



Cayman Litigation & Dispute Resolution Q1 2017 Review

Welcome to the Q1 2017 Stuarts litigation and dispute resolution review. Stuarts' litigation and dispute resolution team acts in a wide range of company, commercial and insolvency related disputes arising under Cayman islands law. The Q1 2017 Quarterly Review addresses the impact of Arbitration clauses on the ability to Wind-Up Cayman Islands companies.

The Effect of Arbitration clauses in the context of Petitions presented by Shareholders to Wind Up Companies.

In considering the impact of an arbitration agreement upon the ability to wind-up a Cayman Islands company, the starting point is the Arbitration Law (2012) and the Foreign Arbitral Awards Enforcement Law (1997 Revision) ("FAAEL").

Arbitration Law 2012 and Foreign Arbitral Awards Enforcement Law (1997 Revision)

An application for a stay of Cayman Court proceedings in support of a Cayman domestic arbitration, is made under s.9 of the Arbitration Law 2012 whilst an application to stay an arbitration seated outside of the Cayman Islands, is made under s.4 of the FAAEL¹.

The Arbitration Law 2012 gives primacy to the parties' arbitration agreement by making a stay of court proceedings, relating to the same dispute, mandatory (s.9(2)), unless the arbitration agreement is null and void, inoperative or incapable of being performed. Likewise, Section 4 of the FAAEL also provides that a stay shall be granted in favour of an overseas Arbitration, subject to the same exceptions and also that a stay will not be granted if the Court is satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, in that there is not a dispute of substance that could survive a summary judgment type application: see the English decision of *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 W.L.R. 726.

Arbitrability and English Case Law

The issue of arbitrability goes beyond the scope of the arbitration agreement. It involves a consideration of the inherent power of a national legal system to determine what issues are capable of being resolved through arbitration. The issue goes beyond the will or the agreement of the parties. The scope of even the most widely drafted arbitration agreement has to yield to restrictions derived from other areas of the law.

Fulham Football Club (1987) Ltd v Richards [2012] Ch 333

The issue of arbitrability was considered by the English Court of Appeal in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 in the context of an unfair prejudice petition presented pursuant to section 994 of the Companies Act 2006 (which replaced s.459 of the Companies Act 1985).

The English Court of Appeal dismissed an appeal from an order made pursuant to section 9 of the Arbitration Act 1996, staying an unfair prejudice petition. In dismissing the appeal, the Court of Appeal preferred the decision in *In re Vocam Europe Ltd* [1998] BCC 396 (staying an



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¹ The provision is modelled on Article II of the Convention on the Recognition and Enforcement of Foreign Awards (1958), the New York Convention.

unfair prejudice petition under section 9 where a shareholders' agreement provided for all matters in dispute to be referred to arbitration) to that of **Exeter City Association Football Club Ltd v Football Conference Ltd** [2004] 1 WLR 2910 (declining to stay an unfair prejudice petition). In the **Exeter City** case, the Court rejected the application for a Stay on the ground that the statutory right to petition for a winding-up on grounds of unfair prejudice was "inalienable" and could not be diminished or removed by contract or otherwise.

In **Fulham FC**, the Appellants sought to argue that the presentation of a s.994 petition invoked the supervisory jurisdiction of the Court and that the petition sought a class remedy which required the Court to have regard to the interests of other shareholders and perhaps even creditors particularly in formulating the relief to be granted. The position, they said, was analogous (and, in substance, identical) to that under a winding-up petition brought on just and equitable grounds under s.122(1)(g) of the Insolvency Act 1986 which, like any of the grounds for compulsory liquidation, seeks to invoke the Court's statutory jurisdiction to make a winding-up order.

In that respect, a creditor's petition under s.122(1)(f) of the English Insolvency Act 1986, based on the alleged insolvency of the company, does undoubtedly seek relief on behalf of the creditors generally even though the petition relies as evidence of insolvency on the company's failure to pay the petition debt which is due and owing to the petitioner. However, the conditions for the Court exercising its power to wind up a company on just and equitable grounds are very different. A shareholder seeking a winding-up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see **Re Rica Gold Washing Co Ltd** [1879] 11 Ch D 36, as addressed in detail in our third Quarterly Review of last year.

Importantly, the Court specifically considered (albeit *obiter*) the position of arbitration provisions in the context of winding up petitions on just and equitable grounds (at [83]):

*"Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the **ACD Tridon** case, that the same probably goes for a similar dispute which is used to ground a petition under s.122(1)(g) to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made-out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding-up proceedings would be justified that a shareholder would then be entitled to present a petition under s.122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under s.9(4)" (emphasis added).*

Other common law jurisdictions

The **Fulham FC** decision has been considered and applied in a number of commonwealth jurisdictions.

Hong Kong

In **Re Quicksilver Glorious Sun JV Ltd** [2014] 4 HKLRD 759 the above passage in **Fulham FC** was applied to an application for a stay of a petition seeking to wind up a company on just and equitable grounds. The Court observed (at [22]) that the fact that the precise relief sought in the petition was not available from an arbitrator was not a critical consideration, although it was relevant. The correct approach, Harris J said, was to identify the substance of the dispute between the parties and ask whether or not that dispute was covered by the arbitration agreement.

Singapore

In **Tomolugen Holdings Ltd v Silica Investors Ltd** [2015] SGCA 57 the Singapore Court of Appeal considered that the approach taken by the Courts in England (**Fulham FC**) and Hong Kong (**Quicksilver**) sought to strike the correct balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal.



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BVI

In the judgment of the Privy Council (on appeal from the Eastern Caribbean Supreme Court (BVI)) in **Hermes One Ltd v Everbread Holdings Ltd** [2016] UKPC 1, it is recorded that the parties treated it as common ground (by reference to **Fulham FC**) (a) that an arbitrator could not award all the relief sought by the claimant, including in particular an order for the winding up of Everbread or for the appointment of a liquidator; but (b) that an arbitrator could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in Court of such orders.

Australia

In **WDR Delaware Corporation v Hydrox Holdings Pty Ltd** [2016] FCA 1164, the Court considered both **Fulham FC** and **Quicksilver**. It was held (at [161] – [164]) that, in substance, the dispute before the Court was between the sole shareholders of Hydrox involving the way in which those shareholders performed their contractual and other obligations *inter partes*. There was no substantial public interest element in the determination of these parties' disputes and it was not suggested that Hydrox was insolvent. Foster J said (emphasis added):

"164. With the exception of that part of the present proceedings which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made [..]"

As a result, a two stage process is envisaged:

1. first, and assuming that the underlying dispute falls within the scope of the arbitration clause, the substantive controversy between the parties should be resolved by arbitration. In the absence of a successful challenge to the arbitration award, it would be very unlikely that the Court would entertain an argument (upon the hearing of any subsequent winding up petition) that effectively sought to go behind the factual findings contained in the arbitration award; and
2. secondly, once the questions of fact and law which mark out the parties' underlying dispute are resolved it will be for the Court, in the exercise of its discretion (and in its consideration of those matters that have been resolved by arbitration), to ultimately decide whether it is appropriate to wind up the company. In the context of the 'gateway' effect of s.95(3) of the Cayman Companies Law, before a Court could make any alternative orders to a winding up, the underlying issues would require to be resolved in an arbitration.

Recent Cayman Islands case law

In **Cybernaut Growth Fund L.P. 2014 (2) CILR 413** and **In the matter of the SPhinX Group of Companies FSD 0016 of 2009 and FSD 45 of 2014** both concerned applications under s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).

The case of **Cybernaut Growth Fund L.P. 2014 (2) CILR 413**, concerned a Petition by five limited partners under the Exempted Limited Partnership Law (2007 Revision) to wind up a limited partnership given their loss of trust and confidence in the General Partner. The limited partnership had been constituted by an agreement that included an arbitration provision in relation to "... any dispute arising out or relating to this agreement". The Court refused an application to strike out or stay a petition. The Court distinguished **Fulham FC** and characterized the dispute in **Cybernaut** as one about the identity of the liquidator:

"The parties are all agreed that the partnership should be wound up. The real issue is whether it should be wound up by the GP or a qualified insolvency practitioner appointed by the court. In circumstances where the limited partners are said to have lost confidence and trust in their GP, the distinction is crucial. [...] It seems to me that the possible approach suggested by Patten, LJ [in the Fulham FC case] probably only has any practical application in two circumstances. If a winding-up petition includes a matter which constitutes a discreet inter partes claim falling within the scope of an arbitration agreement then it could be hived off for decision by the arbitral tribunal. Alternatively, if the petition includes matters which could properly be tried as preliminary issues then I think that those issues could be determined by an arbitrator rather than the court".



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In **Cybernaut**, the Court then continued:

“As a matter of principle, I think this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding up order (whether relating to a company or an exempted limited partnership) is an order in rem which is capable of affecting third parties. Because the source of an arbitral tribunal’s power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. Secondly, any dispute about who should be appointed as liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business ... There is a public interest in ensuring that all businesses are properly liquidated in the interests of all their stakeholders ... I regard winding up orders, supervision orders and orders for the appointment / removal of liquidators as class remedies, which in turn leads me to the conclusion that such proceedings fall within the exclusive jurisdiction of the court”.

The **Cybernaut** case was considered in the Grand Court and the Cayman Islands Court of Appeal in **In the matter of the SPhinX Group of Companies FSD 0016 of 2009 and FSD 45 of 2014** and **In the matter of the SPhinX Group of Companies CICA No 6 of 2015**.

At first instance, Sir Andrew Morritt applied **Fulham FC** (together with **Assaubayev v Michael Wilson Partners Ltd [2014] EWCA Civ 1491** and **Salford Estates (No. 2) Ltd v Altomart Ltd [2014] EWCA Civ 1575**). The Court held that the upshot of those three cases was that it is no bar to a stay, so that a contractual arbitration may take place, that the same issue may arise in associated legal proceedings. What is not permitted, is the reference to arbitration of a matter which is within the exclusive jurisdiction of the court: “A matter of public interest cannot be delegated to a private contractual process”.

Sir Andrew Morritt’s decision was upheld on appeal (**In the matter of the SPhinX Group of Companies CICA No 6 of 2015**). The Court of Appeal rejected the argument that the specific factual issues in dispute involved the exercise of a power vested in the Liquidators as officers of the Court, regulating the class rights of the members, and as such were not arbitrable at all. The necessary conditions for a Stay under Section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) were met and the application to dismiss the Stay in favour of arbitration was refused.

It was perfectly legitimate to enforce the private contractual right in favour of Arbitration, which remained the case despite the fact that the enforcement of the arbitration agreement may both (i) delay the liquidation court process; and (ii) add to the expense of administering the Estate.

Conclusion

The fundamental principle which emerges from **Fulham FC** and which now appears to have gained traction in England, Hong Kong, Singapore, Australia, the BVI, and the Cayman Islands is that the fact that the precise relief sought in the petition is not available from an arbitrator is not dispositive of whether or not the underlying dispute is capable of resolution through arbitration. The correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement. If it is, the substantive controversy between the parties should be resolved by arbitration, and once the questions of fact and law which mark out the parties’ underlying dispute are resolved it will be for the Court, in the exercise of its discretion, to decide whether to wind up the company.

The above strikes the balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal.

This publication is for general guidance only and it is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands Law only as at 26 April 2017. No advice is given herein as to the laws of other jurisdictions and case law from other jurisdictions is referred to only for illustrative purposes. If you would like further information please contact Richard Annette of Stuarts Humphries.



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