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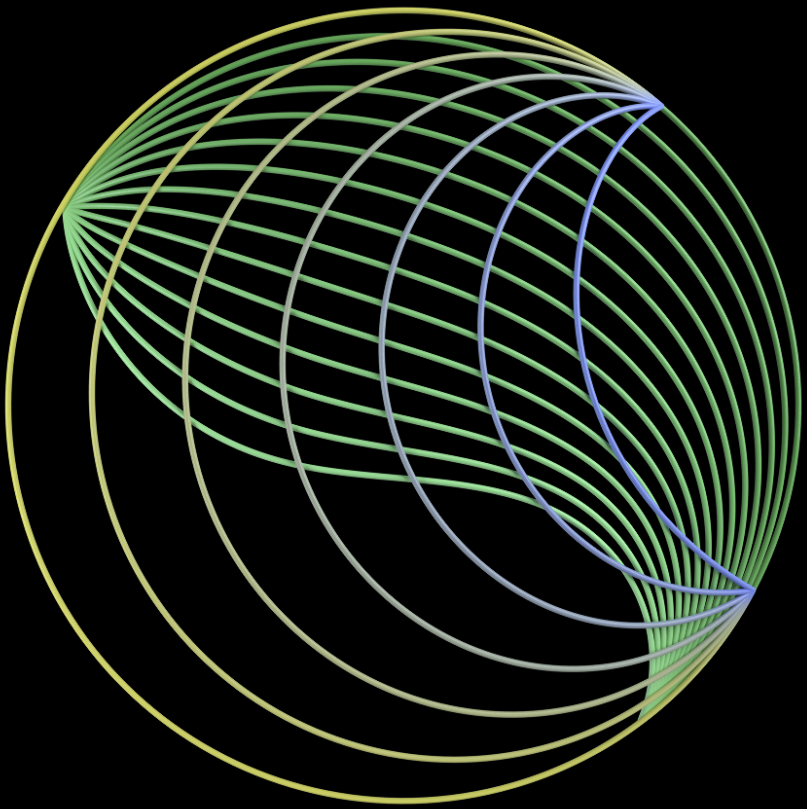

A practitioner's perspective | Insolvency & restructuring in Bermuda, with a focus on the liquidation of insurance companies

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Insolvency & restructuring in Bermuda, with a focus on the liquidation of insurance companies

Bermuda is a leading insurance[1] market and is particularly renowned as a domicile of choice for captives. As of 2021, there were 1,158[2] registered insurers in Bermuda with total assets of $1.4 trillion. The jurisdiction enjoys a robust regulatory environment, bettered by years of refining to meet the demands of international businesses operating in Bermuda. The Bermuda Monetary Authority (the "BMA"), in its 2021 Annual Report, noted that "Bermuda (re)insurers have paid out roughly $65 billion, $400 billion, and $60 billion to policyholders in the United Kingdom, United States and European Union, respectively, since 1997," underscoring the eminence of the jurisdiction in the international insurance market. This paper provides some of the distinct aspects of liquidating insurance companies in Bermuda from an insolvency and restructuring practitioner's perspective.

Overview of the Bermuda insolvency regime

Bermuda does not yet benefit from a consolidated insolvency regime in the sense of a stand-alone insolvency act, like in other Caribbean jurisdictions. The provisions concerning the liquidation of companies are in the Companies Act 1981 ("Companies Act"), specifically Part XIII, which deals with Winding Up. The art and practice of insolvency in Bermuda is marked by its orientation to asset recovery, soft regulation of the profession, considerable involvement of the courts, and significant cross-border considerations.

Recovery orientation

Various jurisdictions have instituted mechanisms for rescuing distressed businesses. For instance, the administration procedure is prevalent in certain common law jurisdictions such as the United Kingdom ("UK") and Kenya; the Cayman Islands also recently ushered in a new restructuring regime via the Companies (Amendment) Act, 2021 which allows for the appointment of a dedicated restructuring officer. Another well-known reorganization procedure is the Chapter 11 process in the United States. Broadly, these mechanisms entail a moratorium on enforcement actions by creditors. The procedures allow restructuring professionals, working with management and other key stakeholders, to develop appropriate rescue options for distressed businesses. In Bermuda, it is possible to restructure businesses through a light touch (provisional) liquidation or the scheme of arrangement mechanism. However, these mechanisms can be arduous and drawn out, hence do not efficiently render themselves to a business rescue disposition.

Soft regulation

Insolvency and restructuring is a profession that is increasingly being regulated. For instance, in the UK and Kenya, insolvency practitioners must be licensed,

procure professional indemnity insurance cover, be members of a recognized professional body and meet various other requirements. By comparison, Bermuda has very minimal requirements for insolvency and restructuring professionals. However, it bears to note that via a 2020 amendment to the Companies (Winding-Up) Rules 1982[3], a liquidator or provisional liquidator (or in the case of two or more joint and several appointments, at least one of them) should be resident in Bermuda and their credentials accepted by the Court after scrutiny of the same.

Court centric

A derivative consequence of the antiquated insolvency and restructuring laws and soft regulation of the insolvency and restructuring profession is the significant involvement of the Supreme Court of Bermuda (the "Court") in the insolvency and restructuring process. In essence, the Court has taken a supervisory role which can result in delays given its broad remit. A Committee of Inspection, usually consisting of a combination of creditors and contributories, advises liquidators on the conduct of the liquidation and tends to resolve, or at least smooth, some of the matters usually presented to the Court.

Cross-border considerations

The significant global connections of companies registered in Bermuda often result in interesting cross-border issues during the restructuring or liquidation process. For example, regarding insurance companies, their global reach is not only limited to policyholders, creditors and investors, but also includes their operations, management, assets, and the control of their affairs. Therefore, practitioners usually navigate through cross-border issues, including the appropriate jurisdiction to commence recognition and recovery actions, and reporting to various supervisory bodies and other relevant stakeholders.

Liquidation of insurance companies

In particular to restructuring insurance companies, other statutes and pertinent provisions in the Companies Act are equally important.

The Insurance Act 1978 ("Insurance Act")

The Insurance Act regulates the insurance business in Bermuda. It deals with, among other things, the registration, regulation, and disciplinary measures for insurers and other persons engaged in the insurance business. In addition, part VII of the Insurance Act deals with the insolvency and winding up of insurance companies, with Section 35 providing the grounds on which the BMA may present a petition for the winding up of an insurer - being a company that may be wound up under the Companies Act.

The Insurance Act contains special provisions relating to the winding up of insurers carrying long-term business[4]. For instance, an insurer carrying on a long-term business cannot be wound up voluntarily[5]. Further, in winding up an insurer carrying long-term business, "the liquidator shall, unless the Court

otherwise orders, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer, whether an existing insurer or an insurer formed for that purpose; and, in carrying on that business as aforesaid, the liquidator may agree to the variation of any contracts of insurance in existence when the winding up order is made, but shall not affect any new contracts of insurance." [6] The preceding makes it imperative that the liquidator, over a long-term insurer, should be capable of supporting its ongoing operations, taking into account the unique aspects of such insurers, such as relevant actuarial considerations.

The Insurance Act also informs the distribution waterfall in the liquidation of insurance companies in addition to the relevant provisions in the Companies Act and the Employment Act 2000 (the "Employment Act"). A good understanding of the interplay between the requirements of the various acts is crucial to the proper and efficient liquation of insurance companies.

The Segregated Accounts Companies Act of 2000 ("SAC Act")

A "segregated accounts company" is a company registered under Section 6 of the SAC Act. A "segregated account," as defined in the SAC Act, means a separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities, and obligations linked to such account) of a segregated accounts company pertaining to an identified or identifiable pool of assets and liabilities of such segregated accounts company which are segregated or distinguished from other assets and liabilities of the segregated accounts company. The provisions of the Companies Act and the Limited Liability Company Act 2016 apply to a segregated accounts company to the extent that they are consistent with the SAC Act, and the segregated accounts company is a company within the meaning of Section 2 of the Companies Act or is a limited liability company, respectively[7]. An insurer can be registered as a segregated accounts company under the SAC Act. If such an insurer carries on long-term and general business, they will not be required to maintain separate accounts as required under Section 24 of the Companies Act. A company can also maintain segregated accounts subject to provisions of a private Act[8].

Part IV of the SAC Act contains the provisions relating to the receivership of a segregated account and winding up of a segregated accounts company. The Registrar[9] must be served with an application made to the Court for a receivership order in respect of a segregated account[10], and a segregated accounts company cannot be wound up voluntarily without the consent of the Registrar[11]. In the receivership of a segregated account or the liquidation of a segregated accounts company, the assets linked to each segregated account can only be applied to the liabilities of that segregated account unless the asset or liability is linked to more than one segregated account in which case they are to be dealt with following the terms of the pertinent governing instrument or contract[12].

The Employment Act

Liquidation usually entails the termination of employment contracts, given that companies cease or gradually reduce their operations until their eventual dissolution. Therefore, the provisions of the Employment Act are primarily relevant in ranking employee claims in a distribution waterfall. In this regard, Section 23 on severance allowance is critical, as read in concert with Section 236 of the Companies Act, which deals with preferential payments.

Conclusion

A concrete understanding of the nuances of the insolvency and restructuring practice in Bermuda ensures that professionals protect the interests of creditors and increase the chances of maximizing returns to creditors. Guided by efficiency, economy, and effectiveness tenets, ardent practitioners, can uplift the eventual distributions made to creditors.

About the author

Danvas is an Insolvency & Restructuring Manager at Deloitte. He has over 6 years of multi-jurisdictional experience supporting distressed and insolvent businesses in Eastern Africa and the Caribbean & Bermuda regions. His experience encompasses both out of court restructuring and court supervised reorganizations through company administrations, receiverships, liquidations, business reviews, financial advisory and financial restructuring.

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Citations

[1] In the context of this writing, insurance includes reinsurance, and insurers include reinsurers.
[2] BMA Annual Report, 2021.
[3] Rule 2.
[4] The Insurance Act defines "long-term business" as insurance business of any of the following kinds, namely, -
(a) effecting and carrying out contracts of insurance on human life or contracts to pay annuities on human life;
(b) effecting and carrying out contracts of insurance against risks of the persons insured sustaining injury as the result of an accident or an accident of a specified class or dying as the result of an accident or an accident of a specified class or becoming incapacitated or dying in consequence of disease or disease of a specified class, but does not include excepted long-term business;
(c) effecting and carrying out contracts of insurance, whether effected by the issue of policies, bonds, or endowment certificates or otherwise, whereby in return for one or more premiums paid to the insurer, a sum or a series of sums is to become payable to the persons insured in the future, not being contracts such as fall within either paragraph (a) or (b) does not include excepted long-term or special purpose business.
[5] Section 35A of the Insurance Act.
[6] Section 37(2) of the Insurance Act.
[7] Section 25A and 25B of the SAC Act.
[8] Section 2(5) of the SAC Act.
[9] Registrar of Companies.
[10] Section 20(3) of the SAC Act.
[11] Section 24(3) of the SAC Act.
[12] Section 19(3) and Section 25(1) of the SAC Act.

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