



Appointing liquidators in the Cayman Islands

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Executive Summary

Where multiple Cayman Islands entities in the same corporate structure become subject to insolvency proceedings (e.g. Cayman Islands master/feeder fund structures), the Cayman Islands Courts will typically seek to appoint the same liquidators at each level where such entities share similarities in circumstances. Doing so typically aligns with the Overriding Objective of the Court to deal with matters economically and efficiently, and in the context of a liquidation, helps protect the interests of stakeholders in the liquidation.

That said, certain circumstances may call for the appointment of different office holders at different levels of the structure or even at the same level.

The same liquidator at all levels of the structure

In circumstances where multiple Cayman Islands entities in the same structure become the subject of insolvency proceedings and share similar circumstances, the Cayman Courts will typically look to avoid the appointment of different liquidators at each level as doing so would require different office holders familiarising themselves with overlapping facts and in most cases this increases costs and run contrary to the Court's aim to ensure the liquidation of each entity is progressed as efficiently and economically as possible. This should not come as a surprise given the Court will seek to advance or comply with the principles behind the Overriding Objective to conduct proceedings efficiently and economically and on a reasonable basis, and in the context of liquidation proceedings, in the best interests of those financially interested in the liquidation. The assignment of one judge to deal with related insolvency proceedings also helps achieve this objective.

In *AJW Master Fund*¹, which involved a Cayman Islands master/feeder fund structure entering into official liquidation, the Court made clear that advancing the Overriding Objective is typically served by evaluating what is in the best interests of the various stakeholders of the liquidation with reference to the circumstances faced by each entity. In this case however, following the appointment of the official liquidators at the master fund level, the Court appointed different official liquidators at the feeder level because the official liquidators at the master level did not satisfy the independence requirements under the Cayman Islands Insolvency Practitioners' Regulations to be appointed at the feeder level. However, when it became evident that having separately appointed liquidators was costing investors an additional US\$50,000 per month, the liquidators at the feeder level applied to remove the liquidators at the master level. Unsurprisingly, the Court granted the application and ensured the same liquidators were appointed across both entities. In doing so, Jones J emphasized the importance of considering the fact patterns which have led Cayman Islands entities in the same structure to enter into official liquidation; where those fact patterns are similar and for the purposes of the liquidation there is no relevant difference between the entities, the Court will be hesitant to agree with the appointment of different liquidators at each level².

1. *In the Matter Of AJW Master Fund II Limited* [2011 (1) CILR 363]

2. Further to *AJW Master Fund*, it is important to note that where the structure in question involves a typical "master/feeder" structure, or something analogous to this where the investors' economic interests at one level reflects a proportionate share in the net asset value or profits at another level, the Court may recognise this economic reality and be prepared to look through the relevant shareholder registers to treat investors as having a direct interest in the master fund (or equivalent entity) notwithstanding they are not directly invested or shareholders in the entity. This is an important point given it provides standing to investors at one level to apply to set aside an improperly obtained supervision order at another level notwithstanding they are not creditors or direct investors.



Different liquidators at different levels

In *Platinum Partners Value Arbitrage Fund*³ the Court agreed that there might be reasons to appoint different liquidators at different levels in a structure. Relevant factors include:

1. whether any actual or possible conflicts of interests exist which would render it inappropriate to appoint the same liquidators across the structure, also taking into account the independence of those engaged or to be engaged by the liquidators⁴;
2. whether the liquidators have the necessary resource to conduct the liquidation in an efficient and effective way⁵; and
3. whether any real advantage of appointing one office holder over another exists.

In respect of the liquidation proceedings of Abraaj Holdings (“AH”) and other Cayman Islands entities within the group of companies controlled by, or affiliated with AH, the Court has identified other factors relevant in determining the appropriateness of appointing liquidators at different levels.

In 2018, winding up petitions and applications to appoint provisional liquidators were presented against AH and Abraaj Investment Management Limited (“AIML”, which served as the management platform with respect to various entities in the Abraaj group). One of the main areas of dispute between those seeking the appointment of liquidators was whether the same or different liquidators should be appointed over AH and AIML respectively.

With respect to appointment of liquidators over both entities whose asset and creditor bases were heavily centred in Dubai and the United Arab Emirates, the Judge appreciated the importance for the liquidators to be from large international accounting firms with a local presence in Dubai and with extensive experience in implementing successful restructurings. However, the circumstances also in this instance called for the appointment of different liquidators for the following reasons:

1. AIML and AH had different creditors;
2. AIML and AH had different boards of directors and different counsel (noting that a decision was taken by each of AH and AIML in April 2018 that the companies could no longer continue with common directors and counsel);
3. AIML appeared to have contentious claims against AH which needed to be investigated by separate liquidators;
4. the liquidators appointed over AH (PwC) had the support of a significant number of creditors (including the secured banking group which held substantial security over AH’s assets); and
5. the liquidators appointed over AIML (Deloitte) had already commenced an investigation of certain matters involving AIML’s former management (in March 2018) which had given them a “head start” on any other firm and would lead to material costs savings for the liquidation estate.

Different liquidators for different stakeholders

It is frequently a feature of investment funds for the voting and participating shareholder rights to be held separately by the manager and the investor respectively. This can result in a situation where the manager and investor may disagree about the identity of the liquidators.

In the case of *Re Adamas*⁶, the sole remaining participating shareholder (the “Shareholder”) in two funds had concerns relating to mismanagement. However, the Shareholder did not have voting rights to appoint its chosen liquidator. In correspondence, the Shareholder instead sought to require the manager of each fund, who held the relevant voting rights, to place them into voluntary liquidation and identified the Shareholder’s preferred liquidators appointed.

3. *In the matter of Platinum Partners Value Arbitrage Fund (International) Limited (In Liquidation)* (FSD 118 and 131 of 2016 - Unreported decision of Justice Jones, 16 December 2016)

4. *Ibid.*, at paragraph 15, where the validity of transactions of each entity in a master / feeder structure had to be determined by liquidators, such conflict of interest between the master fund and the feeder fund made it inappropriate for the same liquidators to preside over the liquidations of each entity.

5. *Ibid.* At multiple points in the judgment, Jones J placed importance on the ability of liquidators to conduct the liquidation in an efficient and effective way, and the question of whether there was sufficient evidence to suggest that this was or was not the case was an important one.

6. *In The Matter Of Section 131 Of The Companies Law (2018) Revision And In The Matter Of Asia Private Credit Fund Limited - Civil Appeals Nos. 17 and 27 of 2019*



The managers passed the necessary resolutions, but did not appoint the Shareholder's chosen liquidator. The Shareholder sought orders from the Court that: (i) the voluntary liquidation of the funds continue under the supervision of the Grand Court pursuant to section 131(b) of the Companies Law in the Cayman Islands; and (ii) the Shareholder's preferred liquidators be appointed as joint official liquidators of the two funds.

Initially the Grand Court appointed two sets of liquidators to each fund to appease both the Shareholder and the manager but his decision did not survive an appeal to the Court of Appeal.

The Court of Appeal emphasised the importance of conducting liquidation proceedings "in the interests of those persons who are financially interested in the liquidation process" and how "the Court should be slow to second-guess the stakeholders as to how efficacy or economy is likely best to be served", in particular where the stakeholders speak with the same voice⁷.

Conclusion

These cases demonstrate that there is no "one size fits all" approach when it comes to the appointment of liquidators in the Cayman Islands. The Cayman Court continues to adopt an agile and flexible approach when appointing liquidators to more than one company in a structure in order to ensure that the interests of the various stakeholders are taken into consideration. For further information, or to discuss the appointment of liquidators over Cayman Islands entities, please contact our lawyers below.

7. Ibid, paragraphs 55 and 105.

Key Contacts



Colette Wilkins QC
Partner (Hong Kong)
T: +852 2596 3307
E: colette.wilkins@walkersglobal.com



Luke Petith
Senior Counsel (Dubai)
T: +971 4 363 7926
E: luke.petith@walkersglobal.com



Cate Barbour
Senior Counsel (Dubai)
T: +971 4 363 7917
E: cate.barbour@walkersglobal.com



Carly Kilshaw
Senior Associate (Dubai)
T: +971 4 363 7944
E: carly.kilshaw@walkersglobal.com



Michael Testori
Associate (Dubai)
T: +971 4 363 7925
E: michael.testori@walkersglobal.com



Tania Diab
Paralegal (Dubai)
T: +971 4 363 7910
E: tania.diab@walkersglobal.com

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