

# Protecting the flank: foreign restructuring and provisional liquidations in the Cayman Islands

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Provisional liquidators are normally appointed to protect company assets pending the hearing of a winding up petition. However, the provisional liquidation process may also be used as a tool to assist with cross-border restructurings.

A company may apply to appoint provisional liquidators in order to protect itself and its assets from creditors while it restructures its business. This is essential where a Cayman Islands company sits within a network of companies undergoing restructuring in a foreign jurisdiction. Placing the Cayman Islands company into provisional liquidation protects it from creditors who are not subject to the moratorium put in place by the onshore court whilst the wider restructuring of the group, including the Cayman Islands company, takes place. In this context, the aim of a provisional liquidation is similar to the UK administration process or proceedings pursuant to Chapter 11 of the US Bankruptcy Code (**Chapter 11**).

## Provisional liquidation procedure

The provisional liquidation jurisdiction is governed by section 104 of the Companies Law (2016 Revision). Section 104(2) deals with the traditional grounds for such an appointment, namely that a provisional liquidator is necessary to prevent the dissipation or misuse of the company's assets. The important subsection for restructuring purposes is section 104(3), which provides that the company can make an *ex parte* application to appoint a provisional liquidator on the grounds that it is or is likely to become unable to pay its debts within the meaning of section 93<sup>1</sup> and the company intends to present a compromise or arrangement to its creditors. A compromise or arrangement has been found to include a Chapter 11 restructuring or a foreign scheme of arrangement. It should be noted that in order to take advantage of this provision, the company must present a winding up petition (and have standing to do so). Once the restructuring process is successfully concluded, the winding up petition is simply withdrawn and the company continues in existence.

## What happens once provisional liquidators are appointed

The appointment of provisional liquidators triggers a moratorium on claims. The court will grant the provisional liquidator such other powers as it thinks fit. However, the court will be mindful not to disturb the debtor in possession requirement pursuant to Chapter 11. Accordingly, the powers of the provisional liquidator are usually light touch, often being only a power to monitor the progress of the foreign restructuring and report to the court and the creditors. A provisional liquidator will be particularly keen to ensure creditors in a foreign restructuring are afforded the same rights as they would be allowed in proceedings under Cayman law. It is, of course, open to the provisional liquidators to apply for further powers should it become necessary to do so.

<sup>1</sup> ie that the company is cash flow insolvent.

## Recognition in foreign jurisdictions

The Cayman Islands provisional liquidation regime is capable of recognition in other jurisdictions. Provisional liquidators appointed under section 104(3) have been recognised pursuant to Chapter 15 of the US Bankruptcy Code, examples include LDK Solar Co Ltd and Suntech Power Holdings Co Ltd.

## Potential changes - new restructuring moratorium procedure

Whilst the current process for restructuring provisional liquidations is useful, it is paradoxical that the company must be wound up before measures can be put in place to rescue it. With this in mind, proposals have been made to revise the regime by amending the Cayman Islands Companies Law and Companies Winding Up Rules. Such proposals call for the creation of a standalone court supervised restructuring moratorium, separate from the winding up regime.

In summary, the proposals would mean:

- There will be no need to present a winding up petition.
- The filing for an appointment of a restructuring officer will give rise to an immediate moratorium.
- The threshold for a restructuring moratorium will be the same as that for appointing provisional liquidators pursuant to section 104(3).
- The moratorium will have extra-territorial effect, although enforcement will only be possible in the Cayman Islands in respect of parties subject to *in personam* jurisdiction.

## Conclusion

The proposal paper is still awaiting submission to the Insolvency Rules Committee for review, but it is hoped these changes will make it easier for companies to benefit from the moratorium on claims; in the meantime, companies can take advantage of the procedure as provided in section 104(3).

## Contacts

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### Simon Dickson

Partner, Cayman Islands  
+1 345 814 9110  
simon.dickson@mourant.com

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