

Cayman Islands: New Regime for Assisting Overseas Insolvency Proceedings

As originally appeared in Offshore Insight

Tony Heaven-Wren, April 2009

applebyglobal.com

Part XVI of the Companies Law came into effect on 1 March 2009, its purpose being to codify the Court's powers to make orders in aid of foreign insolvency proceedings. It has been brought in at the same time as an overhaul of Cayman's domestic insolvency regime, which is addressed in a separate article in this issue.

In implementing legislative changes in this area, the Cayman Islands legislature has not gone for a wholesale adoption of UNCITRAL'S Model Law. (In this respect the Cayman Islands approach is similar to that of Jersey, Bermuda and – for the moment at least – the British Virgin Islands, where legislation was passed some time ago adopting the Model Law but has never been brought into effect). Nevertheless the implementation of Part XVI will see the Cayman Islands Grand Court continue to build on a strong tradition of cross-border insolvency best practice and to apply most of the Model Law principles, but without the need for findings of fact as to the 'centre of main interests' of the debtor.

PART XVI COMPANIES LAW – OVERVIEW

Part XVI applies to insolvency proceedings brought outside the Cayman Islands and to applications for recognition and assistance from the foreign representative of those proceedings.

The structure of Part XVI of the Companies Law in summary:

- The definitions that foreign representatives must satisfy in order to attain standing to seek ancillary relief from the Court are set out in s. 252.
- The kinds of ancillary orders that the Court may, in its discretion, make are set out in s. 253.
- The guiding principles and considerations for the Court in deciding whether to exercise its discretion to grant ancillary orders are set out in s. 254.
- Certain notice obligations arising upon issue of foreign insolvency proceedings in

respect of Cayman Islands incorporated companies, or foreign companies registered in the Cayman Islands, are set out in s. 255.

Under Part XVI, the Court at all times retains its discretion to make orders ancillary to or in assistance of a foreign bankruptcy proceeding. This is in contrast to comparable legislation in other jurisdictions, such as Chapter 15 of the United States Bankruptcy Code. There, subject to an applicant satisfying the Bankruptcy Court that the relevant proceedings are ‘foreign main proceedings’ (i.e. issued in the place where the company has its centre of main interests or ‘COMI’) then, subject only to objections on the grounds of public policy, the applicant is of right entitled to be recognised and automatically benefit from key Chapter 15 protections. These include an automatic stay of proceedings, the rights to use, sell and lease property, the right to apply to transfer an interest of the debtor of property located in the U.S., and the right to operate the debtor’s business.

In the Cayman Islands there are no such threshold tests or automatic rights, but the same types of relief and assistance are available on a discretionary basis. Foreign representatives must satisfy the Court that it is appropriate for it to exercise its discretion by granting the relief sought in the foreign representative’s application. Consequently, the controversy surrounding recent applications of the Chapter 15 system, in which the Bankruptcy Court acts as a sole gatekeeper rigidly enforcing mandatory procedures without the benefit of court discretion do not apply to Cayman Islands cross-border insolvency law and practice. The central issue is the appropriateness of granting relief, not the question of where the debtor’s COMI is located.

S. 252 of the Companies Law confers jurisdiction for an application for ancillary relief under Part XVI based on the debtor’s incorporation in the country of the foreign bankruptcy proceeding. This is a lower threshold for standing than applies in respect of Chapter 15 and, arguably, also under the Model Law. Under Chapter 15, although there is a presumption that COMI is where the debtor is incorporated, the courts have treated this as a very weak presumption, easily rebutted. Where

automatic relief based on COMI is not possible, Chapter 15 does provide for the possibility of discretionary relief, but only where there the debtor has an ‘establishment’ in the country where the proceeding has been commenced. This is defined as a non-transitory place of economic activity, which is clearly something more than merely a registered office. (One U.S. judge has gone still further and, based on a misunderstanding of the restrictions in the Companies Law on the activities that exempted companies can carry on in the Cayman Islands and in a case where proper evidence of Cayman law was unfortunately not before the court, expressed the view that Cayman Islands exempted companies almost by definition do not have an establishment in the Cayman Islands.)

Under the Model Law, a registered office in the place of the foreign bankruptcy proceedings has been treated as sufficient to found standing for a foreign representatives’ application for ancillary relief unless it is a mere ‘letter-box’ but it is not clear whether this will be followed, without further considerations, in future cases elsewhere.

For the purposes of Part XVI, however, since incorporation alone is a basis for standing to apply for ancillary relief, the question of whether a company is ‘established’ in its jurisdiction of incorporation is for practical purposes redundant.

For those cases where the debtor is not incorporated in the jurisdiction where the proceedings are commenced, the proper construction of ‘established’ will be relevant. For an establishment to exist a place of business is required, as opposed to simply the presence of assets within the jurisdiction, although a place of business can be the debtor’s registered office.

Part XVI does not require any assessment of the COMI of a debtor nor any determination of whether particular foreign proceedings are main or non-main. Further, in order to seek ancillary orders pursuant to s. 253 there is no requirement for a foreign bankruptcy proceeding to be subject to control or supervision by the foreign court; this follows the approach taken by the Model Law.

The forms of ancillary relief that the Court can provide to foreign representatives (as defined) pursuant to s. 253 are:

- Recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor.
- Enjoining the commencement or staying the continuation of legal proceedings against a debtor.
- Staying the enforcement of any judgment against a debtor.
- Requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative.
- Ordering the turnover to a foreign representative of any property belonging to a debtor.

An ancillary order may only be made under subsection (1)(d) against the debtor itself or a person who was or is a relevant person as defined in s. 103(1) -- that is, being connected with the debtor in one of the prescribed professional capacities or involved in the promotion or management of the company.

S. 253(1) of the new Part XVI provides the full range of ancillary relief that is available under Model Law. The matters the Court will consider in determining whether to make ancillary orders upon application by a foreign representative are set out in s. 254. The key touchstone for the Court is guidance by matters that will best assure an economic and expeditious administration of the debtor's estate. The points of references to which the Court is to have regard mirror the former s. 304 of the U.S. Bankruptcy Code, namely:

- Just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled.
- Protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy.

- Prevention of preferential or fraudulent dispositions of property in the debtor's estate.
- Distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V.
- Recognition and enforcement of security interests created by the debtor.
- Non-enforcement of foreign taxes, fines and penalties.
- Comity.

S. 255 is directed at protecting Cayman Islands creditors of companies that become subject to foreign insolvency proceedings by giving local creditors sufficient notice to ensure that they are not disadvantaged relative to creditors in the debtor's home or other jurisdictions.

Procedural rules to implement these provisions have also been introduced. The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008 prescribe requirements for such matters as evidence to be produced on applications for orders under the sections summarized above.

CONCLUSION

The new Part XVI codifies the Cayman Islands' well-established international cooperation practices. Those practices uphold (although they do not directly apply) the key principles of the Model Law other than its focus on non-discretionary relief based only on COMI. Part XVI has greater similarity to former s. 304 of the U.S. Bankruptcy Code than to Chapter 15, a conscious decision having been taken by the Cayman Islands legislature to continue its historically flexible approach to cross-border insolvency in the Cayman Islands.

Should you have any questions or requests for further information, please contact:

Tony Heaver-Wren
Associate

theaverwren@applebyglobal.com
Tel: +1 345 814 2732

This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.

April 2009

© Appleby

The Right People. The Right Places.

Bermuda

Canon's Court
22 Victoria Street
PO Box HM 1179
Hamilton HM EX
Bermuda

Tel +1 441 295 2244
Fax +1 441 292 8666

Jersey

PO Box 207
13-14 Esplanade
St Helier
Jersey JE1 1BD
Channel Islands

Tel +44 (0)1534 888 777
Fax +44 (0)1534 888 778

British Virgin Islands

No 56 Admin Drive
Wickhams Cay 1
PO Box 3190
Road Town
Tortola VG 1110
British Virgin Islands

Tel +1 284 494 4742
Fax +1 284 494 7279

London

2nd Floor
2 Royal Exchange Bldgs
London EC3V 3LF
United Kingdom

Tel +44 (0)20 7283 6061
Fax +44 (0)20 7469 0540

Cayman Islands

Clifton House
75 Fort Street
PO Box 190
Grand Cayman KY1-1104
Cayman Islands

Tel +1 345 949 4900
Fax +1 345 949 4901

Mauritius

8th Floor
Medine Mews
La Chaussée
Port Louis
Mauritius

Tel +230 203 4300
Fax +230 210 8792

Hong Kong

8th Floor
Bank of America Tower
12 Harcourt Road
Central
Hong Kong

Tel +852 2523 8123
Fax +852 2524 5548

Zurich

Bahnhofstrasse 52
CH-8001
Zurich
Switzerland

Tel: +41 44 214 6525
Fax: +41 44 214 6524