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CONCURRENT SESSION

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Cayman Islands publishes reforms to restructuring regime

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The Cayman Islands Government has published the Companies (Amendment) Bill, 2021 (**Bill**) which will introduce welcome amendments to the Companies Act (2021 Revision) (**Act**), to facilitate the efficient restructuring of distressed companies for the benefit of their stakeholders. The amendments, which are anticipated to be in force in short order, introduce a formal restructuring procedure for companies outside the traditional winding up process and under the supervision of a "restructuring officer" and the Grand Court of the Cayman Islands (**Court**).

Restructuring Petition

Under the proposed amendments, a company may petition the Court for the appointment of a restructuring officer [1] on the grounds that it is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors (**Restructuring Petition**). The introduction of a bespoke Restructuring Petition will address some of the stakeholder concerns arising from the provisional liquidation regime, and the reputational or commercial consequences associated with the presentation of a winding up petition, which is required as part of the procedure presently in force. In particular:

1. It will no longer be necessary for a winding up petition to be presented in order to facilitate a court-supervised restructuring, and the Court will have no power to wind up a company on the basis of a Restructuring Petition.
2. An automatic stay will take effect as soon as a Restructuring Petition is presented (and not once the order is made, as is the case under the current regime), which will prevent the continuation or commencement of any proceedings against the company - including all foreign proceedings, the presentation of a winding up petition or the passing of any resolutions for a company to be wound up - without leave of the Court.
3. A petition for the appointment of restructuring officers may be presented without a resolution of a company's members or an express power in its articles of association. Under the existing regime, in the absence of such authority, directors of a Cayman Islands company must procure a friendly creditor to present a winding up petition in order to engage the Court's jurisdiction to appoint provisional liquidators. This will apply automatically to companies incorporated after the amendments are introduced, while the legislation provides for an "opt-in" option for companies incorporated before that date.
4. The requirements for the appointment of a restructuring officer are otherwise the same as those for the appointment of a provisional liquidator under section 104(3) of the Act. That is, they require the satisfaction of a two-limb test; that (a) a company is or is likely to become unable to pay its debts as they fall due; and (b) the company intends to present a compromise or arrangement to its creditors. It is therefore likely that the Court will continue to follow the well-established authorities on the interpretation of this test, which address how the interests of stakeholders are to be balanced and how advanced a restructuring proposal must be for a company to present a Restructuring Petition; see for example In the Matter of Sun Cheong Creative Development Holdings Limited

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(unreported, Smellie CJ, 20 October 2020).

5. The powers of the restructuring officer, including the manner and extent to which such powers will modify the function of the board of directors, are flexible and will continue be defined by the terms of the appointment order.

Creditor Rights

The amendments to the Act also ensure that there are adequate protections in place to preserve and protect the rights of creditors, including:

1. Requiring that a restructuring Petition be heard on an inter partes basis, unless the company can satisfy the Court that there are grounds justifying an ex parte application (unlike the existing regime which was ex parte by default). This is consistent with recent efforts by the Court to ensure adequate notice of an application is provided to creditors and stakeholders where possible; see for example In the Matter of Midway Resources International (unreported, Segal J, 30 March 2021).
2. A contributory or creditor may apply to the Court for a variation or a discharge of an order appointing the restructuring officers, or for the removal and replacement of a restructuring officer. With respect to grounds for removal, we anticipate that the Court will continue to follow the existing authorities on this question which were set out most recently by Doyle J In the Matter of Global Fidelity Bank, Ltd (Unreported, Doyle J, 20 August 2021).
3. Creditors with security over the whole or part of the assets of the company will remain entitled to enforce that security without the leave of the Court and without reference to the restructuring officer.
4. Creditors may still present a winding up petition in respect of the Company, with leave of the Court.
5. If the restructuring of a company fails and the company is subsequently wound up, the winding up will be deemed to have commenced from the date of the presentation of the Restructuring Petition, such that official liquidators will be in a position to claw back any preference payments made to creditors within the six months immediately preceding the presentation of the Restructuring Petition and any invalidated transactions in the twilight period between presentation of the Restructuring Petition and the winding up order will be void under section 99 of the Companies Act.

Other Amendments

Where Restructuring Officers are able to formulate a viable restructuring plan and wish to pursue a scheme of arrangement:

1. An application may be made in the restructuring proceedings to sanction a compromise or arrangement with the creditors or members of a company, without the need to commence separate proceedings to sanction the scheme of arrangement under section 86 of the Companies Act. This amendment will remove a significant financial and administrative burden, which will be particularly helpful for the restructuring of corporate groups.
2. A members' scheme of arrangement will be deemed to be binding on the members of a company if the scheme is approved by a majority of 75% of members in value and no longer also requires the approval by the majority of members in number. A creditor scheme of arrangement will still require approval by a majority of creditors in number representing 75% in value of the creditors.

Conclusion

These much-anticipated amendments to the Cayman Islands Companies Act will at last

introduce a formal restructuring process distinct from the winding up procedure, with additional flexibility for companies looking to reorganise for the benefit of their stakeholders, and at the same time retain important safeguards for the benefit of unsecured creditors. It is an important step in the ongoing development of the Cayman Islands as a leading financial centre with the ability to effectively and efficiently implement large-scale cross-border restructurings according to established legal principles.

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[1] The restructuring officers appointed to a company are officers of the Court and must include at least one licensed Cayman insolvency practitioner. The Court also has discretion to appoint a foreign practitioner to act as a restructuring officer in appropriate cases.

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Joel E. Cohen is a managing director with Stout Risius Ross, LLC in New York in its Disputes, Compliance & Investigation group. He has more than 19 years of experience in the dispute, forensic and insolvency practice areas, most specifically in the financial services and asset-management industries. Mr. Cohen's experience encompasses a number of significant cross-border insolvency and litigation matters, where he has served as financial advisor and consulting expert to fiduciaries, offshore liquidators, and bankruptcy and litigation trustees. He has assisted these clients in a variety of litigation consulting services, including asset-tracing, fraud, Ponzi schemes, industry custom and practice for investment managers, and forensic analysis. He also has led several internal investigations within the context of family office, investment advisors and various corporate structures. Before joining Stout, Mr. Cohen was a managing director at a boutique financial advisory and consulting firm. Prior to that, he spent a number of years with a global financial advisory firm in its Dispute & Investigations group, where he helped manage a team of CPAs, economists, attorneys and finance professionals in executing a diverse array of complex engagements related to the various hedge-fund/private-equity fraud, insolvencies and litigations that characterized the global financial crisis of 2008-09. Mr. Cohen previously was a leader in the disputes practice at a Big 4 accounting firm and senior vice president at a prominent investment bank in charge of internal investigations. He has worked with premier law firms on accounting malpractice, business insurance disputes, fraud detection and economic investigations. Mr. Cohen has expertise in managing the expectations of various stakeholders involved in insolvency proceedings, liquidations, litigation settlements and receiverships, namely in his capacity in assisting a board, trustee, receiver or official liquidator with their duties, including U.S. and cross-border considerations. He has experience within the offshore world, regularly handling cases out of the Caribbean. Mr. Cohen received his B.A. in economics with a focus on accounting from Rutgers University.

Jennifer Fox is a is a dispute-resolution partner in the Grand Cayman, Cayman Islands office of Ogier. She is a member of both the firm's global Restructuring and Corporate Recovery team and its Trust Advisory Group. Ms. Fox has been practising in the Cayman Islands since 2009 and in the BVI since 2008, and she has experience in all contentious issues coming before the Cayman Islands courts. Her practice spans all offshore aspects of complex commercial litigation, fraud and asset-tracing, contentious insolvency and restructuring, and contentious private client work. Ms. Fox regularly appears in the Financial Services Division of the Grand Court. She acts for all participants in the offshore financial services market, including insolvency officeholders; investment managers and directors of Cayman vehicles; creditors, shareholders and limited partners; and all other parties to large-scale commercial fraud and insolvency litigation. Ms. Fox regularly advises and acts for beneficiaries, trustees and protectors with respect to all issues concerning offshore trusts and estates, and has a particular interest in insolvent or illiquid trusts. She received her First Class Bachelor of Laws (with honors) from Keele University and her postgraduate diploma in law at the Inns of Court School of Law in London, and she was a Major and Pegasus Scholar of the Inner Temple.

Alissa M. Nann is Of Counsel at Foley & Lardner LLP in New York and a member of the firm's Bankruptcy & Business Reorganizations Practice. Her practice focuses on corporate and financial restructuring, business solutions, bankruptcy litigation, and debtors' and creditors' rights. Ms. Nann

represents debtors, creditors, buyers, financial institutions, contract counterparties, trustees and official ad hoc committees in large-asset bankruptcies, out-of-court workouts and adversary proceedings. Her experience spans numerous industries, including energy, health care, education, aviation, retail, manufacturing, telecommunications, financial services, real estate and hospitality. Ms. Nann has experience representing nonprofit entities both in and outside of bankruptcy matters. She also represents banks and trustees of bank holding companies, including in litigation related to the procurement of tax refunds and disputes with the FDIC over refund ownership. She also focuses her practice on indenture trustee representation. Ms. Nann has experience in the representation of trustees regarding the resolution of and objections to bankruptcy claims, the pursuit of fraudulent-transfer and preference actions, and litigation related to bad-faith bankruptcy filings, Ponzi schemes and § 363 sales. Prior to joining Foley, she was an associate with a national firm where she represented Irving Picard, the SIPA trustee in the liquidation of Bernard L. Madoff Investment Securities LLC. Prior to that, she clerked for Hon. Shelley C. Chapman in the U.S. Bankruptcy Court for the Southern District of New York. Ms. Nann is the office chair for Foley's Women's Network in the New York office and is a Foley LGBTQ Ally. She is also the New York office co-liaison for Foley's Racial Justice and Equity *Pro Bono* practice group (RJEPG) and dedicates *pro bono* hours to, among other things, working with the New York City Bar Consumer Bankruptcy Project, advising individual consumer debtors regarding the bankruptcy process. She also dedicates *pro bono* hours to assisting victims of domestic violence in custody and child-support battles, as well as in seeking legal status in the U.S. through the HerJustice organization. She also assists asylum-seekers through the New York City Bar Association. Ms. Nann received her B.A. with high honors from Michigan State University in 2002 and her J.D. with high honors in 2006 from Georgetown University Law Center, where she was a member of the Student Bar Association and an executive editor of the *American Criminal Law Review*.

Evan J. Zucker is Of Counsel in Blank Rome LLP's Bankruptcy & Restructuring group in New York, where he concentrates his practice on corporate reorganizations and related complex litigation in national and cross-border matters. He frequently represents foreign representatives in chapter 15 proceedings, creditors' committees, secured creditors, indenture trustees, executory contract parties and other key parties in interest. Mr. Zucker routinely publishes and speaks on bankruptcy topics, including the model laws promulgated by UNCITRAL's Working Group V, as well as the causes of retail insolvencies around the world. In 2019, he was honored as one of ABI's "40 Under 40." In 2021, Mr. Zucker was selected by the Chief Judge for the Bankruptcy Court as vice chair of the Chapter 11 Lawyers' Advisory Committee for the U.S. Bankruptcy Court for the Eastern District of New York. He is an adjunct professor at St. John's University School of Law and a member of its Alumni Association, and he is a member of ABI and its Law Review Alumni Association. In 2018, Mr. Zucker was inducted into the International Insolvency Institute's ("III") NextGen Leadership Program (NextGen Class VII). In 2021, he was selected to serve as the chairperson for the program, after serving on its executive committee in 2020. Mr. Zucker routinely publishes and speaks on bankruptcy topics, including the causes of retail insolvencies around the world. Previously, he clerked for Hon. Jerome Feller in the U.S. Bankruptcy Court for the Eastern District of New York. Mr. Zucker received his B.B.A. with high distinction from Emory University and his J.D. *cum laude* from St. John's University School of Law.