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The Bahamas: Law & Practice

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Higgs & Johnson

BAHAMAS

Law and Practice

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Contents

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1. State of the Restructuring Market

1.1 Market Trends and Changes

The Bahamas is a well-developed offshore financial centre providing specialist corporate, financial and fiduciary services to, among others, many international business companies incorporated in The Bahamas.

While the present companies and partnership legislative regime provides a general framework for facilitating the restructuring of legal, ownership and operational functions of an entity, the process involves the realisation of assets and the payment of creditors followed by the dissolution of the debtor. The law does not provide an effective "corporate rescue" mechanism.

The Bahamas Post-COVID-19 and Post-FTX

The effects of the COVID-19 pandemic from 2020 to 2023 have negatively impacted on individuals and businesses alike the world over. In The Bahamas, the onset of the shutdowns for the COVID-19 pandemic began merely six months after Hurricane Dorian, a powerful Category 5 storm, hit The Bahamas in September 2019 causing USD3.4 billion in damage and losses.

In an effort to alleviate the combined economic impact of Hurricane Dorian and COVID-19, the government of The Bahamas facilitated legislative reform and implemented initiatives such as:

- the expansion of the special unemployment assistance programme to include self-employed persons who would not ordinarily qualify for the unemployment benefit under the country's national insurance programme;
- arrangements between the Central Bank of The Bahamas and domestic banks and credit unions, under which a three-to-six-month deferral of repayments on credit facilities was made available to businesses and individuals;
- a Business Continuity Loan Programme to assist small and medium-sized enterprises in surviving the period, by assisting with operational costs such as salaries, rent, insurance, utilities and inventory/supplies; and
- a Tax Credit and Tax Deferral Employment Retention Programme, which provided businesses with a turnover in excess of USD100,000 (and thus the cash flow to preserve their employment levels) with payroll support in an effort to retain up to 10,000 jobs.

Against this backdrop, individuals and businesses continued to face the risk of bankruptcy or insolvency, as the regime relating to such proceedings remained (and remains) unchanged.

There was no restriction on the filing of winding-up petitions or bankruptcy petitions during that period. Additionally, there was no increase of the prescribed statutory minimum debt for:

- a debtor's summons under the Bankruptcy Act; or
- a statutory demand under the relevant companies legislation.

There was also no extension of the timeframe within which the debtor was required to respond. It therefore was (and remains) the case that a bankruptcy petition may be filed against an individual if they have been served with a debtor's summons requiring payment of a debt of at least USD200 and fail to respond within three weeks. Similarly, if a company fails to respond to statutory demand (which must relate to a debt of at

least USD1,000) within three weeks, it may find itself the subject of a winding-up petition.

The number of filings in the Bankruptcy Division of the Supreme Court reflects a slight uptick in insolvency proceedings over the past few years: there were seven in 2022, and six were filed in 2023 (to date).

Furthermore, under the companies legislation, there is a "clawback" period from the onset of insolvency during which a voidable preference or a disposition at an undervalue may be set aside. Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts, with a view to giving such creditor a preference over the other creditors, shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

In addition, every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of such company's official liquidator, who must commence any action to set aside the disposition within two years after the date of the disposition.

Moreover, there remains no "safe harbour" for directors who may be in the throes of a financial storm. Directors must also be mindful of their common law fiduciary and statutory duties to minimise the loss to the company's creditors where there is no reasonable prospect that the company will avoid insolvent liquidation. A failure to do so may result in the director incurring personal liability – whereby, on the application of the liquidator, the director may be required to contribute to the assets of the insolvent company.

However, change is on the horizon. In October 2020, the Economic Recovery Committee (ERC) was established by the government of The Bahamas to chart the course for economic recovery, and to make recommendations that have the potential to transform the Bahamian economy. In addition to recommendations for, inter alia, the establishment of a Sovereign Wealth Fund and the creation of an "entrepreneurship visa" to lay a foundation for high-tech and fintech opportunities, a key recommendation was the modernisation of the insolvency regime for companies declaring bankruptcy in The Bahamas. In 2023, the executive issued a clarion call for the financial services industry to "innovate again", and pledged to modernise the insolvency regime.

With the legislative amendments to the Companies Act, 1992 in 2012, a comprehensive statutory framework for international co-operation and judicial assistance by Bahamian courts in relation to foreign insolvency proceedings, together with the ability to appoint a provisional liquidator, was introduced and signalled a positive step in the modernisation of the country's insolvency laws.

This was most recently and effectively employed in the "FTX collapse". In November 2022, the Securities Commission of the Bahamas presented a regulator's winding-up petition against FTX Digital Markets Ltd ("FTX Digital") and suspended its licence to operate as a digital asset business. Thereafter, the Commercial Division of the Supreme Court of the Bahamas (the "Bahamian Court") appointed Joint Provisional Liquidators over FTX Digital. The Joint Provisional Liquidators filed a Chapter 15 petition in the

United States Bankruptcy Court for the District of Delaware (the "US Court") which recognised the provisional liquidation in The Bahamas as a foreign main proceeding and stayed the execution of any transfer in relation to the assets of FTX Digital. Certain other FTX entities (excluding FTX Digital) filed voluntary petitions for Chapter 11 in the US Court, which operates as an automatic stay over the assets of said entities.

FTX Digital, acting through its Joint Provisional Liquidators, has signed a Settlement and Co-operation Agreement with the Chapter 11 Debtors to, inter alia, "proceed with parallel proceedings" in the US Court and The Bahamian Court, and to co-operate towards accomplishing the goals of "working together in good faith to determine ownership of assets", "avoiding redundant work", "minimising expense" and "respecting the sovereignty of different legal systems".

While the FTX matter is sub judice, it is of interest and will continue to be keenly observed by Bahamian insolvency practitioners.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

Save for the special procedures which apply to licensed banks and registered insurers, there is no statutory procedure for restructuring the debt obligations of an insolvent company in The Bahamas. However, it is possible to obtain a stay of a liquidation proceeding if the official liquidator successfully promotes an arrangement for the reorganisation or reconstruction of the company or a separation of its businesses.

Additionally, a company may, after the presentation of a winding-up petition, apply to the court for the appointment of a provisional liquidator on the basis that the company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors. To this extent, it may be possible to forge a restructuring in the course of liquidation.

The suite of legislation that governs insolvency includes the following:

- the Companies Act, 1992 as amended by the Companies (Winding-Up Amendment) Act, 2011 (collectively, the "Companies Act");
- the Insolvency Practitioners Rules, 2012;
- the Companies Liquidation Rules, 2012;
- the Foreign Proceedings (International Co-operation) Liquidation Rules, 2012; and
- relevant provisions of the Banks and Trust Companies Regulation Act, 2020, and the Insurance Act.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Liquidation proceedings may be voluntary, within or without a court process, or involuntary; and a winding-up petition may be presented by the company itself, or by any creditor, contributory or regulator of the company.

Voluntary Liquidation

A voluntary liquidation may be commenced:

- by a resolution of a majority of the company's shareholders (or directors, where appropriate) that the company be wound up voluntarily;
- upon the occurrence of a winding-up event;

- upon the expiry of a fixed period for the duration of the company prescribed by the memorandum or articles of association; or
- upon a resolution of a company that it be wound up on the basis that it is insolvent.

Involuntary/Compulsory Liquidation

A winding-up petition may be presented on the following grounds (among others):

- that the company passed a resolution directing that it be wound up pursuant to an order of the court;
- that the company is insolvent and cannot pay its debts as they fall due;
- that the presentation of the petition is equitable and just in the circumstances in the exercise of the court's discretion;
- when the company does not commence business within a year of its incorporation, or suspends business for a year; and
- when the number of members on its register is reduced to fewer than two.

A company will be deemed "insolvent" if:

- a creditor has served a statutory demand on the company requiring it to pay the sums due, and the company has failed to do so within three weeks thereafter;
- it is proven, to the satisfaction of the court, that the company is unable to satisfy its indebtedness; or
- the execution of another process (viz court judgment or order) is unsatisfied.

The assets of a company may be placed into receivership by:

- a mortgagee, where the mortgage is by deed; or
- a lender pursuant to the terms of the security documents governing their relationship.

Additionally, the Supreme Court may appoint a receiver in respect of a debtor company in any case where it appears to the Court to be just and convenient to do so.

2.3 Obligation to Commence Formal Insolvency Proceedings

Liquidation proceedings are usually commenced when a company is insolvent. If a company continues to trade or operate when it is insolvent, its directors may incur personal liability for "insolvent trading" and will be obliged to make a contribution to the company's assets.

Further, where liquidation is commenced voluntarily, a declaration of solvency is required to be provided within 90 days by all the directors of the company. If such declaration is not provided, the voluntary liquidator must apply to the court for an order that the liquidation shall continue under the supervision of the court. Even where the declaration is provided, the voluntary liquidator is obliged to seek a supervision order if it becomes apparent during the course of the liquidation that the company is insolvent or of doubtful solvency.

2.4 Commencing Involuntary Proceedings

As noted in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, a creditor, contributory or regulator of the company may institute involuntary or compulsory proceedings by presenting a winding-up petition for the company on the basis that the company is insolvent or that it is just and equitable that it be wound up.

In addition, where a company carries on a regulated business, its regulator may present a winding-up petition on the grounds that the company is not duly licensed or registered to carry on such business; or for any other reason provided for under the relevant regulatory laws. The Central Bank of The Bahamas is also empowered by Section 60 of the Banks and Trust Companies Regulation Act to place a licensed bank under its supervision into compulsory liquidation subject to the provisions of that Act.

2.5 Requirement for Insolvency

Insolvency is not required for the commencement of proceedings; it is merely one of the grounds.

If a winding-up petition is presented on the grounds of insolvency, the petitioner must show that the company is unable to pay its debts as they fall due or that the value of the company's liabilities exceeds its assets.

A company shall be deemed to be unable to pay its debts if:

- a creditor serves a valid statutory demand which the company fails to pay or settle within three weeks;
- execution against the company of a judgment or court order in favour of a creditor is wholly or partly unsatisfied; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts.

2.6 Specific Statutory Restructuring and Insolvency Regimes

The procedure for liquidation is generally the same for all types of companies and there is no comprehensive insolvency regime that applies solely to banks, insurance companies or other companies carrying on regulated business. However, companies licensed or registered under the Banks and Trust Companies Regulation Act, the Securities Industry Act or the Insurance Act are subject to additional requirements relating to liquidation as set forth in those Acts. For example, such companies may not commence voluntary liquidation without the prior written approval of the Central Bank, Securities Commission or Insurance Commission, as the case may be.

Additionally, in the case of a registered insurer, that company must publish a notice of intention to apply for such approval in the local newspaper and send a copy of that notice to its shareholders and policyholders, unless that requirement is dispensed with by the Insurance Commission. A shareholder or policyholder who may be affected by the insurer's voluntary liquidation shall be entitled to make representations to the Insurance Commission before it determines whether or not to grant approval.

Restructuring of Licensed Banks

With the coming into force of the Banks and Trust Companies Regulation Act, 2020, the Central Bank now has statutory power to appoint a statutory administrator in respect of a licensed bank if it is of the opinion that such bank company is, among other things, unable (or likely to become unable) to meet its debts as they fall due or to pay its depositors' demands in the normal course of business. A statutory administrator shall be appointed for a specified period (which may be extended), during which no proceedings may be brought or continued against the bank and no creditor may enforce their security or issue any execution, without the prior written consent of the statutory administrator.

The statutory administrator shall have full and exclusive powers to operate and manage the bank and may, with the approval of the Central Bank, carry out a merger of the bank or transfer all

or some of the bank's shares or other securities, assets, rights and liabilities. Such transfer may be made by the statutory administrator in favour of a purchaser, bridge institution or an asset management vehicle, with a view to resolving the bank. Additionally, the statutory administrator may, with the written approval of the Central Bank, carry out a restructuring of the liabilities of the bank through arrangements with the bank's creditors, including a reduction, modification, rescheduling or novation of their claims.

At the expiry of the statutory administration period, the Central Bank shall revoke the bank's licence and commence a compulsory winding-up proceeding, if the reason for the appointment of the statutory administrator continues to exist.

Restructuring of Registered Insurers

Similar to banks, registered insurers may also be placed into statutory administration by their regulator. Pursuant to Section 75(A) of the Insurance Act, the Insurance Commission may appoint a statutory administrator in a number of specified circumstances, including where the insurer has failed to pay its liabilities or is, in the opinion of the Insurance Commission, unlikely to be able to pay its debts as they become due. The statutory administrator shall have exclusive power to manage and control the affairs of the insurer, and if the statutory administrator considers it feasible to restore the company to financial soundness, they shall develop a plan of reorganisation accordingly. Further, within 90 days after their appointment, the statutory administrator shall apply to the Supreme Court for the approval of such plan, if the Insurance Commission determines that, through reorganisation, there is a reasonable prospect of restoring the insurer to financial soundness.

If the Supreme Court approves the plan of reorganisation and makes an order to that effect, the statutory administrator must provide a copy of the plan to the insurer's policyholders and other creditors who would not receive full restitution or payment of their claims under the plan. The copy of the reorganisation plan must be accompanied with a notice requiring the insurer's policyholders and creditors to submit their objections within the time prescribed by the Insurance Act.

If the statutory administrator does not receive objections to the plan from at least 20% of the policyholders of the company within the time specified, the reorganisation may be duly carried out. Otherwise, the statutory administrator shall submit, in a similar manner, further reorganisation plans until such time as fewer than 15% of the policyholders submit objections to the plan; or alternatively, shall refer the matter to the court for directions.

Judicial Management

Pursuant to Section 77 of the Insurance Act, the Insurance Commission also has power to present a petition, with leave of the court, for an order that a registered insurer or any part of its insurance business be placed under judicial management. The grounds on which such a petition may be presented include where the insurer is in financial difficulties. Once the petition is presented, all proceedings and the execution of all writs against the company shall be stayed, unless the leave of the court is obtained or the court orders otherwise.

Upon the appointment of a judicial manager, the management of the insurer, or of such part of the insurer's business as the court directs, shall vest in the judicial manager to the exclusion of any other person. The court shall issue directions to the judicial manager as to their powers and

duties as it deems fit, and the judicial manager shall act under the control and supervision of the court. As soon as practicable, the judicial manager shall file a report with the court stating which of the following courses of action is, in their opinion, most advantageous to the general interests of the company's policyholders, and shall seek an order accordingly:

- the transfer of all or any part of the insurance business of the company to some other company in pursuance of a scheme prepared by the judicial manager and annexed to the report;
- the carrying on of its business by the company either unconditionally or subject to such conditions as the judicial manager may suggest;
- the winding-up of the company; or
- such other course as the judicial manager considers advisable.

After hearing from the Insurance Commission, the judicial manager and any person who in the opinion of the court should be heard, the court shall make an order to give effect to the course it considers most advantageous to the interests of the insurer's policyholders.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

Bahamian legislation does not provide a framework for consensual and other out-of-court workouts and restructurings.

However, in practice, informal/consensual restructuring and workout strategies are generally explored by banks and other lenders who, depending on the nature of the security involved and their assessment of the level of risk associated with the transaction, can be more receptive to such methods. If an agreement is reached between the company in financial difficulty and the bank or lender, it is then formalised by:

- the restructuring of the loan;
- forbearance by the lender;
- an injection of new money by the lender; or
- security by the borrower or related parties.

As noted in **2.3 Obligation to Commence Formal Insolvency Proceedings**, if an operating company continues to trade when it is insolvent, its directors may be liable for insolvent trading; thus, some directors may have a limited appetite for pursuing opportunities for the company to negotiate a consensual restructuring.

There is no requirement for mandatory consensual restructuring negotiations before the commencement of liquidation.

3.2 Consensual Restructuring and Workout Processes

This topic is not applicable.

3.3 New Money

As indicated in **3.1 Consensual and Other Out-Of-Court Workouts and Restructurings**, it is not unusual for new money to be injected by the lender; although it is also possible for the injection to be made by a third party. A third party would likely seek the subordination of existing debts and, in such a case, secured lenders may agree to subordinate their debts, depending on the nature of their security.

3.4 Duties on Creditors

If a deed of arrangement is made between a company and its creditors in circumstances where there is a common basis of consent, it may be repudiated by a creditor who discovers that other creditors were induced to execute the deed by a secret bargain to their advantage.

Additionally, if a company fails to have due regard to the interests of its debenture holders or other creditors when negotiating or implementing a consensual workout strategy, such company and its directors may be exposed to a claim of oppression or unfair prejudice. Pursuant to Section 280 of the Companies Act, a debenture holder, and any other person who in the opinion of the court is a proper person to bring a complaint, may apply to the Supreme Court for an order against a company or its directors or officers to restrain oppressive action. Where such an application is made, the court may make an order to rectify the matter complained of if it is satisfied that:

- an act or omission of the company or any of its affiliates effects a result which is oppressive or unfairly oppressive, or which unfairly disregards the interest of any debenture holder or creditor;
- the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner which is oppressive or unfairly oppressive, or which unfairly disregards the interest of any debenture holder or creditor; or
- the powers of the directors of the company or any of its affiliates are or have been exercised in a manner which is oppressive or unfairly oppressive, or which unfairly disregards the interest of any debenture holder or creditor.

3.5 Out-of-Court Financial Restructuring or Workout

In a syndicated loan transaction, it would not be unusual for lenders to agree terms permitting a majority or super-majority of lenders to bind dissenting lenders to changes made to the credit agreement terms.

In the absence of such an agreement, however, an informal consensual process would be challenging, as there are no cram-down mechanisms for bringing about an otherwise consensual financial restructuring.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

The main types of security that may be taken by a secured creditor include:

- mortgages;
- assignments;
- fixed or floating charges;
- liens; and
- pledges.

A mortgage or assignment involves the transfer of the legal title to the asset. Mortgages are typically used for creating security interests in real property; whereas assignments are usually used to create security interests in intangible property.

A charge does not involve the transfer of legal title, but rather is created by an agreement which gives the chargee the right to realise the charged asset and to apply the proceeds against the obligations of the chargor to it.

Charges are either fixed or floating. A fixed charge immediately attaches to specific assets. In contrast, a floating charge exists over a fluctuating body of assets, for which the chargor is free to deal with and dispose of the charged assets unless and until the charge crystallises and converts into a fixed charge.

A pledge involves the transfer of possession of the asset in circumstances where title to the asset remains with the pledgor.

4.2 Rights and Remedies

In an insolvency context, a secured creditor may enforce and realise its security without reference to the debtor's liquidator, provided that its security is validly created and effective under its governing law. In exercising such rights, a secured creditor will be subject to the terms of any intercreditor agreement to which it is a party.

Unless it surrenders its security or is only partly secured, a secured creditor typically stands outside the liquidation process, although the court will have regard to the wishes of all creditors in matters relating to the winding-up. Generally, the wishes of unsecured creditors will be regarded more highly than those of secured creditors. However, where a creditor is only partly secured, they are entitled to the same consideration, in respect of the unsecured portion of their debt, as wholly unsecured creditors, and the court will have regard to their debts.

4.3 Special Procedural Protections and Rights

If there is a balance owing to a secured creditor after they realise their security, the secured creditor may prove in the liquidation for the unsecured balance.

Additionally, if a secured creditor considers that its debt is more than the value of its security, it may, before realising its security, provide the liquidator with particulars of its security and valuation of it. When the security is realised in such a case, the net proceeds of realisation shall be substituted for the valuation initially provided to the liquidator.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

The claims of creditors against the company will all rank pari passu, subject to the rights of:

- secured and preferred creditors;
- any agreements with creditors that their claims will be subordinated or otherwise deferred to the claims of other creditors; and
- any contractual rights of set-off or netting of claims between the company and any party.

The rights of secured creditors may be enforced without the leave of the court pursuant to the terms of the security. Once the claims of secured creditors have been satisfied, the company's assets will be distributed to the unsecured creditors equally in proportion to their admitted claims, according to the statutory waterfall of priorities outlined in **5.5 Priority Claims in Restructuring and Insolvency Proceedings**.

5.2 Unsecured Trade Creditors

This topic is not applicable.

5.3 Rights and Remedies for Unsecured Creditors

In all matters relating to the liquidation and winding-up, the court shall have regard to the wishes of the creditors. Further, although the

powers of the court to appoint or remove an official liquidator or to stay the proceedings are discretionary, great weight will be placed on the wishes of the majority of the creditors in value where the court is exercising such powers.

5.4 Pre-judgment Attachments

Pre-judgment attachments are permitted if they are executed or completed by a creditor before a winding-up petition is presented to the Supreme Court; or in the case of a voluntary liquidation, before the creditor has notice that a meeting was called for the purpose of commencing a voluntary winding-up. In this context, execution is completed vis-à-vis goods by seizure and sale, and vis-à-vis securities, upon making a charging order absolute. Further, an attachment of a debt is completed when the debt is recovered.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

The statutory waterfall of priorities in respect of liquidation claims is as follows:

- liquidation expenses;
- certain taxes due to the government of The Bahamas;
- sums due by the company to employees;
- wages due to any worker or labourer for services rendered to the company in the two months preceding the relevant date (commencement of the winding-up or the date of a winding-up order);
- certain sums due and payable by the company on behalf of employees; and
- certain sums due to workers for personal injury accrued before the relevant date.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

As indicated in **2.1 Overview of Laws and Statutory Regimes** and **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**, there is presently no statutory restructuring procedure for restructuring or reorganising the debts of an insolvent company in the nature of a statutory scheme of arrangement or corporate rescue in The Bahamas.

Notwithstanding this, a company may initiate:

- a reorganisation of its share capital;
- a merger;
- a consolidation; or
- a separation of business operations in the course of a formal liquidation process or as a part of an informal work-out.

A company may also initiate a liquidation process and seek the appointment of:

- a Provisional Liquidator on the grounds that it is unable (or is likely to be unable) to pay its debts or to present a compromise or arrangement to creditors; or
- a receiver with the power to carry on the company's business operation, and to structure a sale of the company, its business or assets.

A company might also seek out voluntary arrangements with its creditors.

These options are helpful and may be strategically employed to facilitate a restructuring or

reorganisation within the context of a formal liquidation process.

6.2 Position of the Company
This topic is not applicable.

6.3 Roles of Creditors
This topic is not applicable.

6.4 Claims of Dissenting Creditors
This topic is not applicable.

6.5 Trading of Claims Against a Company
This topic is not applicable.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group
This topic is not applicable.

6.7 Restrictions on a Company's Use of Its Assets
This topic is not applicable.

6.8 Asset Disposition and Related Procedures
This topic is not applicable.

6.9 Secured Creditor Liens and Security Arrangements
This topic is not applicable.

6.10 Priority New Money
This topic is not applicable.

6.11 Determining the Value of Claims and Creditors
This topic is not applicable.

6.12 Restructuring or Reorganisation Agreement
This topic is not applicable.

6.13 Non-debtor Parties
This topic is not applicable.

6.14 Rights of Set-Off
This topic is not applicable.

6.15 Failure to Observe the Terms of Agreements
This topic is not applicable.

6.16 Existing Equity Owners
This topic is not applicable.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Voluntary Liquidation
A company may be placed into voluntary liquidation, by a resolution of its directors or shareholders in accordance with its articles of association. As indicated previously, however, the liquidation of an insolvent company is required to be controlled by the Supreme Court. Therefore, even where a company is placed into liquidation voluntarily, the voluntary liquidator is required to apply to the court for a supervision order if there is no declaration of solvency by the directors within the prescribed time.

Involuntary/Compulsory Liquidation
Involuntary liquidation proceedings are generally brought by a creditor or contributory on the basis that the company is insolvent or that it is just and equitable for the company to be wound up. However, a regulator of the company may also bring proceedings on the grounds that the company's regulatory licence has been suspended or revoked, or for any other reason provided under the applicable laws.

As an alternative to liquidation commenced by a creditor, contributory or regulator, it is possible for the directors or shareholders of a company to place the company into voluntary liquidation, and to appoint a voluntary liquidator with a view towards the voluntary liquidator applying to the court for an order that the company be wound up under the supervision of the court. Once granted, the supervision order will be effective as an order that the company be wound up by the court, and the prior actions of the voluntary liquidator will be valid and binding on the company and its official liquidator. Although such proceedings may be regarded as involuntary because they are controlled by the court, they are invoked at the instance of the company and are "voluntary" to that extent.

Provisional Liquidation

After the filing of the winding-up petition, but before the court makes a final determination, it can appoint a provisional liquidator in respect of the company as a form of interim relief until the hearing of the petition.

An application for the appointment of a provisional liquidator may be made by its regulator, a creditor or contributory of the company on the following grounds.

- That there is a prima facie case for the making of a winding-up order.
- That the appointment of a provisional liquidator is necessary:
  - (a) to safeguard against the dissipation or misuse of the company's assets;
  - (b) to prevent the oppression of minority shareholders;
  - (c) to safeguard against the mismanagement or misconduct on the part of the company's directors; or
  - (d) in the public's interest.

An application for the appointment of a provisional liquidator may be made by the company itself, ex parte, on the grounds that the company is unable (or is likely to be unable) to pay its debts and intends to present a compromise or arrangement to its creditors.

Powers of Liquidators

The official liquidator is an officer of the court and enjoys broad powers, which are exercisable with or without the sanction of the court. Powers exercisable with court sanction include:

- the power to bring or defend legal proceedings in the name and on behalf of the company;
- the power to pay any class of creditors in full;
- the power to make any compromise or arrangement with creditors; and
- the power to disclaim onerous property.

A voluntary liquidator has the same powers enjoyed by the official liquidator and may exercise such powers without the sanction of the court, although there are certain exceptions. A provisional liquidator may exercise the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out any specific functions for which they were appointed, including facilitating a restructuring.

Automatic Stay, Set-off, Disclaimer, etc

When a company is placed in voluntary liquidation, there is no automatic stay of proceedings against the company, as is the case when a winding-up order or supervision order is made, or when a provisional liquidator is appointed.

In all liquidations, contractual rights of set-off between the debtor company and any creditor

shall be enforced. Further, even if contractual set-off is not available, set-off shall nevertheless be applied after an account is taken of what is due from each party to the other in respect of their mutual dealings, and any balance shall be provable in the company's liquidation or paid to the liquidator accordingly. Nonetheless, sums due from the debtor company shall not be included in such account if the creditor had notice at the time they became due that a winding-up petition against the company was pending.

With the leave of the court, a liquidator of the company may disclaim any onerous property of the company even though they have taken possession of it, tried to sell or assign it or otherwise exercised the rights of ownership in relation to it. For these purposes, "onerous property" means an unprofitable contract or assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or to perform an onerous act. A disclaimer of onerous property operates to determine the rights, interests and liabilities of the company in or in respect of the property disclaimed, but except so far as necessary to release the company from liability, does not affect the rights and liabilities of any third party. Further, any person who suffered loss or damage as a result of a disclaimer may prove in the liquidation in respect of such loss and damage.

Proofs of debt are adjudicated by the liquidator, and where the debt is subject to a contingency, the liquidator shall estimate the value of the debt and inform the creditor accordingly. If a creditor is dissatisfied with the decision of the liquidator in respect of a proof or claim, they may lodge an appeal to the court within 21 days for the decision to be reversed or varied.

In a voluntary solvent liquidation, the surplus assets of the company (if any) will be distributed in accordance with the company's articles of association. In an official liquidation, the official liquidator may pay dividends and distributions in cash or in specie.

Reports to Creditors, and Conclusion

The liquidator shall prepare reports and accounts with respect to their conduct of the liquidation and the state of the company's affairs. Where the company is being wound up by or subject to the supervision of the court, the liquidator's reports are periodically filed with the court and are a matter of public record.

When the affairs of the company are fully wound up, the liquidator shall prepare their final report and accounts, which should be filed with the Companies Registrar and provided to the company's members or creditors, as the case may be. In a voluntary solvent liquidation, a certificate of dissolution of the company may be obtained from the Companies Registrar after the filing of the requisite documents. In liquidations by or subject to the supervision of the court, the official liquidator will apply for their release and for an order that the company be dissolved.

7.2 Distressed Disposals

In a liquidation proceeding, it is the responsibility of the official liquidator to negotiate and execute the sale of the company's assets or business, and they may exercise their power to sell such assets to any person, subject to the sanction of the court. In such a sale, a purchaser would acquire good title that is free and clear of claims and liabilities asserted against the company, and which are not secured by the assets sold.

It is possible for an official liquidator to obtain the sanction of the court to execute a sale transac-

tion that was negotiated prior to the commencement of liquidation.

7.3 Organisation of Creditors or Committees

A liquidation committee comprising not less than three and no more than five creditors may be elected at the first meeting of creditors, which is required to be convened within 90 days of the making of the winding-up or supervision order.

A creditor is eligible to be a member of the liquidation committee if its debt is not fully secured and it has lodged a proof of debt which has not been rejected or disallowed for voting purposes. The committee may appoint legal counsel, and its legal fees and expenses which are reasonably and properly incurred shall be paid out of the estate of the company as a liquidation expense.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection With Overseas Proceedings

The Supreme Court of The Bahamas has statutory power to grant recognition and assistance in relation to overseas insolvency proceedings.

Section 254 of the Companies Act provides that the court may make ancillary orders in connection with liquidation or insolvency proceedings outside the jurisdiction of The Bahamas. Such ancillary orders may include:

- orders directing that property in The Bahamas belonging to a foreign debtor may be turned over to the debtor's foreign representative; and
- orders requiring a person in possession of information relating to the debtor's business or affairs to be examined, or to produce documents to the debtor's foreign representative.

In order to fall within the contemplation of the provision, certain important criteria must be met. The applicant must be a foreign representative as defined by the Companies Act – ie, a trustee, liquidator or other official appointed in respect of a foreign corporation or other foreign legal entity. The debtor must be subject to a foreign proceeding in the country in which it is incorporated or established.

The foreign proceeding must be a judicial or administrative proceeding relating to liquidation or insolvency in which the property and affairs of the debtor are subject to the control or supervision of the foreign court for the purpose of the reorganisation, rehabilitation, liquidation or bankruptcy of the debtor. Furthermore, the foreign proceeding must be in a "relevant foreign country" designated under the Foreign Proceedings (International Co-operation) (Relevant Foreign Countries) Liquidation Rules, 2016.

8.2 Co-ordination in Cross-Border Cases

The Companies Act does not expressly enable the court to enter into protocols or other arrangements with foreign courts to co-ordinate proceedings; however, there is power to do so at common law, and the courts of The Bahamas have exercised such power in appropriate cases.

8.3 Rules, Standards and Guidelines

In exercising its discretion to grant or refuse an ancillary order, the court will be guided by considerations, which would facilitate the economic and expeditious administration of the debtor's

estate in a manner consistent with, among other things:

- the public policy of The Bahamas;
- the just treatment of all holders of claims against or interests in a debtor's estate;
- the protection of claim holders in The Bahamas against prejudice and inconvenience in the processing of claims in the foreign proceedings;
- the distribution of the debtor's estate among creditors substantially in accordance with Bahamian law;
- the recognition and enforcement of security interests created by the debtor;
- the non-enforcement of foreign taxes, fines and penalties; and
- comity.

8.4 Foreign Creditors

The Bahamas is generally regarded as a creditor-friendly jurisdiction, as its insolvency laws adopt a universalist approach and creditors are treated the same regardless of their originating jurisdiction.

8.5 Recognition and Enforcement of Foreign Judgments

In The Bahamas, there are two mechanisms by which a foreign judgment may be enforced.

First, foreign judgments may be recognised and enforced under the Reciprocal Enforcement of Judgments Act 1924. This Act permits the recognition of judgments obtained in the following jurisdictions: Australia, Barbados, Belize, Bermuda, Guyana, Belize, Jamaica, the Leeward Islands, St Lucia, Trinidad and Tobago and the United Kingdom.

An application for recognition must be brought, in The Bahamas, within 12 months of the date of the foreign judgment. Then, the foreign judgment must be registered in The Bahamas before any enforcement step is taken.

Second, if a judgment is obtained from a jurisdiction not named above, it would be necessary to institute new proceedings in The Bahamas, with the foreign judgment being exhibited for persuasive effect. Once a judgment in the Bahamian courts has been successfully obtained and registered, the Bahamian judgment can be enforced (vis-à-vis the foreign judgment).

The Bahamas is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments.

There are no basic requirements for recognition, and the Bahamian courts will generally recognise a foreign judgment obtained in an applicable jurisdiction, unless there is a specific policy consideration as relates to the jurisdiction in which the judgment was obtained (in the case of judgments obtained from a jurisdiction not named above).

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

Receivers and liquidators may be appointed in insolvency proceedings in The Bahamas.

Statutory administrators and judicial managers may also be appointed in respect of a licensed bank and/or insurance company.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Receivers

Where a receiver is appointed over any property of a company, they shall, subject to the rights of any secured creditors:

- receive the income from the property;
- pay the liabilities connected with the property; and
- realise the security interest of those on behalf of whom they are appointed.

However, unless they are appointed as a receiver-manager or are otherwise permitted to do so by the court, a receiver is not permitted to carry on the business of the company. Notably, a receiver may apply to the court for directions relating to their duties. Such an application for directions could be useful where, in the course of carrying out their functions, a receiver is uncertain as to the validity of any procedural or other step which they are proposing to take. The receiver should apply only in exceptional circumstances and not use this power to delegate the receivership to the court.

Under the Companies Act, a receiver has a statutory duty to act honestly and in good faith, and to deal with any property of the company in their possession or control in a commercially feasible manner.

If a receiver is appointed for more than 12 months, they are required to provide monthly reports to the Registrar of Companies as well as to any debenture holders belonging to the same class as the debentures in respect of which they were appointed. Such reports must be in a form approved by the Registrar and must show:

- the receiver's receipts and payments during the period of 12 months or, if the receiver ceases to act, during the period to which the last preceding abstract related up to the date of their ceasing to act; and
- the aggregate amounts of the receiver's receipts and payments during the course of the receivership since appointment.

Liquidators

Generally, it is the duty of the liquidator to:

- ascertain, marshal and collect the assets of the company;
- determine the liabilities and identify the creditors; and
- distribute such assets to the creditors.

Further, in the event of any surplus, the liquidator is responsible for distributing the surplus assets to the entitled persons. However, the powers of a provisional liquidator will be subject to the terms of the order by which they are appointed.

Statutory Administrators

Under the Banks and Trust Companies Regulation Act, the Central Bank of The Bahamas may appoint a statutory administrator to manage the operations of a bank. The statutory administrator is vested with the powers, functions and responsibilities of the shareholders, directors and officers of the bank unless specified otherwise, and any action or decision taken must be done under the authority of the statutory administrator. The statutory administrator will also have full and exclusive powers to manage and operate the bank as necessary, in order to, inter alia:

- carry on the business of the bank;
- continue or discontinue any or all of its operations;
- stop or limit obligations;

- execute instruments in the name of the bank;
- safeguard the assets of the bank; and
- implement a plan of action with respect to the bank that has been approved by the Central Bank.

The statutory administrator is accountable to the Central Bank for the performance of its duties and the exercise of its powers as statutory administrator.

The Insurance Act also sets out a regime for the appointment of a statutory administrator by the Insurance Commission to manage the operations of insurance companies. The statutory administrator has the power to:

- continue or discontinue the company's operations;
- stop or limit the payment of the company's obligations;
- employ staff to participate in the operations or control of the company;
- execute any instrument in the company's name;
- initiate, defend and conduct in the company's name any action or proceeding to which the company is or might be a party; and
- take such steps as may be necessary to protect the assets of the company.

Further, where the statutory administrator considers it feasible to restore the company to financial soundness, it shall develop a plan of re-organisation for the company.

Judicial Managers

Where the Insurance Commission deems it necessary or proper to do so, it may present a petition to the court that the company, or any part of it, be placed under judicial management.

The management of the company (or of such part of the business of the company as the order of the court directs) shall vest in the judicial manager appointed by the court; and they shall not issue new policies or renew any existing policies without the leave of the court.

The judicial manager is obliged to manage the company with the greatest economy compatible. They must file with the court and share with the Insurance Commission a report stating which of the following courses is, in the circumstances and in their opinion, most advantageous to the general interest of the policyholders of the company, and seek an order accordingly:

- the transfer of all or any part of the insurance business of the company to some other company in pursuance of a scheme prepared by the judicial manager and annexed to the report;
- the carrying on of its business by the company, either unconditionally or subject to such conditions as the judicial manager may suggest;
- the winding-up of the company; or
- such other course as they consider advisable.

9.3 Selection of Officers

Receivers

A receiver may be appointed and removed in respect of a debtor company by the security holder, pursuant to the terms of its security document. Additionally, the court has power to appoint and remove a receiver in any case where it appears to the court as just and convenient to do so.

The appointment of a receiver displaces the power of the directors to exercise control of the assets that are subject to the receivership. However, residual powers relating to matters not

affected by the receivership (that is, powers outside the scope of the authority of the receiver) remain vested in the directors.

A receiver is not required to have any particular qualifications. However, a person may not be appointed as a receiver if such person is:

- a body corporate;
- undischarged bankrupt; or
- disqualified from acting as a trustee under a trust deed executed by the company.

Voluntary Liquidators

Subject to the provisions of the constitutional documents of the company, a voluntary liquidator may be appointed by the shareholders and/or directors of the company, depending on the type of company. No particular qualifications are required, and any person, including a director or officer of the company, may be appointed as voluntary liquidator. Once a voluntary liquidator is appointed, the powers of the directors cease, save to the extent that the company in a general meeting or the voluntary liquidator sanctions their continuance.

A voluntary liquidator may be removed from office by an ordinary resolution passed at a meeting of the company, convened for that purpose by any member or members holding not less than one fifth of the company's issued share capital or entitled to not less than one fifth of the votes if the company does not have a share capital. Whether or not such a meeting has been convened, any contributory may apply to the court for an order that a voluntary liquidator be removed from office on the grounds that they are not a fit and proper person to hold office.

Provisional and Official Liquidators

Provisional and official liquidators are appointed by the court, and the court may appoint such person as it sees fit. In making the appointment, the court has unfettered discretion, but shall have regard to the wishes of the majority of the creditors, whose votes will be counted by reference to the value of their debts. The court may remove a provisional or official liquidator from office on the application of a creditor or contributory of the company, or the relevant regulator where the company carried on a regulated business.

In order to be appointed by the court as provisional or official liquidator, an individual must have the professional qualifications set forth in the Insolvency Practitioners' Rules, and must meet the independence, residency and insurance requirements. Individuals appointed to act as provisional or official liquidator are typically accountants, but attorneys and other professionals who meet the qualifications can also be appointed.

Upon the appointment of a provisional or official liquidator, the directors and other officers of the company remain in office, but they cease to have any duties, functions or powers other than those required or expressly permitted under the Companies Act, 1992.

Statutory Administrators

As relates to *banks*, governed by the Banks and Trust Companies Regulation Act, the Central Bank may, by notice in writing, appoint a statutory administrator and is obliged to notify the Minister (responsible for finance) and the bank itself of the appointment, specifying in the notice the grounds for the appointment.

The statutory administrator may be from the private sector (often, an accountant) or be an official of the Central Bank.

The Central Bank may simultaneously publish notice of the appointment of a statutory administrator in the Gazette and in a newspaper of general circulation.

The appointment is for a period of 12 months but not exceeding 24 months in total. The Central Bank is empowered to vary the terms of appointment of a statutory administrator, and to remove and replace a statutory administrator.

The statutory administrator is governed in the exercise of its functions by:

- the Banks and Trust Companies Regulation Act and any regulations made thereunder; and
- any directions issued by the Central Bank.

They shall only be accountable to the Central Bank for the performance of their duties and the exercise of their powers as statutory administrator.

As relates to *insurance companies*, notice of the appointment of a statutory administrator by the Insurance Commission shall be published in the Gazette or in any other manner as may be prescribed by the Insurance Commission.

The Insurance Commission has the power to revoke any appointment of statutory administrator at any time upon written notice to the person so appointed, and that person forthwith shall cease to act as statutory administrator. The Insurance Commission may elect to carry out such functions on their own behalf or appoint a successor to act as statutory administrator.

Judicial Managers

Pursuant to the filing of a petition by the Insurance Commission and the hearing of the petition by the court, judicial managers are appointed and removed by the court and receive such remuneration as the court directs. Any charges and expenses of the judicial manager are borne and charged against the property of the company in such order of priority and in relation to any existing charge on that property as the court thinks fit.

The judicial manager shall act under the control of the court, and may apply to the court at any time for instructions as to the manner in which they shall conduct the judicial management or in relation to any matter arising in the course of the judicial management.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

Company directors owe statutory and fiduciary duties to act honestly and in good faith with a view towards the best interests of the company, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

In this context, where a company is financially stable and therefore able to pay its debts in a timely manner, the interests of its shareholders as a whole, understood as a continuing body, can be treated as the company's interests. However, where a company is insolvent or bordering on insolvency, or where it is probable that the company will enter into an insolvent liquidation, the directors' fiduciary duty to the company to act in its interests shifts to include

a duty to act in the interests of creditors as a whole. Where this occurs, the directors must give appropriate weight to the interests of the company's creditors and balance them against shareholders' interests in the event they might conflict.

A director's breach of duty may result in personal liability, whereby, on the application of the liquidator, the director is required to contribute to the assets of the insolvent company.

Additionally, a director may be liable for wrongful trading and may be ordered to make a contribution to the assets of the company if a company of which they are director is placed into insolvent liquidation, and:

- they knew or ought to have concluded that there was no reasonable prospect that the company could avoid going into insolvent liquidation; and
- they thereafter failed to take every reasonable step open to them to minimise the loss to the company's creditors.

For these purposes, the facts which the director ought to know or ascertain, the conclusions which they ought to draw and the reasonable steps they ought to take are those which would be known, ascertained, drawn or taken by a reasonably diligent person with both:

- the general knowledge, skill and experience that may be reasonably expected of a person carrying out the same functions carried out by that director in relation to the company; and
- the general knowledge, skill and experience of the director concerned.

Accordingly, a director will be judged by the standards of what can reasonably be expected of a person fulfilling their functions, and showing reasonable diligence in doing so, having regard to the functions carried out by that director in relation to the particular company and its business.

10.2 Direct Fiduciary Breach Claims

In the insolvency context, the liquidator is the person competent to assert direct breach of duty claims against the directors.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

There are two types of transactions avoidance provisions which may arise in The Bahamas: preferences and fraudulent dispositions.

Voidable Preference

A preference is defined under the Companies Act as every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts with a view towards giving such creditor a preference over the other creditors.

Fraudulent Disposition

A fraudulent disposition is any disposition of property made at an undervalue, by or on behalf of a company with intent to defraud its creditors; and is voidable at the instance of such company's official liquidator. For these purposes, "undervalue" in relation to a disposition of a company's property, means:

- the provision of no consideration for the disposition; or

- a consideration for the disposition, the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

11.2 Look-Back Period

The look-back period for voidable preference claims is six months immediately preceding the commencement of liquidation. There is no look-back period for fraudulent dispositions, but claims must be brought within two years after the date of the disposition.

11.3 Claims to Set Aside or Annul Transactions

The right to bring an avoidance claim is one conferred on the liquidator in relation to their conducting of the liquidation, and may not be assigned to a third party. However, it is possible for the liquidator to obtain funding from the creditors (or other third party) to pursue such claims.

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