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**COMPARATIVE REVIEW
OF APPROACHES TO
"RESCUE" OR "DEBTOR-
IN-POSSESSION" (DIP)
FINANCE IN
RESTRUCTURING AND
INSOLVENCY REGIMES**



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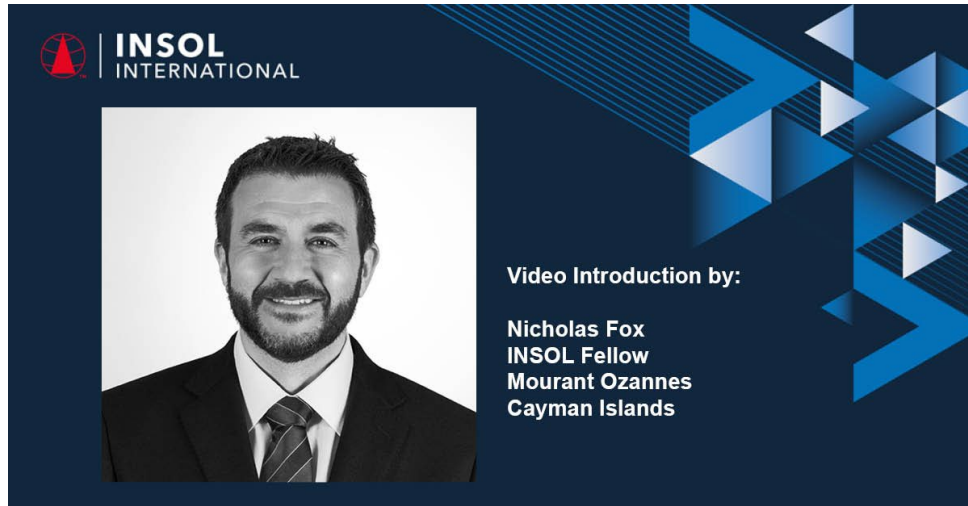
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CAYMAN ISLANDS



1. Is there an established market for rescue finance?

There is no specific "DIP finance" legislative framework in the Cayman Islands. However, forms of rescue finance are available under to entities in distress, including through schemes of arrangement and formal insolvency proceedings.

There is also not an established local market for rescue finance in the Cayman Islands. Any financing is typically of a cross-border nature, provided by onshore financial institutions.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

While there is not necessarily an established local market specializing in rescue financing, a Cayman Islands debtor can source such funding from a wide variety of financial institutions in the global finance markets (as described further at question 3 below).

3. If yes, what are the main sources of funds for rescue finance?

Commonly, rescue financing is provided by one or more bank working capital facilities but depending on the exact funding needs, financing can also be obtained from other sources. Those sources include credit funds, insurance companies, distressed debt or special situations funds, or through capital markets issuances, as well as from existing lenders, shareholders, or affiliated companies. If the company is backed by a private equity sponsor, that sponsor may also decide, for strategic reasons, to inject new equity in order to support a restructuring of the company's debt.

4. Is rescue finance codified or subject to specific legislation?

As noted above, rescue finance is not codified in the Cayman Islands.

The principal route into a restructuring in the Cayman Islands is by filing a winding-up petition and then appointing provisional liquidators to 'hold the ring', allow the company to benefit from the moratorium on legal claims against it and enable a restructuring to take place. Such provisional liquidators can either be 'light touch', performing a supervisory and assistance function whilst the company's directors remain responsible for its day-to-day business; or displace the functions of the

company's Board. Provisional liquidator appointments of this nature are frequently utilized in a cross-border group restructuring situation, including court-approved restructurings (e.g. US Chapter 11) to enable the Cayman entities to be protected whilst these restructurings take place.

There is provision in the Companies Act for companies to petition for their own winding-up and the appointment of provisional liquidators over them, to facilitate a restructuring.

Please note that, later in 2021, it is anticipated that substantive amendments to our Companies Act will be brought into force, which will usher in a new regime in which a Restructuring Officer will be able to be appointed over Cayman companies, without the need for a separate winding-up petition. There will also be clarification around the circumstances in which a Restructuring Officer's appointment can be terminated, following a successful restructuring. This is intended to further facilitate and clarify Cayman's already successful restructuring regime.

The primary mechanism for restructuring a company's liabilities is a scheme of arrangement between the company and its creditors or members, or classes of creditors or members, pursuant to section 86 of the Companies Act. A scheme can be pursued outside of any insolvency process, although it is often combined with the presentation of a winding up petition and the appointment of provisional liquidators pursuant to Part V of the Companies Act in order to obtain the benefit of an automatic stay of actions against the company while the scheme takes place.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

There are generally no regulatory restrictions on cross-border foreign investment imposed by Cayman Islands law. In particular, the Cayman Islands has no foreign currency exchange controls and foreign financial instructions are not required to be regulated in the Cayman Islands unless established in or carrying on business in the Cayman Islands.

6. Is court approval required for rescue finance or any security granted to the lender? If so, what considerations does the court take into account in approving or rejecting a proposal for rescue finance?

Court approval is not required for rescue finance, in and of itself.

However, where borrowing is taken on during a provisional liquidation, then as a matter of course provisional liquidators will often seek court sanction approving taking on such debt, especially if it relates to anticipated litigation and the sharing of the proceeds of such. Court approval is also required for the appointment of provisional liquidators themselves.

Similarly, court approval is required for a scheme of arrangement, which is the mechanism within which rescue finance is often injected. For a scheme to be approved by the court, the terms of the scheme must first be approved by more than 50% by number and 75% by value of those attending and voting in each class. The court will also need to be satisfied that sufficient notice was given to each class member, that the majority fairly represent the class, and whether the arrangement

seeking to compromise the rights of each class member is clear and documented properly so that each class member can make an informed decision. Once approved by vote and sanctioned by the court the scheme will bind all scheme participants including any dissentient minority.

Any company that is liable to be wound up can be put into provisional liquidation following the presentation of a winding up petition. A creditor, shareholder, or the company itself can apply for the appointment of provisional liquidators between the presentation and the hearing of the winding up petition. If a scheme of arrangement is put forward within a provisional liquidation then the extent of the court supervision will depend on the terms of the order appointing the provisional liquidators. In some situations the directors will remain in control and the provisional liquidators will merely have a supervisory 'light-touch' role, or in other situations, the provisional liquidators will temporarily displace the directors entirely for the duration of the scheme. In either case, the provisional liquidators will be subject to the court's supervision and the court's involvement in the scheme process will be the same as if the company was not in provisional liquidation. If the scheme is sanctioned by the court, then the winding up petition would typically be dismissed and the provisional liquidators would be discharged of their duties and the restructured company would regain full control of its management and affairs.

7. Is creditor or secured creditor approval required for rescue finance?

The exact position will be determined by the existing capital structure of the company, and in particular the contractual terms of any pre-petition banking facilities. There is no statutory provision which requires secured creditor consent in order to implement a rescue financing package.

However, note that Cayman insolvency law does not impose an automatic stay binding on secured creditors which would prevent such creditor from enforcing its security. For this reason, in the majority of cases a rescue financing proposal will likely require the support of any existing secured creditors in order to prevent a situation where such lender's security was enforced over the company's assets.

As noted above, in many cases it will be the debtor's senior secured banks that will actually be providing the emergency financing.

8. What role does a creditors' committee play in approving rescue finance (if any)?

In almost all compulsory liquidations there will be a liquidation committee comprising of a number of stakeholders of the company. If the company is insolvent, these stakeholders will be creditors. The liquidation committee's role is to act as a sounding-board, and liquidators may take rescue finance proposals to their liquidation committee for their views and approval, often as a preparatory step before a court sanction application.

In a different context, we also see creditors' committees on consensual restructurings whereby the finance parties agree to a standstill arrangement until rescue financing or a debt / equity restructuring can be agreed. These are contractual arrangements formed with the mutual consent of all creditor parties and the debtor(s).

9. What priority of repayment is available to unsecured rescue financiers, if any?

In our experience, outside of liquidation or restructuring through a scheme of arrangement, it would be uncommon for rescue financing to be provided on an unsecured basis, unless it took the form of an equity injection from existing shareholders or its private equity sponsor. Such funding can be unattractive as it would not receive any special preference under Cayman law, and would rank behind claims of secured and unsecured creditors.

When a company is in liquidation, any borrowing incurred by provisional liquidators will rank as a liquidation expense and therefore rank ahead of ordinary unsecured creditors.

When rescue finance is injected through a scheme of arrangement, the terms of that scheme will govern the company's continuing liabilities after the scheme has been approved.

10. Can rescue finance be provided on a secured basis?

Yes. Rescue finance can and would typically be provided on a secured basis, and often by the company's existing relationship bank or key syndicate banks. In that context, the rescue funding will commonly be secured by the existing security package (assuming the terms of that security are flexible enough to accommodate such further loan advances). Note that if the debtor company is in liquidation, the consent of the Cayman Islands courts would be required in order for the company to grant new security after the commencement of liquidation (which is deemed to be the date the winding up petition is filed).

11. Can rescue finance be provided on a super-priority secured basis?

Yes. Rescue financing would most commonly be provided on a super-priority secured basis, whereby the right of repayment for any new funding ranks ahead of pre-petition secured indebtedness. As the Cayman Islands has no statutory DIP financing regime, the super-priority ranking is typically provided for by contract, in an applicable intercreditor agreement.

12. Can priority or additional security be obtained for pre-petition financing?

Cayman law does not automatically extend priority or additional security for roll-up financing. This can, however, be achieved by contract (but note our comments at question 10 above regarding court consent for additional security granted post-petition).

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

Cayman law perfection requirements will depend on the nature of the collateral. The most common forms of Cayman law governed security are security over shares in the Cayman Islands company and security over contractual rights. In the case of security over shares, strictly speaking no steps are required to perfect such security, but it is customary to obtain certain deliverables (including blank undated share transfers and irrevocable voting proxies) to facilitate

enforcement of the security. It is also customary to record details of the security in the relevant company's register of members.

In the case of security over contractual rights, notice must be given to the applicable counterparty in order to establish priority of the security as against any competing interests. Security interests over bank accounts domiciled in the Cayman Islands are perfected in substantially the same way, by delivery of notice to the account bank. Security taken over specific tangible collateral such as Cayman-registered vessels, aircraft and land is perfected by registration in the applicable register. However, unlike the United States and other jurisdictions, the Cayman Islands has no centralized, publicly searchable register covering security interests generally. Where any security interest is granted by a Cayman Islands company, details must be recorded in that company's register of mortgages and charges. This is an internal statutory record and a failure to update such register does not invalidate or render the security interest unperfected.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

Yes, while this will vary based on the terms of the transaction and the parties involved, it is common for a rescue finance provider to require monitoring of key milestones. These would typically cover matters such as asset disposals, prepayments or operational restructuring and cost-cutting measures.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

As stated above, rescue finance in the Cayman Islands is not codified or subject to specific legislation. However, a number of cases in the Cayman Islands have demonstrated the provisions of the Companies Act which might be used to implement rescue finance due to their flexible nature. See *Re Ocean Rig* [2017 (2) CILR 495] in which the Cayman Islands Grand Court sanctioned a scheme of arrangement in relation to a company incorporated in a foreign jurisdiction but which shifted its centre of main interests to the Cayman Islands before initiating the scheme process. *Schahin II Finance Company (SPV) Limited* is a 2018 case in which a scheme of arrangement was used to inject \$15m of DIP priority rescue finance.

16. How has the market for rescue finance been impacted by the COVID19 pandemic?

To date, strong central bank stimulus and other government measures have prevented large scale defaults and thus cushioned the impact of the pandemic across many sectors. Many corporate borrowers responded to initial pressures by drawing on existing credit facilities to maximize available cash. However, in other cases the pandemic has led to, or amplified, existing issues for companies in heavily affected industries (particularly retail, energy, aviation and hospitality) which have been required to restructure their balance sheets. This often requires rescue finance to support the business while it undergoes restructuring. The Cayman Islands continues to see a large amount of restructuring activity as it is a stable and creditor-friendly jurisdiction in which financial counterparties have ultimate recourse to the common law court system.