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- Formation and function of a Committee
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Cayman Liquidation Committees – What Prospective Members Need to Know

In this guide Harneys considers the role and function of a liquidation committee appointed under the Cayman Islands' Companies Winding Up Rules.

A vital component in the liquidation of a Cayman Islands company is the formation of a liquidation committee (***Committee***) which will assume a consultative role and act in an advisory capacity to the liquidator regarding strategy, decision-making and intentions.

This Guide provides an overview of the law and procedure relating to Committees in the Cayman Islands and aims to furnish prospective members with additional knowledge relating to:-

- the formation and function of a Committee
- the rights and duties of individual Committee members

Formation and function of a Committee

Pursuant to Order 9(1) of the Companies Winding up Rules 2008 (***CWR***), in almost all compulsory liquidations, the liquidator is required to establish a Committee.[1] The Committee of a company being wound up will be elected at the first meeting of the stakeholders in the liquidation.

The membership of the Committee will be determined by whether the liquidator certifies that the company is solvent, insolvent or of doubtful solvency. If the liquidator determines that the company is insolvent then the Committee must comprise not less than three and not more than five shareholders. If the company is insolvent the Committee must comprise not less than three and not more than five creditors. If the company has been certified as of doubtful solvency the Committee must comprise not less than three and not more than six members, a majority of whom must be creditors and at least one of which must be a shareholder. In the event that the liquidator's initial certification as to the solvency/insolvency of

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the company changes during the course of the liquidation, the membership of the Committee will similarly change so as to properly represent the stakeholders in the liquidation.

As a generality, the liquidator will have preference for a balanced Committee which is reflective of the full range of the different classes of stakeholders which may exist. However, this is not always possible since stakeholders may vote for whichever nominee they choose. This can give rise to a Committee which is biased in favour of one creditor group, and in *In Re Herald Fund SPC (In Official Liquidation)*, the Grand Court confirmed that it no longer has an inherent jurisdiction to rule on the composition of a Committee. Therefore, absent evidence of gross misconduct, fraud or inappropriate behaviour, the Court cannot dismiss or reconstitute a Committee.

Any creditor is eligible to nominate himself to be a member of the Committee unless his debt is fully secured or has been wholly rejected by the liquidator. In the event that the number of nominations exceed the number of positions available, creditors will be asked to vote for the creditor representative they wish to sit on the Committee. Creditors' votes will be weighted in proportion to the value of their claims. Where a vote is required, it is likely that a creditor will only be entitled to vote if he has lodged a proof of debt. The liquidator may form an initial view on the validity of creditor claims solely for the purposes of voting at the meeting (as opposed to a final determination of claims). In the event that a creditor has an unliquidated or unascertained claim (e.g. a cause of action against the company which has not yet resulted in a judgment), then that creditor's debt will usually be valued at $1.00 for voting purposes.

The logic behind forming Committees in such a procedural manner is to ensure that those with no tangible economic interest in the company do not have an opportunity to influence the progression of the liquidation.

Under the Insolvency Practitioners Regulations 2008, the Committee has the right to enter into a remuneration agreement with the liquidator, and the liquidator must present his invoices to the Committee for approval. The Committee also has the power to apply to the Court for an order requiring the liquidator to exercise (or refrain from exercising) his powers in a particular way, and to require him to report to the Committee on miscellaneous issues. Prospective Committee members should note that they do not retain any express veto power in relation to these matters.

Prospective members should also note that sitting on a Committee is likely to be a reasonably time-consuming and costly exercise. The cost of sitting on a Committee will not be recoverable from the company's estate, although travel and related expenses will be.

Express rights and duties of Committee members

The Committee acts as a confidential sounding board for the liquidator. The liquidator will often discuss issues like the wider restructuring of the company in question or any other rescue alternatives that may be available. In the event that the Committee is called upon to consider matters of a legal nature, the Committee may resolve to appoint a lawyer to give advice to the Committee, either generally or in respect of any specific matter arising in connection with the liquidation.

Membership of the Committee provides a member with extensive access to information not ordinarily shared with non-members relating to the liquidation. Members are also able to request particular reports from the liquidator. The liquidator is obliged to furnish the members with records of his accounts when required. As a result, prospective members will be asked to sign a confidentiality undertaking as a condition to taking a seat on the Committee, given that much of the information provided to them will be commercially sensitive and, in many cases, legally privileged.

Becoming a member of a Committee creates a fiduciary relationship with other creditors and contributories. Committee members must act honestly and in good faith. Specifically, members should know that they will be

prevented from deriving a profit from their office on the Committee. Furthermore, a member is strictly prohibited from allowing his private interests to conflict with his duty as a Committee member.

From a practical perspective, a prospective Committee member should provide the liquidator with a proxy form detailing which of its employees are authorised to act on its behalf at official meetings. Members can (and frequently do) appoint their own lawyers as their representative.

The liquidator will call a meeting within three months of the Committee's establishment where he must present the members with a written report and accounts in relation to the liquidation. Minutes of meetings of the Committee will also be circulated to all members 14 days after each meeting. Committee members must be given notice of, and can appear at, any application by the liquidator for the court's sanction of the exercise of any power for which such sanction is needed.

The Committee members have a right to receive a report from the liquidator on all such matters that appear to him to be of concern with respect to the progress of the winding up. The members have a right to receive such reports at least every six months but can direct the liquidator to provide them more frequently. With regard to the requests for information, unless the request is unreasonable, the costs of complying are excessive, or there are insufficient assets, the liquidator must comply with the request.

Committee members must treat their appointment with deference and diligence. Where a member fails to attend three consecutive Committee meetings either in person or by telephone, his membership of the Committee is automatically terminated.

Conclusion

Although being a member of a Committee can occasionally be an onerous task, given that there can be no guarantee of the Committee being truly representative of all stakeholder interests, it will often be prudent for a stakeholder to nominate himself to be a member. A Committee member has greater access to information from the liquidator (including confidential information) as well as a degree of influence over what the liquidator does and doesn't do. However, any stakeholder who nominates himself for the Committee must bear in mind that the liquidator is required to formally notify the Grand Court of the composition of the Committee. As a result, a nominee must assume that his membership on the Committee will become public knowledge at some point. This may impact the decision of a stakeholder (in particular a creditor) who may wish to remain confidential regarding his stake in the company.

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[1] "*Unless the Court otherwise directs, a liquidation committee shall be established in respect of every company being wound up by the Court*." Generally, the Court will dispense with the formation of a Committee only if it cannot be formed with the requisite number of members (i.e. there are insufficient nominees).

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