

The Bahamas

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The Commonwealth of The Bahamas comprises over 700 islands and cays, extending for more than 500 miles from southeast Florida to the north of the island of Hispaniola. The Bahamas, a former British colony that attained independence on July 10 1973, is a member of the Commonwealth of Nations.

The Bahamian judicial system, with relevance also to commercial matters, is grounded in English common law. However, a significant body of statutory instruments exists that has a bearing on commerce generally and insolvency matters. The Supreme Court of The Bahamas, whose jurisdiction includes civil and criminal matters, is the court of first instance for matters involving insolvency or bankruptcy. Decisions of the Supreme Court of The Bahamas are subject to appeal to the Court of Appeals and ultimately to the Judicial Committee of the Privy Council, which held hearings in The Bahamas in December 2007, having also done so in 2006 – the first time it sat outside the United Kingdom.

Most insolvency or troubled debt matters trigger liquidation or receivership proceedings, mainly on the application of, or appointment by, creditors. However, depending on the circumstances, a company can commence liquidation proceedings, as can certain regulators such as the Central Bank of The Bahamas. The Companies Act 1992 and the International Business Companies Act 2000 address the relevant procedures relating to liquidations and receiverships, with the Winding-Up Rules supplementing the liquidation provisions. The powers of regulators to apply for proceedings against entities subject to their regulation are generally contained in the statutes governing such entities (eg, the Banks and Trust Companies Regulations Act for banks and trust companies, and the Investment Funds Act 2003 for investment funds).

I. The legal framework and the effectiveness of court processes/legal remedies

1.1 Describe the nature and effectiveness of the following:

(a) Debt recovery remedies where the creditor has no security

A creditor with no security can institute proceedings in the Supreme Court of The Bahamas and, if the debtor is resident and has assets in The Bahamas, such judgment will be effective.

If the debtor is resident in The Bahamas but has no assets in The Bahamas, proceedings can be brought and any judgment obtained, subject to the laws of the country in which the debtor has assets, can be enforced against those assets in such foreign country.

If the debtor is resident abroad and has assets in The Bahamas, proceedings cannot be brought against the debtor in The Bahamas, whether by way of an original suit or by enforcement of a judgment obtained against the debtor in the country in which it is resident.

A creditor can serve on a debtor resident in The Bahamas a formal statutory demand for payment of a liquidated debt and, if the demand is not satisfied or compromised within the time specified, can then petition the court to have the debtor made bankrupt. The court will refuse to consider the petition if the debt is genuinely disputed. The same principles apply, *mutatis mutandis* where a creditor's claim is against a Bahamian company or against a Bahamian international business corporation (IBC). Claims against such entities entitle a creditor to petition the court for compulsory winding-up of the company by the court.

(b) The enforcement of security

By the Declaratory Act 1799, English common law was applied in The Bahamas and still applies in The Bahamas, save where modified by statute passed by the Bahamian Parliament.

Many English statutes have been re-enacted in The Bahamas, but the English Bills of Sales Acts were not re-enacted and the restrictions therein are therefore not applicable.

The methods of enforcing security in The Bahamas are normally spelled out in the contract creating the security and governed by common law. To constitute an effective security, Bahamian freehold or leasehold property must be by way of a mortgage which conveys the legal estate therein to the lender and which should also be recorded under the Registry of Records Act to preserve priority capable of constituting legal security. In such mortgages, the borrower/mortgagor has the right to redeem the mortgage (called the 'equity of redemption'). It is also possible to create an equitable mortgage by a deposit of the title deeds with the lender/mortgagee, in which case a memorandum is executed by the parties to evidence the transaction.

Virtually all kinds of other goods can be mortgaged by a simple document which assigns the ownership of the goods to the mortgagee subject to the mortgagor's equity of redemption. Where goods are capable of being transferred by physical delivery, they can be the subject of a pledge or charge as security by delivery. Book debts are capable of constituting legal security – even future book debts. A contractual right can also be mortgaged. Trademarks, copyrights and other IP rights can be mortgaged under the Trademarks Act and the Copyright Act. Shares in a Bahamian company can be made the subject of security for a loan, subject to any restrictions in the company's

articles of association. Insurance policies can be mortgaged to a bank or other lender, but they are not pledgeable, as mere possession of the policy does not confer rights to recover the proceeds of the policy – although such possession may constitute an equitable charge. Under the Merchant Shipping Act of The Bahamas, ships can be mortgaged. The mortgage must be registered in the Registry of Ships. However, the position of aircraft as security in The Bahamas is dubious and specialised advice should be taken if it is contemplated. The common law principles as established in leading English cases are followed in The Bahamas in respect of floating charges over present and future property and such charges are accordingly valid.

Insofar as the enforcement of security can be accomplished by the taking of possession, the following should be noted:

- Land and building – the mortgagee is liable to burdensome restrictions if it physically takes possession before foreclosing the mortgage or otherwise obtaining a court judgment against the mortgagor; in an equitable mortgage it should always take possession of the title deeds.
- Goods – in a Bahamian chattel mortgage, the mortgagee does not have to take possession.
- Insurance policies – if the proceeds of the policy are mortgaged, possession of the original policy should be taken.
- Ships – possession should be taken only if the mortgagee defaults, in which case the ship can be arrested.
- Floating charges – physical possession of assets should be taken if practicable after the charge takes definite form and a receiver is appointed.

(c) Corporate bankruptcy/liquidation processes

The process to liquidate a Bahamian company, whether an IBC or a company formed under the Companies Act, is the same. The creditors must petition the court for a compulsory winding-up or apply at the hearing of a petition for a voluntary winding-up for it to be continued under the court's supervision. There is no material difference in either process, but a winding-up under the court's supervision is generally initiated only by the company itself following a voluntary winding-up of the company by resolution.

(d) Formal corporate rescue processes

The Bahamas does not have proceedings similar to Chapter 11 rescue processes.

(e) Informal corporate rescue possesses

The court has the power to approve any scheme for the termination of a company's liquidation by permanently staying all further proceedings in the winding-up. Such court approval does not necessarily require the unanimous support of all creditors.

In the case of IBCs, the winding-up provisions of the Companies Act were applicable to IBCs, but in 2000 a new IBC Act was passed which enacted a separate winding-up code for IBCs but identical to that applicable to companies incorporated under the Companies Act. Section 192(1) of the IBC Act 2000 allows a party to apply to the court to rule on any question of the act's interpretation. If any qualms exist regarding the jurisdiction of the court to approve a rescue scheme for an IBC and permanently stay the liquidation, this section of the act can be invoked. It is impossible in all the circumstances to visualise the rejection by the court of such a scheme.

1.2 What are the formal processes to effect a liquidation of the company's assets?

See section 1.1 (c) above.

1.3 What is the effect on debt collection and the enforcement of security of:

(a) An adjudication of corporate bankruptcy/liquidation?

A secured creditor is entitled to ignore – even from the time of the commencement of proceedings – the liquidation and realise its security. It is also entitled to prove in the liquidation for any difference between the amount recovered on realisation and the total amount of its claim. Otherwise, only the official liquidator or the trustee in bankruptcy, as the case may be, is entitled to take any steps to collect debts.

(b) The commencement of a formal corporate rescue process?

Since a formal rescue process entails an application to the court, the approval of the court is necessary in order to curtail the liquidator's actions in the collection of debts. See section 1.1(d) above.

(c) The initiation of an informal corporate rescue process?

The initiation of an informal corporate rescue process clearly would not *ipso facto* restrain the liquidator in its collection of debts. However, if such proceedings are being conducted by the court and the claims of all parties having an interest in the liquidation are satisfied, the court would stay the liquidation proceedings, including the liquidator's power to collect debts.

1.4 Are insolvency procedures started in another jurisdiction in respect of a corporation incorporated in your jurisdiction recognised? In particular, what would be the impact of US bankruptcy proceedings being commenced?

In The Bahamas chapter of the previous edition of *The Americas Restructuring and Insolvency Guide*, the authors referred to a decision of a Florida court whereby a Chapter 11 petition was dismissed and the court, based on the principle of comity, deferred to the Bahamian court as being the appropriate court to deal with the insolvency of the company in question.

There are no decisions of the Bahamian court whereby a Chapter 11 proceeding was recognised by the Bahamian court in respect of a corporation incorporated in The Bahamas. It is the view of the current authors that if the Bahamian court were satisfied that the US court had jurisdiction to entertain an application for a Chapter 11 rescue process of a Bahamian company in accordance with the Bahamian conflict-of-law rules, and the right of Bahamian creditors and others having an interest in the company were adequately protected, the Bahamian court would recognise a Chapter 11 proceeding brought in respect of a Bahamian corporation.

1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential personal liability for continuing to trade? In practice, are any such provisions actually enforced?

Sections 106 to 110 of the Companies Act 1992 specify the potential liability of directors in certain circumstances, such as:

- the granting of loans to directors, officers and others when there are reasonable grounds to believe that, after giving such financial assistance, the company would be unable to

- pay its debts; or
- the making of commission or dividend payments by the company in similar circumstances.

Allowing a company to continue to trade when it is in financial difficulties is a much more passive matter and it would be difficult to attach liability to directors for this without proving positively that the directors had so acted fraudulently or had not acted honestly.

Bahamian legislation does not specifically address whether a company director is liable if he allows a company to continue to trade, but Section 56 of the IBC Act 2000 provides: "Every director, officer, agent, and liquidator of a company in performing his functions shall act honestly and in good faith with a view to the best interest of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

Accordingly, it appears that there is no presumption of liability *ipso facto* arising out of an IBC continuing to trade while in financial difficulties. Officers are liable only for misfeasance, fraud and wilful or intentional negligence.

2. What are the advantages and disadvantages of triggering a formal procedure?

Court proceedings are obviously expensive. Negotiations, whether open or without prejudice, save costs, if successful.

3. What are the practical options for out-of-court restructuring?

Once a Bahamian company or IBC is in liquidation by the court it cannot be restructured in the absence of the procedure described in section 1.1(e) above.

4. What is the effect on the management of a company of:

4.1 An adjudication of corporate bankruptcy/liquidation?

Corporate bankruptcy does not exist in The Bahamas. Once a Bahamian company or an IBC is ordered to be wound up by the court, the powers of the directors to manage the company cease and are taken over by the official liquidator.

4.2 The commencement of a formal corporate rescue process?

The management of the company – whether by the liquidator or, in certain circumstances, by a receiver and manager appointed by the court – cannot be affected in any way in the absence of a court order. See section 1.1(d) above.

4.3 The initiation of an informal corporate rescue process?

The initiation of an informal corporate rescue has no effect whatsoever on the management of a company.

5. Parties in interest/key players

5.1 Who is responsible for the 'case management' control and administration of a corporate bankruptcy/liquidation, a formal rescue or an informal rescue?

Once winding-up proceedings of a Bahamian company, including an IBC, have commenced, the file is assigned to a judge of the Supreme Court who, save for certain administrative matters that can be dealt with by the registrar of the Supreme Court, is responsible for 'case management' control and administration of the liquidation of the company.

5.2 Who is responsible for preparing the restructuring plan in a formal or an informal rescue?

Should the restructuring plan be initiated in the course of the winding-up of a company, the liquidator is responsible for preparing the plan.

5.3 Who are the key players? What are their roles and responsibilities?

If a company or an IBC is insolvent, the key players are the creditors. In certain circumstances in an insolvency, a creditors' committee may be appointed to advise or make recommendations to the liquidator. The court is the final decision maker in all cases of corporate insolvency.

6. What financial information is available to creditors?

The official liquidator, if ordered by the court, is

obliged to make reports to the court and to the creditors in the case of a corporate insolvency at such intervals as the court may direct. Unless special circumstances dictate, information is largely confined to:

- the assets and liabilities of the company;
- assets collected by the liquidator;
- the potential recovery in the liquidation; and
- the steps that the liquidator intends to take to recover assets and satisfy claims.

7. Common questions

7.1 Funding and the priority given to new money

Funds advanced to a company or an IBC to assist in financial difficulties do not give the lender priority status, unless the lender is given security for such debt or unless the court in the liquidation permits the creditor to advance monies to assist the liquidator in recovering assets. In these cases, repayment of the advance made is given priority.

7.2 Ranking of creditors

In what order are creditors paid in a corporate bankruptcy/liquidation?

Under Section 267 of the Companies Act and Section 155 of the IBC Act, preferential payments that rank in priority to all other debts are:

- one year's arrears of rates or taxes;
- wages of clerks or servants payable for services rendered during the four months before the 'relevant date' (the date of the winding-up order in the case of a compulsory liquidation and in all other cases the date of commencement of the winding-up);
- wages of workmen or labourers for a similar period of two months; and
- in a winding-up by the court, amounts due to workmen in respect of personal injury accrued before the date of the winding-up order.

Save for the persons that can claim to be entitled to preferential payments, all other unsecured creditors rank *pari passu*.

7.3 Avoidance of antecedent transactions

Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?

Section 262 of the Companies Act and Section 161 of the IBC Act provide that: "Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, as would if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such traders, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and is invalid accordingly."

An undue or fraudulent preference by Section 72 of the Bankruptcy Act is defined as follows: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying or suffering the same becomes bankrupt, within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration."

7.4 'Cram-downs'

What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or an informal rescue plan?

Secured creditors can ignore the entire winding-up proceedings if they wish.

Unsecured creditors that vote against a plan, if they are not in the majority, can be overruled by the court.

7.5 Creditor protection

What actions can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?

Dissatisfied creditors can apply to the court for such relief as the circumstances of the matter may require.

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