

Holding the Ring: Cayman Islands Court Appoints Provisional Liquidators Notwithstanding Arbitration Stay

In *Peakwave Investment Management Limited v Energy Evolution GP Limited*, the Cayman Islands Court (the "Court") held that it retains jurisdiction to appoint provisional liquidators ("PLs") even where a winding up petition has been stayed in favour of arbitration. Whether it would exercise its discretion to make such an appointment depends on the facts.

Background

The case arose from a joint venture dispute between Peakwave Investment Management Limited ("Peakwave") and Wealth Train Global Limited ("Wealth"), primarily over the control of the general partner ("GP") of a joint venture vehicle, Energy Evolution Fund LP, a Cayman Islands exempted limited partnership (the "Fund"). Peakwave, the minority shareholder in the GP, alleged that Mr Jiao, the controller of Wealth (the majority shareholder in the GP), had caused the diversion of approximately US\$45 million in dividends into companies associated with him – the argument being that those dividends should have reached the Fund instead. Peakwave filed a winding up petition against the GP on the just and equitable basis and sought the appointment of PLs. In response, Wealth cross-applied for a stay of the petition and the PLs' appointment in favour Hong Kong arbitration, which Wealth represented was to be commenced imminently (the shareholders'

agreement contained an agreement to arbitrate any dispute, claim, difference or controversy).

The Court's Findings

The Court reaffirmed the overriding principle that where parties have agreed to arbitrate, courts should generally hold them to their contractual bargain and refer arbitrable disputes to the tribunal. However, the Court held that it does have jurisdiction to appoint PLs notwithstanding that a winding up petition has been or will be stayed in favour of arbitration. A stay of the winding up petition is a pro tanto stay only - the petition remains in existence and can be revived once the arbitration has concluded.

The Court held that in appointing PLs it exercises a complementary jurisdiction to that of the arbitral tribunal because the tribunal does not have jurisdiction to grant that relief and parties cannot bestow that jurisdiction on the tribunal in an arbitration agreement. Further, parties do not contract out of statutory remedies merely by agreeing to arbitrate.

While the Court exercised its jurisdiction to appoint PLs, it emphasised that their powers should be limited to avoid encroachment on the competence of the tribunal. In this case, the Court refused to grant investigatory or discovery powers - such matters would fall within the tribunal's purview.

Key Takeaways

- (a) **Provisional liquidators can be appointed while an arbitration is ongoing.** The stay of a winding up petition in favour of arbitration does not preclude the Court from appointing PLs to preserve assets and documents while the arbitration runs its course. Whether the Court will exercise its discretion is highly fact sensitive.
- (b) **Complementary jurisdictions.** The Court retains jurisdiction to grant forms of interim relief that only a court can grant notwithstanding the ongoing arbitration.
- (c) **The Court will not grant unlimited powers to provisional liquidators.** Applicants should consider what powers are truly necessary for the case at hand. The Court may decline to grant broad investigatory or discovery powers.

The Court has made clear that it will hold parties to their arbitration bargains, but it will not allow arbitration clauses to be used as a means of frustrating legitimate statutory relief.

This means that, among other things, where assets require protection by way of interim relief not available to the tribunal, the Court may, in the appropriate circumstances, be prepared to appoint provisional liquidators to hold the ring.

Further Assistance

If you would like further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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February 2026
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