

Recent Developments in Offshore Jurisdictions

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ABI Conference

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18 June 2015, New York
2.45pm – 4.00pm



Assistance to foreign debtors or process

- Cayman Islands
 - Bespoke statutory international co-operation rules for foreign debtors subject to a proceeding at home
 - Statutory regime does not apply to: (1) Cayman domiciled debtors; or (2) debtors in possession (must have a "foreign representative", e.g. a trustee)
 - Picard v Primeo Fund (2014)
 - If Cayman domiciled debtor in foreign process: "light touch" provisional liquidation is typical: e.g. Arcapita, Suntech, based on common law comity

Assistance to foreign debtors or process

- Curaçao
 - No specific statutory provisions
 - Dutch Supreme Court case September 13, 2013 (Yukos Bankruptcy) – also relevant for Curaçao
 - Trustee in foreign bankruptcy can sell and transfer assets located on Curaçao, provided that:
 - trustee is authorized to do so under foreign law
 - attachment made by individual creditor on assets located in Curaçao is respected (including attachments made after date of opening foreign bankruptcy proceedings)

Requirements for winding up (bankruptcy)

- Cayman Islands
 - Debt (cash flow insolvency) and “just and equitable” petitions
 - Convenient means of enforcing foreign judgments and awards
 - Recent developments:
 - arbitration agreements - effect on winding up jurisdiction
 - security for costs against foreign petitioners

Requirements for winding up (bankruptcy)

- Curaçao
 - Creditor needs to establish that debtor is no longer paying its due and payable debts
 - there are at least two creditors
 - low threshold for evidence of claim: summary review
 - if claim of creditor is disputed, debtor must substantiate rebuttal

Enforcement of foreign judgments

- Cayman Islands
 - Statutory reciprocal enforcement
 - Common law enforcement:
 - monetary judgments (not taxes or fines)
 - judgment creditor sues “on the foreign judgment”
 - no rehearing of underlying merits
 - defences: fraud, public policy, lack of jurisdiction
- Applicable in the bankruptcy context following [Rubin](#)

Enforcement of foreign judgments

- Curaçao
 - Unless a treaty applies, foreign judgments will not be enforceable without re-litigation
 - Generally no full re-litigation on the merits. Foreign judgment will generally be given binding effect if:
 - jurisdiction of foreign court is based on internationally acceptable grounds;
 - proper legal procedures have been observed; and
 - enforcement of foreign judgment does not violate Curaçao public policy
 - Recent Dutch Supreme court case (Gazprombank v. Bensadon, September 26, 2014) adds fourth requirement: not irreconcilable with judgment rendered by Curaçao court or earlier foreign judgment

Asset and document preservation orders

- Cayman Islands
 - Freezing injunctions (supporting local and foreign litigation)
 - Search and seizure orders
 - Pre-commencement discovery

Asset and document preservation orders

- Curaçao
 - Conservatory attachment quite easy
 - ex parte decision
 - low threshold, court grants leave for attachment unless claim is prima facie invalid or attachment is disproportionate
 - creditor will have to initiate legal proceedings regarding the claim within a fixed period set by the court (usually 14 days, possible longer if well substantiated)
 - No discovery, but limited right to obtain documents under 843(a) Curaçao Code of Civil Procedure

Cross border insolvency - recent highlights

- Assistance available to foreign insolvency office holders
 - Is universalism, modified or otherwise, dead?
Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36
- Traps for the unwary
 - Proofs of debt & submission to the jurisdiction, anti suit injunctions
Stichting Shell Pensioenfonds v Krys & Another [2014] UKPC 41

Working with foreign regulators

- Regulators worldwide have oversight over various matters. Risk that actions taken in one jurisdiction will have an adverse impact in another
- Appointment of receivers over offshore entities or freezing bank accounts in the US can lead to regulators in offshore jurisdictions having to take actions
- Where assets, information and/or cause of action are located in the US, this can lead to competing interests. Politics can also be an issue
- This tension leads to increased costs and considerable delays
- The parties that are hurt by this are the innocent creditors and investors