to restrain such claims.

Post-filing credit

15 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A liquidator appointed under both the Companies Act and the IBC Act may, with approval from the court:

- carry on the business of the company, so far as may be necessary for its beneficial winding up;
- raise money on the security of the company's assets;
- draw, make and indorse promissory notes on behalf of the company; and
- do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

Secured or unsecured loans or credit may thus be obtained for the beneficial winding up of a company, notwithstanding that it is in liquidation. No special priority is at present accorded to such loans over existing secured lenders whose rights are already fixed. Such loans would, however, rank ahead of ordinary unsecured creditors.

Financial reorganisation is a voluntary process initiated by resolution of a company's board, frequently where insolvency is not in issue. A debtor involved in this process may obtain secured or unsecured loans or credit provided this is not prohibited under the plan of arrangement governing the reorganisation. Unless special terms have been agreed under the plan, the normal rules as to priorities under the general law would apply to loans or credit obtained.

Set-off and netting

16 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Any contractual right of set-off or non set-off or netting arrangement agreed between the company and any creditor prior to the commencement of the liquidation (including both bilateral and multilateral set-off or netting arrangements) are binding upon the company in liquidation and shall be enforced by the official liquidator.

Sale of assets

17 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The conditions attaching to the sale of assets during a reorganisation depends largely on the terms of the plan of arrangement approved by the court and the articles of arrangement governing the process. Dispositions of assets comprising more than 50 per cent in value of the assets of the company not done in the ordinary course of business must be approved by directors and members, with notice in prescribed terms being given of any members' meeting to address the issue.

The sale of assets during liquidations (voluntary or involuntary) is addressed in statute. Unless otherwise ordered, in a compulsory liquidation a liquidator is required under the Companies Act and IBC Act to obtain the prior approval of the court before selling the real or personal property or effects of the company, including choses in action. In a voluntary winding up the liquidator may dispose of assets without approval of the court. The extent to which a liquidator in a court-supervised winding up may make such dispositions depends on the restrictions imposed upon him or her in the exercise of his or her functions by the court.

A purchaser generally acquires the assets 'free and clear' of any claim or interest. If the assets themselves (eg, land or chattels) are subject to third-party interests, the new owner may end up taking subject to these.

'Stalking horse' bids and credit bidding by secured lenders are not expressly addressed in the Bahamian insolvency statutes. Any adoption of these procedures would have to meet the approval of the court.

Intellectual property assets in insolvencies

18 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

An IP licensor possesses no express statutory power to terminate a debtor's right to use intellectual property once insolvency proceedings are commenced. His or her ability to do so would be dependent upon the terms of the licence agreement entered into with the debtor. Likewise, a debtor possesses no statutory power to terminate IP rights once insolvency proceedings are commenced and its authority to do so would also be governed by the terms of any licence agreement entered into with the licensee.

A liquidator may, with the permission of the court, carry on the business of the debtor for the purposes of the beneficial winding up of the company. The court may also provide by order that property belonging to the debtor is to vest in the liquidator. It would appear that to a limited extent IP rights belonging to a debtor may therefore be used by a liquidator.

Rejection and disclaimer of contracts in reorganisations

19 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

With the leave of the court, a liquidator now has the ability to disclaim onerous property. Onerous property is defined as an unprofitable contract or assets of the company that are unsaleable or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act. A disclaimer operates so as to determine with effect from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed.

Arbitration processes in insolvency cases

20 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

The courts of the Bahamas generally seek to encourage use of alternative dispute resolution mechanisms wherever possible. In practice, however, arbitration procedures are seldom invoked to resolve core issues once insolvency proceedings are in progress.

Arbitration proceedings pending at the time a winding-up order is made or a provisional liquidator is appointed would also be subject to an automatic stay. A party desiring to commence or continue such proceedings would require permission from the court. It is nonetheless to be noted that an arbitration agreement to which the debtor company is a party is not discharged by winding up.

Successful reorganisations

21 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

There are no mandatory features that must be included in a plan of arrangement. Reorganisation under both the IBC Act is voluntarily undertaken and is not set up as a general substitute to liquidation. The role of creditors and their classification do not therefore necessarily feature in the process.

The procedures to be followed in carrying out a reorganisation have been addressed in question 10. To this may be added the right of a member of a company to payment of fair value of his or her shares upon dissenting from the plan of arrangement.

Expedited reorganisations

22 Do procedures exist for expedited reorganisations?

No.

Unsuccessful reorganisations

23 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Non-compliance with the statutory preconditions will prevent implementation of a plan of arrangement. These have been discussed in question 10.

The results of failure to perform a plan of arrangement are not expressly addressed in the IBC Act. If the default relates to payment of a debt, unless prohibited under the terms of the plan itself, a creditor would be likely to exercise remedies available to him or her under the general law or pursue winding up.

Insolvency processes

24 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

The onset of liquidation is brought to the attention of creditors and the wider public through various mandatory advertising requirements. Under the Companies Act, notice of any resolution passed to voluntarily wind up must be published in the Gazette (in practice, one of the major daily newspapers). The Winding-up Rules also have strict guidelines governing the advertisement of all petitions and all appointments of liquidators. Additionally, an official liquidator must describe himself as the official liquidator of the debtor company in all correspondence and documents, further bringing notice of liquidation to the attention of creditors and persons dealing with the company.

During either an involuntary or supervised winding-up, the court may direct meetings of creditors to be held for the purpose of ascertaining their wishes in relation to the appointment of liquidators and other matters relating to the winding up. Such meetings may be convened and regulated in such manner as the court deems appropriate.

Subject to few exceptions, a liquidator must give creditors a minimum of 28 days' written notice within which to prove their debts or claims. Under the Winding-up Rules, a creditor whose claim or proof has been admitted is also entitled at all reasonable times to inspect the case file and obtain copies of any document. Creditors are likewise generally given seven clear days' written notice of any meeting directed by a judge for the purposes of ascertaining their wishes in respect of matters arising in the winding up, including the appointment of liquidators. The requirements as to written notice of meetings are often fulfilled by advertising notice of any meetings in the local newspapers.

A liquidator in an involuntary winding up is regarded as an officer of the court and is subject to its oversight and control. His or her reporting obligations will thus frequently depend upon the terms of his or her appointment. Any liquidation scheme addressing payment of any class of creditors, the compromise of claims and other matters affecting the assets of the company is to be submitted to the court for approval. The liquidator must also file in court every six months after winding up has commenced a list of all proofs received by him or her with his or her decisions thereon.

Once liquidation begins, the right to pursue legal redress on behalf of the estate normally vests in the liquidator. This is often expressly addressed in the terms of appointment. Any action by a creditor against third parties would thus have to be taken independently of the liquidation.

Enforcement of estate's rights

25 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

A creditor may not generally directly pursue remedies belonging to the liquidator. A liquidator may, for instance, sell or dispose of choses in action thereby indirectly allowing a creditor to pursue such remedies. In these circumstances, the fruits of any remedies would belong to the assignee.

Creditor representation

26 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

In an involuntary or supervised winding up, the court may, if thinks it expedient, direct meetings of creditors to be held for the purpose of ascertaining their wishes and may appoint a person to act as chairman of such a meeting and require him or her to report on its outcome.

A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may by resolution delegate to its creditors or any committee of creditors the power of appointing liquidators and filling any vacancies in the appointment of liquidators. By similar resolution the power to enter into any arrangement concerning the powers to be exercised by the liquidators and the manner in which they are exercised may also be delegated to a committee of creditors. Any arrangement entered into between a company about to be wound up voluntarily and its creditors is binding on the creditors if accepted to by three-quarters of their number and value.

The new rules also allow for the formation of a liquidation committee which shall comprise not less than three nor more than five creditors. This committee is elected at the first meeting of the creditors. The committee may resolve to appoint a counsel and attorney to give legal advice to the committee. Legal fees and expenses reasonably incurred by the liquidation committee shall be paid out of the assets of the company as an expense of the liquidation.

Insolvency of corporate groups

27 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

Under the Rules of the Supreme Court actions involving two or more affiliated debtors pending at the same time may be consolidated. This is usually done where some common question of law or fact arises in the actions or where relief claimed arises out of the same transaction or series of transactions. Savings of legal costs and overall administrative convenience are often prominent considerations in the decision whether or not to consolidate.

There are currently no provisions in the Companies Act or IBC Act allowing assets and liabilities of companies within a group to be pooled for distribution purposes. Each member of a group is normally regarded as a separate entity. The situation is different in the case of insurance companies, where a parent and subsidiary may be wound up in conjunction by the same liquidator.

The new rules do allow for greater collaboration with foreign counterparts and contains provisions specifically devoted to international cooperation in insolvencies. These enable various orders to be made in aid of foreign bankruptcy proceedings, including directions for turning over property belonging to a foreign debtor to a foreign administrator. The court is also expressly empowered under the new rules to make a winding-up order in respect of a 'foreign company' that:

- has property located in the Bahamas;
- is carrying on business in the Bahamas; or
- is registered in the Bahamas.

Claims and appeals

28 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

A liquidator must normally give at least 28 days' notice of any deadline for creditors to prove their debts or claims. The following matters shall be stated in a creditor's proof of debt:

- the creditor's name and address;
- the total amount of his or her claim;
- particulars of how and when the debt was incurred; and
- particulars of the security if any held by the creditor.

The official liquidator may require that a proof of debt be verified by affidavit.

The liquidator must examine every proof of debt lodged and may either admit or reject the claim in whole or in part, or require further evidence in support of it. The liquidator's decision must be given in writing and, if a proof is to be rejected, must provide written reasons for refusal. A creditor that is dissatisfied with the decision of a liquidator in respect of a proof may apply to the Supreme Court to reverse or vary the decision.

There are no provisions preventing the sale or transfer of claims against an insolvent's estate. Creditors are accordingly free to sell or dispose of their claims in a liquidation.

Modifying creditors' rights

29 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

There are no provisions in either the Companies Act or IBC Act empowering the court to change the rank of a creditor's claim.

Priority claims

30 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Under the Companies Act and the IBC Act the following claims are paid in priority to all other debts, including those which are the subject of security charges:

- costs and expenses of the winding up;
- statutory rates, taxes, assessments or impositions, fees payable under the insolvency acts, duties and penalties under the Stamp Act, licence fees payable under regulatory laws;
- employees' wages, salaries and gratuities; and
- amounts due in respect of personal injuries to workmen accruing before winding up.

After payment of the liquidation costs, the remaining priority debts rank equally among themselves and are to be paid in full. If the assets of the company are insufficient to meet them, they are to be paid pari passu.

Employment-related liabilities in restructurings

31 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

All wages of clerks, servants, workmen and labourers for services performed within a specified period prior to the commencement of winding up are regarded as preferred debts under the Companies Act and IBC Act. The period in question is basically four months prior to liquidation for 'clerks' or 'servants' and two months prior to liquidation in the case of 'workmen' and 'labourers'.

Dismissal during a restructuring or insolvency may constitute dismissal for redundancy for the purposes of the Employment Act 1996, giving rise to a claim for statutory redundancy pay. Redundancy pay is recoverable as a debt due by the employee in the Industrial Tribunal or before the courts and is regarded as a preferred debt in a liquidation. The amount recoverable is prescribed by statute and is calculated on the basis of length of years' service and the employee's position at the date of redundancy. Where there are numerous claims for wages owed to employees, it is acceptable for one proof to be made by some person on behalf of all creditors in the class.

The procedure to be followed in terminating an employee for redundancy is addressed in the Code of Industrial Practice made pursuant to the Industrial Relations Act. The code is not legally binding but rather contains a set of best practices to be followed by stakeholders to promote good industrial relations. This recommends consultation between management, the Ministry of Labour and employees or their trade union concerning any impending redundancies. It further suggests that:

- as much advance warning as possible be given to employees of any redundancies;
- consideration be given to introducing schemes for voluntary separation and a phased rundown of employment;
- it be established which employees are to be made redundant and the order of their discharge; and
- assistance be offered in finding alternative employment.

Under the new rules claims for deficiencies in pension schemes are accorded preferred status in liquidations.

Pension claims

32 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Any sum due and payable on behalf of an employee in respect of medical health insurance premiums or pension fund contributions are preferential debts. After payment of the liquidation costs, theses debts together with the remaining priority debts rank equally among themselves and are to be paid in full. If the assets of the company are insufficient to meet them, they are to be paid pari passu.

Environmental problems and liabilities

33 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The company through the liquidator remains liable and to the extent that there are damages that are recoverable the Minister of Health may apply as a creditor. If there are assessments that have been levied then they rank in priority as per the answer to question 30 above.

Liabilities that survive insolvency proceedings

34 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Upon completion of a compulsory or voluntary winding up, the debtor company is dissolved and removed from the Register of Companies. Dissolution is normally regarded as bringing the legal existence of the company to an end, including for the purposes of liability. Section 272 of the Companies Act nonetheless provides for the liabilities of the company and of its directors, officers and members to survive removal from the register without stating any limitations on scope. While the IBC Act provides for an application to made to restore a company's name to the register, it contains no similar provisions to section 272 of the Companies Act.

Reorganisation at present is not provided as a general substitute for winding up and may be undertaken by solvent companies.

Liabilities may thus survive this process unless creditors concerned have consented to their release. Any plan of arrangement also requires approval from the court.

Distributions

35 How and when are distributions made to creditors in liquidations and reorganisations?

Distributions will be made only where there are sufficient assets to justify this course. A liquidator must give the Registrar of the Supreme Court not more than two months' notice of any intention to declare a dividend. Notice of intention to declare a dividend must also be given by the liquidator to any creditors known to him or her who have not as yet proved their debts. Immediately after expiry of the time fixed for appealing the rejection of any such proofs, the liquidator shall declare a dividend and give notice of the same to each creditor whose proof has been admitted.

The timing of any distributions during a reorganisation will depend upon the terms of the plan of arrangement.

Transactions that may be annulled

36 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Unless approved of by the court, all dispositions of property, effects and choses in action between the commencement of winding up and the order for winding up in a compulsory liquidation or court supervised liquidation are void. Transfers of shares and alterations in the status of members carried out during this period are also void.

Any attachment, distress or execution of a judgment after commencement of an involuntary winding up or supervised winding up is void. Various transactions may also be invalidated on grounds of undue or fraudulent preference, including:

- conveyances, mortgages, deliveries of goods, payments, executions and other acts relating to property belonging to the company; and
- conveyances and assignments of the property or effects of a debtor to trustees for the benefit of creditors.

Apart from the above, under the Fraudulent Dispositions Act every disposition of property made with the intent to defraud and at an undervalue is voidable at the instance of a creditor prejudiced thereby. Any application to

set aside the disposition must, however, be brought within two years of the date of the transaction complained of.

Proceedings to annul transactions

37 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

See question 36. Transactions may generally only be attacked by a liquidator, however, if the complaint is based on undue or fraudulent preference it may be impugned by a creditor.

It should also be noted that the new rules expressly creates a number of new fraud-based criminal offences, such as fraud in anticipation of winding up, transactions in fraud of creditors, misconduct in course of winding up and making material omissions in any statement concerning the affairs of the company with intent to defraud creditors or contributories. The 'suspect period' for the offence of committing a transaction in fraud of creditors is the 12 months immediately preceding commencement of winding up.

Directors and officers

38 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Officers and directors are not generally personally liable for company obligations. However, under both the Companies Act and the IBC Act past or present officers and directors may be compelled to repay monies or contribute to the assets of the company on proof of specified forms of misconduct. Liability arises mainly in relation to the misapplication or wrongful retention of funds and misfeasance or breach of trust. An application for repayment may be initiated by the liquidator, a creditor or a contributory.

Under section 102 of the Companies Act directors may also be liable to repay the company in respect of resolutions passed prior to winding up authorising prohibited share issues, loans, share acquisitions, commissions and dividend payments. Legal proceedings for repayment under the section must be commenced within two years of the resolution complained of.

In addition, past and present directors and officers may be subject to criminal prosecution for prescribed offences in connection with their management of the company's affairs. They likewise owe fiduciary obligations and a duty of care to the company.

Groups of companies

39 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Generally a parent or affiliated corporation is regarded in law as having a distinct legal personality and therefore it will be uncommon for a parent company or an affiliated corporation to be held responsible for the liabilities of subsidiaries or affiliates. If fraud is proved, however, then the corporate veil may be lifted and liability may attach.

Insider claims

40 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

No.

Creditors' enforcement

41 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Both real property and personal property which is the subject of a security interest may be subject to seizure in the event of a specified default occurring if the document creating the charge provides for this. If seizure is permitted, this will often be done by appointing a receiver after prior notice of the default has been given to the debtor. If the default is not remedied, the receiver will normally take possession of all assets subject to the security and sell them to satisfy the debt.

There are also rights arising at common law to distrain for rent which is in arrears. This allows a landlord to seize and sell a defaulting tenant's goods to procure rent. The tenant's tools of trade up to a certain value, clothing and other specified goods have traditionally been exempt from seizure.

Corporate procedures

42 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Bankruptcies involving individuals are governed by the Bankruptcy Act and the accompanying Bankruptcy Rules. Proceedings are heard by the Supreme Court and may be instituted by one or more creditors in respect of a debt of not less than B$200 where statutory preconditions are met. Where an individual has been adjudged a bankrupt, the court will summon a general meeting of his or her creditors with a view to securing the appointment of a trustee of the property of the bankrupt and giving directions for the discharge of his or her duties. The Bankruptcy Act enables compositions or arrangements for the settlement of the bankrupt's affairs to be agreed to by the trustee. After the close of the bankruptcy or at any time during its continuance with the assent of the creditors, the court may make an order discharging the bankrupt, upon which he or she shall stand released from most debts provable in the bankruptcy.

The procedures for dissolution of companies are addressed in question 43.

Conclusion of case

43 How are liquidation and reorganisation cases formally concluded?

In a compulsory liquidation, after the affairs of the company have been completely wound up, the court may make an order that the company be dissolved. The liquidator then reports the order to the Registrar of Companies, who records the dissolution in the companies register. The case will be treated as being concluded as of the date of the order.

As soon as the affairs of the company are completely wound up in a voluntary winding up the liquidator provides an account of his or her handling of the liquidation, which is laid before a general meeting of the company. He or she then makes a return to the Registrar of Companies confirming that such a meeting was held and, after expiry of three months, the company is deemed to be dissolved. Notification of the dissolution is then given by public advertisement in the Gazette and in any local newspaper as determined by the registrar.

Reorganisation is not a general substitute for winding up in the Bahamas and may be undertaken by solvent companies. The process to be followed will ultimately be governed by the terms of the plan of arrangement approved by the court. As reorganisation is entirely distinct from winding up and may involve no issue of insolvency, the company may continue in existence unless the plan of arrangement calls for otherwise.

International cases

44 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The Bahamas does not currently have legislation in force providing for recognition of foreign insolvency proceedings and office holders. The question of according recognition in such circumstances therefore falls to be determined based on principles of common law.

Courts in the Bahamas normally regard the personal law of a company to be the law of the place of its incorporation. This will therefore be accepted as the law that also governs its dissolution. On this basis, a Bahamian court will accord recognition to a liquidator's appointment under the law of the place of incorporation without the need for formal recognition procedures. Provided it is not prohibited under that law, a Bahamian court will allow

the liquidator to bring proceedings on behalf of the company locally to obtain relief ancillary to the foreign winding up. Similarly, assets belonging to the debtor may be vested in the foreign office holder.

The new Rules legislate extensive provisions for international cooperation in insolvency matters in the Bahamas. The enables a foreign office holder to apply for recognition to act in the Bahamas and thereby attain a wide array of 'ancillary orders', including: a stay of proceedings; a stay of enforcement of a judgment; orders requiring the production of information; and orders for the turnover of assets.

Superior court judgments and arbitrators' awards issued in certain jurisdictions may be registered and enforced under the Reciprocal Enforcement of Judgments Act. This has been addressed in question 7. Foreign creditors are not precluded from proving in an insolvency and generally have the same rights as domestic creditors in participating in such proceedings.

COMI

45 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

No.

Cross-border cooperation

46 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The new Rules empower the court to make wide-ranging ancillary orders in aid of a foreign bankruptcy case. The rules speak to the procedural requirements for invoking the court's assistance. They also specify the considerations that are to influence the exercise of the court's various powers. These include an overriding duty to seek to assure an economic and expeditious administration of the debtor's estate consistent with:

- just treatment of all creditors regardless of place of domicile;
- prevention of preferential or fraudulent dispositions;
- distribution of the estate substantially in accordance with the order of priority that applies locally;
- recognition and enforcement of security interests created by the debtor;
- non-enforcement of foreign taxes, fines or penalties; and
- comity.

Bahamian courts will assist a foreign court in obtaining information or evidence located in the Bahamas which is required for use in pending civil proceedings in another jurisdiction. This is primarily achieved through the Evidence (Proceedings in Other Jurisdictions) Act. The procedure for invoking court assistance involves making an application to a Supreme Court judge.

Cross-border insolvency protocols and joint court hearings

47 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

We are unaware of any arrangements that have been entered into between the Bahamian courts and those of any other jurisdiction to coordinate proceedings. However, the new rules contain provisions addressing international protocols. These make it mandatory for an official liquidator to consider whether it is appropriate to enter into a protocol with a foreign office holder. The stated objective of the provisions is to promote the orderly administration of the estate of a company in liquidation, avoid duplication of work and reduce conflicts between office holders.

Randol M Dorsett **rmd@gtclaw.com**
Leif G Farquharson **lgf@gtclaw.com**

Sassoon House
Shirley Street & Victoria Avenue
Nassau
Bahamas

Tel: +1 242 322 4130
Fax: +1 242 328 1069
www.grahamthompson.com

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