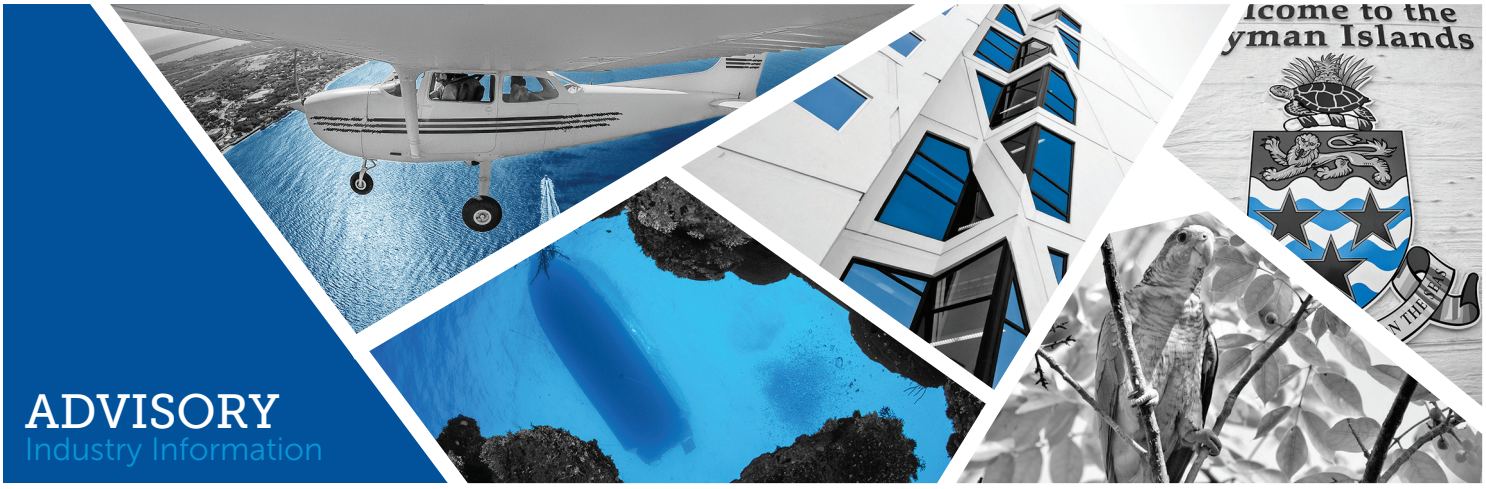

15 December 2022

Tales from the Oriente: the first appointment of restructuring officers in the Cayman Islands

Walkers acted as Cayman Islands counsel to Oriente Group Limited (the "Company") in respect of its successful petition for the appointment of Mr Kenneth Fung of FTI Consulting (Hong Kong) Limited, Mr Andrew Morrison and Mr David Griffin of FTI Consulting (Cayman) Ltd as joint restructuring officers (the "Joint Restructuring Officers") pursuant to Section 91B of the Cayman Islands Companies Act (as amended), being the first petition under the new restructuring officer regime, which came into force on 31 August 2022.

Background

The Company is the parent company of a group (the "Group") which operates a leading financial technology platform providing alternative sources of credit to traditional retail banks for the unbanked and underbanked population of Southeast Asia, with more than 8 million registered users. The Group's performance was significantly affected by the impact of the COVID-19 pandemic on the Southeast Asian economy and the platforms' users, which resulted in a substantial increase in non-performing (consumer) loans, as well as other factors impacting the global capital markets and investor community including, but not limited to, US-China tensions, the Russia-Ukraine war and interest rate increases by central banks.

Notwithstanding the Company engaging in discussions with its creditors regarding a proposed restructuring of its financial liabilities (as well as more broadly, the restructuring of certain Group liabilities due to third party lenders) from at least May 2022, on 20 September 2022, upon the expiry of the deadline for payment under two statutory demands dated 29 August 2022, two creditors (the "Objecting Creditors") presented a petition to the Grand Court of the Cayman Islands (the "Grand Court") (which was served on the Company on 27 September 2022) seeking, amongst other things, the winding up of the Company on the grounds that the Company is unable to pay its debts as defined in Section 93(a) of the Companies Act and is therefore insolvent (the "Winding Up Petition").

On 21 October 2022, the Company presented a petition to the Grand Court seeking the appointment of the Joint Restructuring Officers pursuant to Section 91B of the Companies Act on the grounds that the Company: (i) is unable to pay its debts as defined in Section 93(a) of the Companies Act and is therefore insolvent; and (ii) intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to Section 86 and/or 91I of the Companies Act, the law of a foreign country or by way of consensual restructuring (the "RO Petition").

Immediately before the hearing of the RO Petition, the Company was made aware that, notwithstanding the automatic stay on the commencement or continuation of proceedings upon the presentation of the RO Petition pursuant to Section 91G of the Companies Act (as discussed further below), on 10 November 2022, the Objecting Creditors presented a petition to the High Court of the Hong Kong Special Administrative Region (the "Hong Kong Court") seeking, amongst other things, the winding up of the Company (on substantially similar grounds advanced in the Winding Up Petition) (the "Hong Kong Winding Up Petition").

Hearing

At the hearing of the RO Petition on 11 November 2022, notwithstanding the opposition of the Objecting Creditors, the Honourable Justice Kawaley made an Order appointing the Joint Restructuring Officers in respect of the Company. On 8 December 2022, Kawaley J handed down a written judgment.

Jurisdiction to appoint restructuring officers

Walkers, on behalf of the Company, submitted that case law authorities in respect of restructuring or 'light touch' provisional liquidation proceedings are likely to be both relevant and persuasive in respect of the appointment of restructuring officers. Kawaley J accepted such proposition for two principal reasons:

1. the grounds upon which a restructuring officer petition may be presented under Section 91B of the Companies Act are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the (former) provisions of Section 104(3) of the Companies Act before the new restructuring officer regime came into force; and
2. the cases under the provisional liquidation regime *"… record valuable judicial and legal experience in essentially the same commercial sphere…"* (referring to a lecture delivered by Lady Arden: Taking stock of recent case law of the Judicial Committee of the Privy Council – its breadth and depth on 25 March 2022).

Kawaley J held that, in particular, In re Sun Cheong Holdings[1] was authority as regards the governing legal principles and *"… lucidly paints an instructive portrait of the old statutory scheme which applies with equal force to the restructuring officer regime…"*; and In re Midway Resources International[2] provides practical guidance as to how to evaluate the evidence relating to a proposed restructuring.

In summary, Kawaley J held that in construing the terms of Section 91B in light of previous cases dealing with the provisional liquidation for restructuring regime (now repealed), *"… it may confidently be stated that the jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction…"* to be exercised where the Grand Court is satisfied that:

1. the statutory precondition of insolvency (or likely to become insolvent) pursuant to Section 91B(1)(a) and Section 93 of the Companies Act is met, by reference to credible evidence from the relevant company or some other source;
2. the statutory precondition of an "intention" to present a restructuring proposal to creditors (or any class thereof) pursuant to Section 91B(1)(b) of the Companies Act is met, by reference to credible evidence of a *"rational proposal with reasonable prospects of success"*; and
3. *"… the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding up of the company …"*.

Effect of the statutory stay

Kawaley J held that the statutory stay on proceedings under Section 91G of the Companies Act (which applies from the date of the presentation of a petition for the appointment of restructuring officers, unless withdrawn or dismissed) operates to *"… turbo charge the degree of protection filing a restructuring petition affords to the petitioning company…"*, compared to the (former) remedy of presenting a winding up petition for restructuring purposes (which stay applies from the date a provisional liquidator is appointed and/or a winding up order is made).

At the hearing of the RO Petition, the Objecting Creditors contended that either:

1. a petition for the appointment of restructuring officers cannot be presented when a creditor's winding up petition is pending before the Grand Court; or
2. the Section 91G stay did not 'bite' on winding up proceedings previously commenced against a restructuring petitioner.

---

[1] [2020 (2) CILR 942]

[2] (unreported, 30 March 2020, Segal J)

Kawaley J held that "*mental gymnastics*" were required in order to construe Section 91G in this manner and the challenge was "*clearly misconceived*". Whilst "*it was easy to accept*" that if a restructuring petition could be validly presented whilst a winding up petition was extant, this might interfere with existing winding up proceedings, it was difficult to find any literal or contextual support for the proposition for the position adopted by the Objecting Creditors: Kawaley J held that "*would involve abandoning all attempts to undertake any recognised form of statutory interpretation*". As such, Kawaley J confirmed the position that there is no prohibition on a company presenting a petition seeking the appointment of restructuring officers (such filing triggering the automatic stay under Section 91G) following the presentation of a winding up petition against a company.

Moreover, Kawaley J took the view that the Objecting Creditors had adopted this "*… technical jurisdictional challenge*" as "*a tactical ploy*" "*designed to discredit the apparently straightforward proposition that the [Objecting] Creditor's filing of [the Hong Kong Winding Up Petition] the day before the [hearing of the RO Petition] … was a flagrant breach of the automatic stay triggered by the filing of the [RO] Petition*".

In summary, Kawaley J found that Section 91G was "*unambiguous*" and it is clear that Section 91G imposes an automatic and extra-territorial stay on broadly defined civil proceedings, which expressly includes "*… any court supervised insolvency or restructuring proceedings…*" (that is, to include winding up proceedings), as well as those which have already been commenced against the Company (whether in the Cayman Islands or in a foreign country) as a matter of Cayman Islands law.

Conclusion

Justice Kawaley's judgment in In re Oriente Group Limited, with its detailed analysis of the statutory regime applicable to petitions for the appointment of restructuring officers, provides helpful guidance to practitioners. A copy of the judgment is available here.

Cayman Islands Contacts

Matthew Goucke
Partner
T: +1 345 914 6332
E :matthew.goucke@walkersglobal.com

Fiona MacAdam
Partner
T: +1 345 914 4273
E: fiona.macadam@walkersglobal.com

Siobhan Sheridan
Associate
T: +1 345 814 4558
E: siobhan.sheridan@walkersglobal.com

Hong Kong Contacts

Joanne Collett
Partner
T: +852 2596 3354
E: joanne.collett@walkersglobal.com

Vivian Kwan
Associate
T: +852 2596 3413
E: vivian.kwan@walkersglobal.com

Global Contacts

Luke Petith
Partner - Dubai
T: +971 4 363 7926
E: luke.petith@walkersglobal.com

John O'Driscoll
Partner - London
T: +44 (0)20 7220 4987
E: john.o'driscoll@walkersglobal.com

Adam Hinks
Partner - Singapore
T: +65 6603 1657
E: adam.hinks@walkersglobal.com