



## A Modern Regime for Company Liquidation: What You Need To Know

On 30 April 2012 a modern company liquidation regime for The Bahamas came into force, replacing the former liquidation laws that were largely untouched for more than 60 years. The *Companies (Winding up Amendment) Act* and the *International Business Companies (Winding up Amendment) Act* (together the “new liquidation regime”) were enacted during late 2011 as part of major commercial legislation improvements led by then Attorney-General, John K F Delaney QC, in coordination with industry.

The new liquidation regime has been welcomed across the business and financial services community with more than 200,000 active Bahamian companies on the register, over three-quarters of which are International Business Companies.

The regime’s subsidiary legislation in the form of *Rules* came into effect on 31 July 2012 and the new liquidation regime is now fully operational.

### ***What’s new?***

The new liquidation regime brings wide ranging and various improvements that enhance the attractiveness of Bahamian companies as a whole. This summary highlights only some of the changes as follows:

- ***Meaning of insolvency.*** The meaning of insolvency is expanded (beyond the cash-flow test) to include the balance sheet test – namely, where the value of the company’s liabilities exceeds its assets.
- ***Court’s jurisdiction over a foreign company.*** The court’s jurisdiction is expanded to order a winding up of a foreign company which has property located within The Bahamas or is carrying on business here.
- ***Standing for local regulators.*** Standing is provided for a relevant local regulator (as specified by order of the Minister) in the case of a company carrying on a regulated business, to petition for the winding up of a company whose license has been suspended or revoked.
- ***Shadow director recognized.*** A person who exercises influence over the Board without being formally appointed as a director as a means of avoiding the legal duties is now recognized as a “shadow director”. The newly introduced term is defined as a person in accordance with whose directions or instructions the directors are accustomed to act, and such person may be held to account in the



course of the liquidation as may be officers and directors.

- **Priority accorded to employees' entitlements:** Payment in priority to all other debts is accorded to sums due for *severance pay, earned vacation leave, medical health insurance premiums or pension fund contributions* when an employee is terminated due to the company going into liquidation.
- **Recovery of liquidator's costs in relation to assets held upon a trust:** Provisions are made for dealing with costs incurred in the course of a company's liquidation in connection with assets that the company held under a trust. This is a scenario that has increasingly arisen in this jurisdiction and which has given rise to recent adjudications. Previously no statutory provision addressed the matter. It is important in such circumstances that assets available to satisfy creditors not be burdened by such costs, while at the same time ensuring that those costs are equitably borne by the persons who benefit from the trust asset.
- **Disclaimer of onerous property:** A liquidator now has the ability to disclaim *onerous property*. *Onerous property* is defined as an unprofitable contract or assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act.
- **Voidable preference period expanded:** The so-called "claw-back" period by which preferences may be avoided has been expanded from 3 months to 6 months.
- **Avoidance of undervalue dispositions:** The law relating to the avoidance of dispositions made at an undervalue is now incorporated into the new liquidation regime.
- **Insolvent trading liability:** Liability for directors is provided for where directors allow a company to trade while knowing it to be insolvent.
- **Fraudulent trading liability:** On the application of a liquidator, any person who was knowingly a party to the carrying on of the business of the company with intent to defraud creditors or for any fraudulent purpose may be declared by the court liable to contribute to the company's assets.
- **Duty to investigate:** Liquidator's duties and functions include investigating and reporting to the company's creditors and contributories. Additionally, in the case of a court winding up, the liquidator is empowered to investigate the causes of the failure, and the business dealings of the company as well as assist the



relevant regulator and the police in their investigations. In the event of prosecutions the liquidator is also empowered to assist the Attorney-General in matters relative to such proceedings.

- ***Automatic netting of mutual dealings***: Where there have been mutual dealings between the company and another party, (unless otherwise contracted) an accounting and setting-off will take place. Additionally, regard will be had to any contractual right of set-off and netting arrangements or non set-off arrangements. This is an important enhancement for modern commercial dealings.
- ***International cooperation***: The court is empowered to make ancillary orders to facilitate, in The Bahamas, a foreign liquidation where the activities of the foreign liquidation include matters in The Bahamas.
- ***Insolvency practitioners regulated***: Matters regarding qualification for appointment of official liquidators and their remuneration are regulated by Insolvency Practitioners' Rules.
- ***Flexibility of regime design***: To provide a flexible mechanism for the new liquidation regime to be kept current, a *Liquidation Rules Committee* under the chairmanship of the Chief Justice is established and vested with substantial rule-making scope, thereby lessening the need for parliamentary action from time to time. Rules are subsidiary legislation and are the following: *Companies Liquidation Rules, 2012*; *Insolvency Practitioners Rules, 2012*; and *Foreign Proceedings (International Co-operation) Liquidation Rules, 2012*.

It is to be noted that the pre-existing *voluntary liquidation* regime for International Business Companies was unaffected by the new liquidation regime.

For additional information about the company law changes please contact partners John K F Delaney ([jdelaney@delaneypartners.com](mailto:jdelaney@delaneypartners.com)) or Samantha Knowles-Pratt ([skpratt@delaneypartners.com](mailto:skpratt@delaneypartners.com)).

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