Corporate Restructurings: Who is in Control?

The balancing act between collective, class and individual rights

A paper for the Chancery Bar Association's Bermuda Seminar – 10 May 2019

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Introduction

1. As most in the audience will know, Bermuda's corporate insolvency legislation does not offer much of a statutory framework for the reorganization of insolvent Bermuda companies under Bermuda law (and, in particular, the reorganization of Bermuda exempt companies engaged in international business that are cash flow and/or balance sheet insolvent).

2. The Companies Act 1981 and the Companies (Winding Up) Rules 1982 were both modelled on the UK's Companies Act 1948 and Companies (Winding Up) Rules 1949; and Bermuda's company laws have never been updated by legislation to include a statutory equivalent of US Chapter 11 or UK Administration, or to provide other Debtor-in-Possession restructuring tools[1].

3. Bermuda's statutory framework suggests that Bermuda is a creditor-friendly jurisdiction (taking into account both secured creditors and unsecured creditors), when it comes to insolvency.

4. It also tends to suggest that the stakeholders with the greatest influence or control over the outcome of any potential insolvency or restructuring should be the creditors holding the majority of a Company's debt: even though the Court itself, with the assistance of independent insolvency/restructuring professionals acting as Court Officers, may have legal control over the final determination of any Court-supervised liquidation or Scheme of Arrangement[2].

5. In practice, however, Bermuda has been allowed by the Supreme Court to become a much more debtor-friendly jurisdiction than the legislation seems to contemplate, with the consequence that directors, managers, and controlling shareholders of insolvent companies have been

[1] The Insurance Act 1978, the Segregated Accounts Companies Act 2000, the Banking (Special Resolution Regime) Act 2016, and the laws relating to partnerships, trusts, LLCs, and personal bankruptcy also offer limited statutory assistance.

[2] In some cases, shareholders may have an economic interest in the event that the Company's restructuring or liquidation were to produce a surplus after payment of creditor; and in certain other cases, there can be uncertainty as to whether a stakeholder is properly characterised as a creditor, a deferred creditor, or as a shareholder.

allowed (in an increasing number and variety of cases) to influence (or even dictate) the progress, timing and outcome of the restructuring, subject only to a limited degree of supervision by the Court and by independent professionals appointed by the Court.

6. This debtor-friendly flexibility has no doubt resulted in a 'happy ending' in a number of different restructurings. It may also have been a pragmatic and expedient approach for the Bermuda Court to take in many cases, given the limits on the Bermuda Court's powers and resources; the nature of the role performed by the US Courts under Chapter 11; and the nature of many international 'offshore' structures and businesses.

7. Is there a risk, however, that the Bermuda Court, and creditors of Bermuda companies, have lost too much (or all) control?

The 'Bermuda Practice' for corporate restructuring – absent legislative reform

8. In the absence of properly designed restructuring legislation, the Supreme Court of Bermuda has developed and maintained a practice which enables the directors and management of a Bermuda company to remain in office under the 'supervision' of a 'soft-touch' Provisional Liquidator appointed by the Court upon presentation of a winding up Petition (but without a winding up Order being made), while negotiations take place with creditors (and/or shareholders and/or third parties to the extent appropriate), and a restructuring/refinancing plan is devised and implemented (most conventionally through the medium of a Bermuda Scheme of Arrangement in parallel with a similar foreign scheme or plan, but occasionally through the Bermuda Court's recognition of a foreign scheme or plan, without a local Scheme).

9. The procedure was first used in Bermuda in 1999 (twenty years ago) in the reorganization of ICO Global Communications (Holdings) Limited[3].

10. The 'Bermuda Practice' has subsequently been used in various restructurings, including, for example:

    - Global Crossing Group
    - FLAG Group
    - APW Ltd

[3] The Bermuda restructuring profession is mildly entertained by the fact that the BVI's first successful application for the appointment of 'soft touch' provisional liquidators was only determined on 18 December 2018, with written reasons published on 5 February 2019: *Re Constellation Overseas Limited*, per Adderley J.

- TBS Shipping Ltd
- Asia Global Crossing Ltd
- Pacific Crossing Ltd
- MPF Ltd
- Loral Space
- Energy XXI
- C&J Energy Services
- Z-Obee Holdings Ltd
- Seadrill Limited, North Atlantic Drilling Ltd, and Sevan Drilling Limited.

11. As Kawaley CJ has noted in various reported decisions (and in his textbooks and conference speeches):

"*The restructuring of Bermudian companies by way of parallel proceedings under Chapter 11 of the US Bankruptcy Code in the US, and light touch provisional liquidation proceedings in Bermuda, has been standard practice in the Bermuda Court since the case of ICO Global Communications Limited [1999] Bda LR 69*."

"*This provision has for almost 20 years been construed as empowering this Court to appoint a provisional liquidator with powers limited to implementing a restructuring rather than displacing the management altogether pending a winding-up of the respondent company. … **The established practice of this Court in appointing JPLs to supervise a de facto debtor-in-possession restructuring has typically arisen in the context of winding-up petitions presented by the company. The insolvent company's pre-emptive action in seeking the benefit of the stay of proceedings triggered by the appointment of a provisional liquidator combined with the independent oversight of the proposed restructuring by court officers focussed on protecting creditor interests has never, to my knowledge, ever been opposed by creditor interests**. The petitioning company has invariably commenced the provisional liquidation proceedings with the blessing of the main creditors concerned. A decade ago in Discover Reinsurance Company v- PEG Reinsurance Company Ltd [2006] Bda LR 88, I described the practice in this area of Bermuda insolvency law as follows:*

> *'18. There are circumstances in which, in England and Bermuda, provisional liquidators may be appointed when a winding-up order is not necessarily expected to be made, in early course at least. **Since the last decade of the last century, many insolvent English insurers have been routinely placed into provisional liquidation***

and run-off under schemes of arrangement, essentially for regulatory reasons. Over the last ten years in this jurisdiction, a considerable number of companies, typically non-insurance companies, have been placed into provisional liquidation to facilitate a restructuring involving parallel proceedings in the United States commenced under Chapter 11 of the US Bankruptcy Code. These Bermudian winding-up proceedings have been almost invariably commenced by the company itself, and usually on the basis that the company will ultimately be wound–up in any event, when the restructuring process is completed*.*

*19. The use of provisional liquidation to facilitate a restructuring has not always occurred in clear cases of insolvency. It has often been utilized when companies are in what has been referred to as the "zone of insolvency". Be that as it may, the Bermuda model of restructuring provisional liquidation has often kept the pre-existing management in place, and merely given the provisional liquidators "soft" monitoring powers****. In theory, these monitoring powers are designed to reassure both creditors and the Court that assets are not dissipated, on the implicit assumption that the management that has run the company into difficulties can hardly be trusted to have the creditors' best interests at heart****.*

20. In practice, however, in circumstances where no suspicions about the integrity of the directors really exist, the provisional liquidator is appointed as part of legal quid pro quo for receiving the benefit of the stay on proceedings that the appointment guarantees, Bermuda law presently lacking a formal equivalent of the US Chapter 11 regime or the English administration proceedings. It will be anomalous if a Bermuda company files for Chapter 11 protection and cannot be sued by creditors in the US, but is still vulnerable to suit in its own place of incorporation. Proceedings against a company will not be stayed merely by the filing of a winding-up petition, but only if either (a) a provisional liquidator is appointed, or (b) a winding-up order is made….

21. So in the restructuring context at least, this Court clearly possesses the jurisdiction to appoint provisional liquidators over companies which are not inevitably liable to be wound-up, and in circumstances where there is no need to displace the existing management altogether. ***It is true that this jurisdiction has, it seems to me, only ever been exercised with the company's explicit consent. But, for present purposes, it demonstrates beyond serious argument that the traditional test for the appointment of a provisional liquidator, as developed in the late 19th century, has undergone some refinement in recent years. These principles, after all, do not speak to the absolute***

jurisdiction of the Court as a matter of abstract law, but merely to how an unfettered statutory discretion should be exercised in practice".

12. The 'Bermuda Practice' is not unfamiliar to English law.

13. Indeed, it is derived from English law, although in England, the equivalent practice appears to have been largely devised and implemented with insurance companies in mind (given the unavailability of Administration for insurance companies): see, for example, *Re Andrew Weir Insurance Company Ltd* (1992, unreported), *Re English and American Insurance Co Ltd* [1994] 1 BCLC 649 and *Re Hawk Insurance* [2001] 2 BCLC 480, as well as *Smith v UIC Insurance Co Ltd* [2001] BCC 11 (and see also *Re Daewoo Motor Co Ltd* (2001, unreported)*MHMH Ltd v Carwood Barker Holdings Ltd* [2004] EWHC 3174 (Ch) and *Re Highfield Commodities Ltd* [1985] 1 WLR 149).

14. Moving beyond its English roots, however, the 'Bermuda Practice' is being actively (and creatively) developed in various cases currently pending before the Courts (a number of them involving Bermuda companies listed on the Singapore and Hong Kong stock exchanges).

15. It has not, however, been used in all restructurings (at least not in the manner to which Bermuda has become accustomed). In the context of the Noble Group restructuring, for example, a provisional liquidator was only appointed on 14 December 2018 to assist with the implementation of a final phase: those driving the restructuring had not apparently considered it necessary to apply for a 'soft touch' provisional liquidator any earlier in the restructuring process (despite promoting and implementing Schemes of Arrangement in the UK and in Bermuda, and threatening a UK Administration).

Is 'the Bermuda Practice' controversial, or prone to abuse in practice?

16. It is worth observing that in some of the more recent (and pending) cases, however, the Court's appointment of 'Provisional Liquidators' has been increasingly controversial, in practice:

    - Controversial as to the true state of the Company's finances (and the extent to which it is actually balance sheet or cash flow insolvent, and the reasons why);

    - Controversial as to the standing of any particular Petitioner or applicant to present a winding up Petition and to apply for the appointment of 'Provisional Liquidators', including disputes as to whether the Petitioner is behaving collusively with the

Company[4], or otherwise acting for an improper purpose that is inconsistent with the 'class' remedy; disputes as to whose Petition was presented first; disputes as to whether a second Petition is abusive; disputes as to substitution;

- Controversial as to the identities of the Provisional Liquidators to be appointed (both locally and internationally), and whether they should be removed or replaced;

- Controversial as to the remuneration, fees, and expenses of the Provisional Liquidators, and how those fees are to be assessed and paid[5];

- Controversial as to the likelihood of a restructuring being achievable (in some cases with very little evidence of any prospect of restructuring, let alone "*some prospect*" of restructuring[6]);

- Controversial as to the identity and/or motives of 'White Knight' investors;

- Controversial as to the acts and decisions of the Provisional Liquidators, including the division of labour between local and international office-holders, and whether they should be sanctioned, reviewed, or reversed[7];

- Controversial in the sense that the Provisional Liquidators might have been less than fully effective in terms of securing and preserving the Company's assets (especially in difficult cases involving groups of companies, multiple subsidiaries, secured creditors, exotic assets, and multiple jurisdictions with different legal systems);

- Controversial to the extent that appointments have been made (and continued) for restructuring purposes (if only in part) but on a 'full powers' basis rather than a 'soft touch' basis, i.e. displacing the Board of Directors and Management altogether, and

[4] There are authorities that suggest that the Court should treat a Company's own application for the appointment of JPLs more favourably than a creditor's application: *Re Club Mediterranean Pty Ltd* [1975] 1 AC 36 and *Re Union Accident Insurance Co Ltd* [1972] All ER 1105. But there have been cases in which the Company has been reluctant or unable to make its own application for one reason or another.

[5] See *Re A Company (Liquidators' Costs)* [2013] Bda LR 53 for an example of a dispute over JPL fees and expenses. See also *Re Refco Capital Markets Ltd* [2006] Bda LR 94, which addressed a tension between the Bermuda Court's approach to JPL fees and expenses and the US Court's approach, as well as *Re Global Crossing Ltd* [2002] Bda LR 44 (an application for payment of pre-appointment fees and expenses).

[6] Note *Re Esal (Commodities) Ltd* [1985] BCLC 450 and *Re ARM Asset Backed Securities* [2013] BCC 252.

[7] The scope of the potential liability of a 'soft touch' Provisional Liquidator, and the liability of directors and officers during the period of such an appointment, is likely to be a fertile area for future litigation.

resulting in the Provisional Liquidators assuming full powers of management (sometimes unexpectedly);

- Controversial in the sense that they have been extremely protracted in terms of timing (with Petitions being adjourned for extended periods of time, despite opposition from various stakeholders).

17. In this context, it may be worth keeping in mind Smellie CJ's observations in the Cayman Islands case of *Re Fruit of the Loom Ltd* [2000] CILR, Note 7b[8], in assessing whether the appointment of Provisional Liquidators should continue in any particular case:

    - The Provisional Liquidators should themselves be satisfied that the refinancing and/or sale of the business as a going concern was likely to be more beneficial to creditors than a liquidation of the company's assets and a rateable distribution to creditors;

    - There must be a real prospect of a refinancing and/or sale as a going concern being effected for the benefit of the general body of creditors;

    - Achieving such a refinancing and/or sale as a going concern should be in the best interests of creditors and shareholders in the circumstances; and

    - **The Court will (or should) be astute to ensure that its orders are not abused by a company which is hopelessly insolvent being allowed to continue to trade**.

18. Is it possible however, that, despite this guidance, the Bermuda Practice is being abused by certain debtor companies that are being allowed to continue to trade, when they should instead be wound up and investigated? Is it equally possible that the Bermuda Practice is being abused by certain creditors, who are being allowed to keep winding up petitions alive for very long periods of time simply for the purpose of settlement leverage, thereby prejudicing the company's ability to trade (to the disadvantage of its shareholders)?

[8] Other Cayman Islands decisions involving 'soft touch' provisional liquidations include *Re Trident Microsystems (Far East) Limited* [2012] (1) CLR 424, *Re Mongolian Mining Corporation* (2016, Grand Court of the Cayman Islands, court order, McMillan J), and *Re China Agrotech Holdings Limited* (2017, Grand Court of the Cayman Islands, unreported, per Segal J).

The legal fiction underpinning the 'Bermuda Practice'

19. Rather more prosaically, the 'Bermuda Practice' does depend on a considerable amount of judicial creativity and some degree of 'legal fiction': namely, the notion that a winding up petition can be presented and pursued by a Petitioner in circumstances where none of the parties before the Court (including the Petitioner) actually seeks a winding up order[9].

20. The 'Bermuda Practice' mainly turns on section 170 of the Companies Act 1981, which provides as follows:

"*Power of Court to appoint liquidators*

170 (1) For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.

(2) The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.

(3) When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him."

21. The 'Bermuda practice' also depends on:

- the automatic stay under section 167(4) of the Companies Act 1981, which provides as follows:

"(*4) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose*."

[9] In some cases, the Petition itself has been drafted to state in express terms in its Prayer that the Petitioner does not seek a winding up Order at all!

- the Court's power of adjournment, under section 164 of the Companies Act 1981[10], which provides that:

  "*On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets*...."

- the Court's willingness to waive, dispense with, vary (or simply overlook and forgive retrospectively) certain statutory rules under the Companies Act 1981 and the Companies (Winding Up) Rules 1982 (including, for example, the requirement for public advertisement of the Petition, as well as other rules that are ordinarily designed to protect creditors and shareholders, including rules relating to Liquidator sanction, Committees of Inspection[11], post-petition dispositions, statutory meetings etc[12]);

- the Court's willingness to entertain petitions (and applications for the appointment of Provisional Liquidators) made by directors (without prior notification to, or approval by, shareholders, and without creditor consents): see *Re First Virginia Reinsurance Ltd* [2003] 66 WIR 133, [2003] Bda LR 47[13];

- the Court's willingness to support (and promote) the sealing of Court files (including but not limited to Provisional Liquidator reports), without at the same time insisting that Provisional Liquidators provide periodic reports to

[10] See *Re Titan Petrochemicals* [2013] Bda LR 76, by way of example only.

[11] See *Re Petroplus Finance 2 Ltd* [2014] Bda LR 107, in which Kawaley CJ declined to appoint a sole creditor as a Committee of Inspection, but recognised that a sole creditor may have some degree of influence over the conduct of a liquidation. See also *Re Loral Space & Communications Ltd* [2007] Bda LR 26, in which Provisional Liquidators were appointed as Permanent Liquidators without a vote at statutory meetings.

[12] In *Re C&J Energy Services Ltd* [2017] Bda LR 22, Kawaley CJ held at paragraph 47 (in a first instance, *ex parte*, unargued decision) that "*in general terms there can be little room for doubt that this Court is empowered under the Companies Act 1981 as read with the Companies (Winding-Up) Rules 1982 to short circuit the formal winding-up process where engaging the usual machinery will serve no useful commercial or public purpose*".

[13] In that case, Kawaley J declined, at first instance, to follow the English Court decision of Brightman J in *Re Emmadart* [1979] 1 Ch 540 – the effect of which has, in any event, been reversed in the UK by section 124 of the UK's Insolvency Act 1986 and the correctness of which was also doubted in Australian case law.

creditors/shareholders and/or convene meetings of creditors/shareholders by fixed and enforceable deadlines[14];

- the Court's willingness to attribute commercial 'value' to a Company's listing status, and therefore the importance of its preservation under threat of de-listing. See, in this context Harris J's findings in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338 (in the face of an argument – supported by some authority - that a Company's listing status is not an asset of the Company), to the effect that:

"*The position in Hong Kong as a matter of principle and authority is as follows:*

(1) The listing rules operate as a contract between the listed issuer and HKSE. HKSE has been given the power to make rules under section 23 of the Securities and Futures Ordinance (Cap 571) for such matters as are necessary or desirable for (i) the proper regulation and efficient operation of the market which it operates, (ii) the proper regulation of its exchange participants and holders of trading rights, and (iii) the establishment and maintenance of compensation arrangements for the investing public. When a company is listed, it undertakes and contracts with HKSE to comply with the listing rules….

(2) Thus a listed issuer has a bundle of contractual rights and obligations under the listing rules. The company's listing status is a 'chose in action', which is an expression used to describe "all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession"…. The fact that the company may not assign the listing status is irrelevant because some choses in action are incapable of assignment….

*(3) A company's listing status is akin to a non-transferable stock exchange membership which is nonetheless an asset of the member. In Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd. … in the context of the application of the anti-deprivation principle to the London Stock Exchange ("**LSE**") membership which allows members to access LSE's facilities for dealing in quoted securities, Neuberger J (as he then was) said:*

[14] Under the UK's Administration regime, an Administrator must send a copy of his proposals to all creditors within 8 weeks of appointment, and a creditors' meeting must be held within 10 weeks of the date of the commencement of the administration, with further reports every 6 months' thereafter.

"Cases which would more frequently occur are those where the right or property subject to the deprivation provision has no value, or (in many cases) if it is incapable of assignment, or depends on the character or status of the owner. In such cases, a deprivation provision would, as I see it, normally be enforceable in the event of the insolvency of the owner. If the asset has no value, or if it is incapable of transfer, then it could scarcely be said to be to the detriment of the creditors of the owner if he was deprived of the asset. Similarly, if the ownership of the asset depends on the personal characteristics of the owner, it is difficult to see how objection could be taken to a power to take away the asset, not least because it would be inherently unsuitable to be retained for the benefit of his creditors. An example which springs to mind would be membership of a club. Coming closer to the facts of the present case, the loss of membership of a financial institution, such as a stock exchange, where one has failed to meet one's debts or has gone bankrupt cannot, in my view, be said to fall foul of the principle. Membership of such an exchange turns on the personal attributes and acceptability of a particular individual, and expulsion of [sic] the grounds of not honouring financial obligations (or, indeed, insolvency) would seem to be almost an inevitable incident of membership." (Emphasis added.)

(4) Therefore, the fact that a company's contractual right in the form of a listing status is not distributable as such to its creditors on its insolvency does not show that the listing status is not the company's asset.

(5) Many authorities have referred to a company's listing status as the company's asset, although they have not considered in any detail a listing status' legal attributes and character…"

Is the 'Bermuda Practice' capable of being challenged or re-visited?

22. In *Z-Obee Holdings Ltd* [2017] Bda LR 19, Kawaley CJ noted that "***While this practice of using provisional liquidation proceedings in aid of restructurings (both in cases where it is anticipated that the petition may ultimately be dismissed and where an eventual winding-up order is contemplated) is only expressly supported by local first instance decisions, it is too well established today for this Court to depart from in the absence of full and compelling arguments for so doing***."

23. Depending on one's point of view, however, the 'Bermuda Practice' is not uncontroversial. It is, after all, a practice that has only been endorsed at first instance and by a relatively small number of judges – having never received the benefit of full, adversarial argument, or detailed appellate analysis.

24. Its jurisprudential foundation is certainly debatable, both as a matter of logic and in the absence of clear statutory support, and also if one has regard to the Hong Kong case law (see *Re Legend International Resorts Ltd* [2006] HKLRD 192, a decision of the Hong Kong Court of Appeal, even as explained by Mr. Justice Harris in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338).

25. It is also possible that the logic of *Re Emmadart* [1979] 1 Ch 540 could be revisited in Bermuda, in light of *Re China Shanshui Cement Group Limited*, Grand Court of the Cayman Islands, 25 November 2015 and *Banco Economico SA v Allied Leading and Finance Corporation* [1998] CILR 102), and absent legislative reform[15]. Should Directors, for example, first secure shareholder approval before presenting a winding up Petition and/or before making an application for the appointment of 'soft touch' Provisional Liquidators, if they do not have express powers to do so? Should they at least notify shareholders and give them a proper opportunity to object or be heard?

26. If nothing else, the 'Bermuda Practice' is (if only hypothetically) prone to abuse, if – for example – a Company's Board of Directors or management have in fact perpetrated an international fraud, but are seeking (through the illusion of protracted restructuring negotiations that are given a degree of credibility by the Bermuda Court's Orders) to delay the full investigation, detection, and prosecution of such a fraud while assets are being dissipated and made judgment-proof in the meantime.

27. There have certainly been situations in which various creditors and various shareholders have found the 'Bermuda practice' to be thoroughly unsatisfactory – if only because of its relative uncertainty, its lack of transparency, its lack of clearly stated (and enforceable) rules, and its belated and reactive deployment by certain Boards of Directors unwilling to engage with creditors at an earlier stage.

[15] It is worth noting that *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47 was decided by Kawaley J at first instance, and in the context of an interlocutory application, and on the basis of the Company's submissions alone (albeit those submissions were fully and fairly presented by Narinder Hargun, now the Chief Justice, taking into account all of the authorities to the contrary).

28. There have also been certain situations in which minority shareholders have tried to challenge the Bermuda Court's recognition of foreign restructuring plans passively endorsed by Provisional Liquidators (unsuccessfully thus far[16]), and in which minority (or deferred) creditors or minority shareholders have been dissatisfied with the conduct of the Provisional Liquidators almost as much as the conduct of the Directors and management.

29. One might have thought that, after 20 years of judicial development and implementation, the Bermuda 'practice' might have attracted the attention of the rule-makers or the legislature, with a view to promoting some sensible, transparent, and user-friendly rules and guidelines of general application.

Some thoughts on balancing collective, class and individual rights (and the right to a fair hearing)

30. There have been a number of Bermuda cases recently (in different contexts, including winding up, appointments of Provisional Liquidators, adjournment of hearings) in which the Bermuda Court has placed some weight on the purported views of the majority of unsecured creditors and – depending on the context – the opinions of Directors (or parties associated with and being paid by management), while discounting the views of the petitioning (but unpaid) creditor, other minority creditors, and shareholders (including minority shareholders with legitimate complaints of prejudicial conduct by the controlling majority).

31. There have also been cases in which (despite some tension in the authorities) the Court has placed considerable weight on the views expressed by the Provisional Liquidators (often in support of an adjournment to continue restructuring negotiations), with the consequence, in a number of cases, that a party with an interest in actively pursuing, supporting or opposing a winding-up Petition on its merits (i.e. not for restructuring purposes) has been forced to endure multiple adjournments on a non-consensual basis pending a potential 'restructuring'.

32. One of the practical difficulties in many such cases is evidential: with most applications in winding up proceedings being dealt with on the basis of affidavit evidence (often filed at the last minute), with limited opportunity for discovery and cross-examination, and without the benefit of transparent voting being conducted at a meeting. It is often very difficult to establish, with any degree of certainty, who is connected to whom; what the motives of various participants may be; who has actually received notice of the relevant application or proceedings (and the evidence); whose debts are valid or not; whether the Company's potential state of

[16] See *Re Energy XXI Ltd* [2016] Bda LR 90 and *Re Seadrill Limited* [2018] Bda LR 39.

insolvency is balance sheet insolvency, or cash flow insolvency, or both; and which party can safely be characterised as the 'wrongdoer' or the 'victim'.

33. But the fact of multiple adjournments over a protracted period of time can be legally and commercially prejudicial and unfair (and expensive): and, for my part, I would query the extent to which it is appropriate for the Court to adjourn a winding up petition for a long period of time, even if a Provisional Liquidator has been appointed for 'restructuring' purposes, and even if an adjournment appears to have majority support. Surely the Court's primary function is to resolve disputes as promptly and efficiently as possible; not to 'supervise' interminable restructuring negotiations taking place outside of Court?

Conclusion

34. If only for the purpose of provoking debate, I would raise three questions, by way of conclusion:

    a. Does anybody sincerely believe that anybody other than the Company's directors and management have effective control of a corporate restructuring in Bermuda, even with the appointment of a 'soft touch' Provisional Liquidator and the 'supervision' of the Bermuda Court?

    b. Does the Bermuda Court have the necessary tools, powers, rules, guidelines, and resources to supervise an insolvent corporate restructuring in a fair and efficient manner, in the best interests of all relevant stakeholders?

    c. Given the recent experience of Noble Group, hasn't the time finally arrived for Bermuda to legislate for Administration (both for insurance companies and for other companies), so as to put corporate restructuring in Bermuda on a more stable and modern legal foundation?

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10 May 2019