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## Bermuda 'Light-touch' Provisional Liquidator Restructuring

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*A bold judicial reimagining of the Court's existing power to appoint a provisional liquidator for asset preservation purposes, Bermuda's 'light-touch' provisional liquidation regime empowers embattled boards to pursue company-driven restructuring with the protection of an interim moratorium on proceedings.*

### 'Light-touch' Provisional Liquidation for Restructuring Purposes

Bermuda has no direct equivalent to the statutory moratorium against creditor action that applies to an insolvent English company in administration pursuant to Schedule B1 to the Insolvency Act 1986, or to an American corporate reorganisation pursuant to Chapter 11 of the United States Bankruptcy Code. This legislative gap has been enthusiastically filled by the Bermuda Supreme Court's interpretation of the power to appoint liquidators under section 170 of the Companies Act 1981 (the "Act") to include the power to appoint provisional liquidators for restructuring purposes. For almost twenty years now, *de facto* debtor-in-possession, management-led restructuring has been facilitated in Bermuda by reference to this bespoke restructuring regime.

The distinguishing feature of a Bermuda light-touch provisional liquidation is that provisional liquidators are appointed - oftentimes on the company's own petition - to independently oversee a restructuring process, with a focus on protecting creditor interests. The ultimate restructuring can manifest itself in various ways, although typically we see either an equity injection by a "white knight" investor, a purchase of distressed debt by a third party or a scheme of arrangement whereby the company makes a compromise or arrangement with its members and/or creditors pursuant to section 99 of the Act. Regardless of what form the restructuring ultimately takes, the company has the benefit of a moratorium, or stay, on proceedings being brought against the company during the period in which the provisional liquidators remain in office<sup>1</sup>. This is a particularly valuable protection for imperilled boards of companies in the zone of insolvency, where creditor threats to commence winding up proceedings can distract from the primary task of implementing a financial or operational restructuring to ensure that the company may continue as a going concern.

It is not the role of the light-touch provisional liquidators to determine whether or not a certain restructuring proposal should be pursued. That is of course a question for the creditors and members of the company.

Typically, evidence must be shown to the Court at the appointment stage that demonstrates that certain creditors of certain value are either supportive of the proposal or have indicated that they are willing to wait and see what the company will propose and accordingly do not wish for a winding up order to be made immediately. Subsequent to the appointment of the provisional liquidators, if the necessary creditor support cannot be obtained and a satisfactory restructuring proposal cannot be agreed upon, the provisional liquidators would report this to the Court and, in most cases, a winding up of the company would ensue.

<sup>1</sup> Note that secured creditors may enforce their security notwithstanding the moratorium, except for in circumstances where a contractual standstill has been negotiated between the relevant secured creditors and the company.



## Jurisdictional Foundation for the Light-Touch PL Regime

The foundation for the provisional liquidation restructuring jurisdiction was set out in the 1999 judgment of Ward CJ (as he then was) in *Re ICO Global Communications (Holdings) Ltd* as thus:

*"I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the Company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court".<sup>2</sup>*

Later, in the 2016 decision *In the Matter of Up Energy Development Group Limited*, Kawaley CJ described the advantages of the Bermuda light-touch regime in the following terms:

*"It is the involvement of JPLs, embedded with the restructuring troops, which relieves this Court of the burden shouldered by US Bankruptcy Court judges of resolving a myriad of disputes between the restructuring protagonists...All conflicts are typically resolved before the scheme document is finalized, out of court, with the JPLs playing a generally unheralded but crucial mediating role. They bring a high degree of efficiency and economy to Bermudian restructuring proceedings which would likely be lost in a proceeding without the usual appointment".<sup>3</sup>*

Most recently, in another decision of Kawaley CJ *In the Matter of Z-Obee Holdings Limited*, reference was made to the fact that the Bermuda Court "had an established practice of appointing JPLs to manage a restructuring", and that "it is too well established today for this Court to depart from in the absence of full and compelling arguments for doing so". The Chief Justice concluded with the remark that "the winding up jurisdiction is still being used to fulfil the primary purpose of the winding up jurisdiction: protecting the best interests of the general body of unsecured creditors".<sup>4</sup>

## Light-Touch PL Restructurings - The Bermuda Advantage

The primary purpose of Bermuda's light-touch provisional liquidation regime is to permit a company the time and space to implement a restructuring which may return the company to solvency and allow it to carry on business for the benefit of its stakeholders - under the watchful eyes of the provisional liquidators and the supervision of the Court. The availability of this regime is a tremendous asset for companies incorporated in Bermuda and promotes certainty and predictability in cross-border restructuring matters, including in cases where the shares of the company in question are publicly listed or the company has its operations in jurisdictions other than Bermuda.

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<sup>2</sup> [1999] Bda LR 69 at [6]

<sup>3</sup> [2016] SC (Bda) 83 Com (20 September 2016)

<sup>4</sup> [2017] SC (Bda) 16 Com (21 February 2017)



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