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Offshore Alert: Changes to Insolvency Laws and Rules in the Bahamas

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CHANGES TO INSOLVENCY LAWS AND RULES IN THE BAHAMAS - THE COMPANIES (WINDING UP AMENDMENT) ACT 2011, COMPANIES LIQUIDATION RULES 2012, and INSOLVENCY PRACTITIONERS' RULES 2012¹

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Introduction

- The new insolvency regime implemented in 2012 provides many advantages for the conduct of insolvency work in The Bahamas due to the development of this area of law in several key areas as outlined in this paper.
- The legislation as revised consists of the Companies (Winding Up Amendment) Act 2011, Companies Liquidation Rules (the 'CLR') the Insolvency Practitioners' Rules 2012, Foreign Proceedings (International Cooperation) Liquidation Rules 2012, Foreign Proceedings (International Co-Operation) and the (Relevant Foreign Countries) Liquidation Rules 2016 (hereinafter collectively referred to as 'the legislation') which was implemented with the purpose of modernizing the insolvency framework for domestic and international business companies.
- This paper will highlight the benefits of the legislation currently in force and will illustrate the ways in which the progressive amendments made to the legislation makes The Bahamas a more desirable commercial center for the efficient conduct of liquidations.

Advantages of the new Bahamian insolvency regime relative to other jurisdictions:

- The legislation as presently enacted permits liquidators to apply to the Bahamian court for a ruling to approve a liquidator's commercial judgment. Many onshore jurisdictions stay away from sanctioning commercial judgments. Under the Companies (Winding Up Amendment) Act 2011, there is the ability for the court to ratify the sale of an asset of the company. Generally, onshore courts refrain from making such commercial determinations and require liquidators to make such decisions and therefore possibly bear the risk of being sued.¹
- The Insolvency Practitioners' Rules 2012 allow for more flexibility for the conduct of liquidations that may involve international accounting firms operating in several jurisdictions by permitting joint appointments between practitioners with Bahamian residency and qualified foreign practitioners to act as liquidators in Bahamian winding

¹ *The Panel would like to thank Sophia Rolle-Kapousouzoglou, Parnter Lennox Paton, Nassau Bahamas, Fellow Insol International, for preparing this paper on their behalf.*

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up proceedings. This option is available in Cayman and BVI but not in Bermuda where residency is a requirement for a liquidator to act.

- The use of a liquidation committee is also an option in The Bahamasⁱⁱ whereas in other jurisdictions such as Cayman it is mandatory.
- This option to elect whether or not to form a liquidation committee is beneficial because liquidation committees can be costly, time consuming, and ineffective although they are intended to ensure that the interest of creditors of the company remain protected. In liquidations with large creditor pools liquidation committees can prove to be inefficient and issues usually arise amongst creditors in terms of forming a consensus as to the conduct of the liquidation.
- Another key advantage is that the new insolvency rules make express provision for liquidators to be remunerated out of trust assets where the liquidators have identified, recovered, realized, protected or distributed such trust assets.ⁱⁱⁱ Previously this was not provided for prior to the application of the CLR and before amendments were made to the Winding Up of Companies section of the Companies Act. The provision for payment out of trust assets was the first of its kind in the Offshore Jurisdictions of the Caribbean..
- Therefore, this provision provides greater security for liquidators to ensure that they will be remunerated where the assets of a company are insufficient to pay the liquidator's costs and expenses, since recourse can now be sought from any available trust assets realized by the liquidators.
- Under the new legislation in The Bahamas, local regulators (such as the Securities Commission and Insurance Commission) have standing to petition for the winding up of a company whose licence has been suspended or revoked in the case of a company carrying on a regulated business.^{iv}
- Finally, another distinguishing factor of the new Bahamian insolvency legislation is that it provides for the prosecution and institution of criminal proceedings against directors, officers, prior liquidators, persons who have been professional service providers to the company and persons employed with a company that committed any offence in relation to the company. The costs of any such prosecution by the Royal Bahamas Police Force and the Attorney General may be paid from the assets of the company where the liquidator is able to demonstrate a potential benefit to the estate by assisting the prosecution of wrongdoers.^v
- The court however, is likely to take into account the views of creditors prior to issuing directions for a liquidator to pursue criminal prosecution particularly where there may be limited assets available, and may direct regulatory bodies to pursue such action

Greater International Cooperation

- The jurisdiction of the Bahamian courts in liquidation proceedings has been enlarged as a result of the CLR, and Bahamian Courts now have the power to order the winding up

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of a foreign company that has property located within The Bahamas, is carrying on business there, or is registered as a foreign company within The Bahamas.

- A foreign company is defined as an incorporated or unincorporated body formed under the laws of a country other than The Bahamas.^{vi}
- The new rules permit greater international cooperation as representatives of foreign companies under foreign insolvency proceedings in their home countries can seek assistance from the Bahamian courts in respect of any dealings a foreign company may have in The Bahamas. The Bahamian courts are now empowered to make ancillary orders to facilitate a foreign liquidation where the activities of the foreign liquidation include matters in The Bahamas.^{vii} This relates to enjoining the commencement or staying the continuation of legal proceedings against a debtor, staying the enforcement of any judgment against a debtor, examination or the delivery of information or property belonging to a debtor, and the issuance of letters of request for the purpose of seeking the assistance of a foreign court in obtaining evidence from a *relevant person* resident outside the jurisdiction which is useful for the liquidator's examination of any relevant individuals that may be of interest in the course of the liquidator's investigations.^{viii}
- The recently enacted Foreign Proceedings (International Co-Operation) (Relevant Foreign Countries) Liquidation Rules, 2016 facilitates the ease in which a foreign representative² appointed in a foreign proceeding³ in a relevant foreign country, may be recognized in The Bahamas.
- There have been 142 countries designated to whom the Bahamian Court can provide assistance once a foreign representatives has met the requisite requirements for recognition.

Other Key Developments

- The new legislation also formally recognizes a shadow director who may be held to account and be liable in the course of a liquidation as a consequence of any adverse determinations made by insolvency practitioners while investigating the affairs of the company.
- Another beneficial amendment is that the time period for the claw-back of voidable preferences has been increased from three (3) to six (6) months which allows liquidators greater flexibility to seek to recover funds paid out in favor of any creditor in anticipation of the liquidation, while the company may have been facing impending financial difficulties.^{ix}
- Directors may also now be liable for insolvent trading if they allow a company to trade while knowing it is insolvent.^x

² Which means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding.

³ Which means a judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to liquidation or insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, rehabilitation, liquidation or bankruptcy of an insolvent debtor.

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- Further, liability is now expressly imposed for fraudulent trading. This arises if the court is satisfied that a person at any time before the commencement of the winding up, knowingly a party, carried on the business of the company with the intent to defraud creditors, or for any fraudulent purpose, they may be liable to contribute to the company's assets.^{xi}
- The new insolvency framework also confirms that a secured creditor is entitled to enforce security without leave of the court and without reference to the liquidator.^{xii}

Conclusion

- Overall, the recent developments made to the insolvency legislation in The Bahamas serve the purpose of providing a more comprehensive and practical legal framework for the better administration of liquidations without having to place reliance on the common law in order to seek the necessary relief in areas where the statute previously failed to provide any recourse. Now that this lacuna has been filled, the new legislation provides greater clarity and will improve the efficiency and conduct of insolvency proceedings in The Bahamas for the benefit of creditors, liquidators, their Counsel and other interested parties affected by the liquidation process.

ⁱ The Fourth Schedule to the Companies Winding Up Amendment Act expounds upon Section 205 (3) by describing in addition to the specified duties, functions and powers of official liquidators, and specifies further powers of the liquidators that may be exercised with or without sanction of the court

ⁱⁱ Order 9 of the CLR

ⁱⁱⁱ Section 204 of the Companies (Winding Up Amendment) Act, 2011

^{iv} Order 3 Rule 3 of the CLR permits a Regulator to present a Petition to wind up a company. A **Regulator** is defined as a governmental agency vested with regulatory oversight or power as specified under any of the regulatory laws or by order of the Minister.

^v Section 197 of the Companies Act

^{vi} Section 185 (d) of the Companies Winding Up Act is to be read in conjunction with Order 21 of the CLR. A foreign company carries on an undertaking in The Bahamas if it maintains a place of business or warehouse there, is licensed or registered or required to be licensed or registered under the laws of The Bahamas to do business or sell shares or debentures of its own issue or in any other manner it carries on any undertaking in The Bahamas.

^{vii} Section 254 of the Companies (Winding Up Amendment) Act, 2011 and Part VIIA in general

^{viii} A **'relevant person'** for the purposes of Section 198 of the Companies (Winding Up Amendment) Act is any person who, whether resident in The Bahamas or elsewhere (a) has made or concurred with the statement of affairs; (b) is or has been a director or officer of the company; (c) is or was a professional service provider to the company; (d) has acted as a receiver, advisor or liquidator of the company or of its property; (e) not being a person falling within paragraphs (a) to (d) is or has been concerned or has taken part in the promotion, or management of the company.

^{ix} Section 241 of the Companies Act

^x Section 244 of the Companies Act

^{xi} Section 243 of the Companies Act

^{xii} Section 238 of the Companies Act – under this section where a liquidator sells assets on behalf of a secured creditor, he may also deduct from the proceeds of sale a sum by way of remuneration equivalent to that which would be payable as an expense properly incurred in the winding up by way of percentage or otherwise

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