



Restructuring and Insolvency Jurisdiction Guide: Cayman

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Domestic procedures

	<p>Liquidation: voluntary and official.</p> <p>Cayman does not have an equivalent to the English concept of the company administration or to the Chapter 11 process in the United States.</p> <p>Schemes of Arrangement (typically put together by restructuring officers) allow the company to enter into an agreement with its shareholders and / or creditors.</p> <p>Alternatively, light touch liquidators are available where it is considered desirable for court appointees to work alongside company management.</p>

Official liquidation

A company may be wound up by the Court if it is unable to pay its debts

A company shall be deemed to be unable to pay its debts if:

- it fails to comply with, or set aside, a statutory demand
- execution of a judgment or order obtained from the Court is returned unsatisfied
- the company is unable to pay its debts as they fall due (cash flow test)
- the general rule followed by the Court is that, where a petitioning creditor can prove that its debt is unpaid and the company is insolvent, it has a right to a winding up order

Voluntary liquidation

- may be commenced: (i) automatically (per the company's M&As); or (ii) by special resolution of the shareholders
- If the directors are unable to sign a declaration of solvency within 28 days the liquidation must continue under the supervision of the Court
- The liquidator or a creditor or contributory may apply for the liquidation to continue under the supervision of the court if the company is or is likely to become insolvent or it would be more effective, economic and expeditious for the liquidation to continue under Court supervision

Scheme of Arrangement

- as mentioned a company can also apply for the appointment of a restructuring officer on the grounds that: (i) the company is likely to become unable to pay its debts; and (ii) the company intends to present a compromise or arrangement to its creditors
- schemes involve meetings of classes of creditors/members whose rights are sufficiently similar to allow them to discuss the effect of the scheme together
- each class meeting must achieve statutory majorities of 75% by value, and in the case of a creditors' scheme, a majority (over 50%) by number to agree to the proposed agreement
- once subsequently sanctioned by the Court, Schemes are binding on all creditors/members

Official liquidation

The application to the Court for the winding up of a company is made by petition. For a creditor's or contributory's petition:

- it will be presented to the Court, together with verifying and supporting affidavits confirming the contents of the petition and setting out any other relevant facts relied upon
- it must also be supported by an affidavit sworn by the proposed official liquidator in respect of his or her consent to act, independence, insurance provision and qualifications. Similar requirements apply in respect of proposed foreign liquidators
- it must be served on the registered office of the company and service to be confirmed by an affidavit of service
- a statutory advertisement of a creditor's petition must be placed in a suitable newspaper having circulation in the Cayman Islands (requirements for advertisements in foreign newspapers apply where a company carries on business outside of the Cayman Islands)
- the advertisement must be made to appear not less than 7 business days after service of the petition on the company and not less than 7 business days before the day of the hearing
- a directions hearing will be listed in respect of a contributory's petition
- petition hearing will typically be listed within 3 to 6 weeks of a creditor's petition being presented and 6 to 9 months of a petition on the just and equitable ground being presented. The Court has a discretion as to whether to place the company into official liquidation and, if it does so decide, it will appoint one or more official liquidators or Court may order an alternative remedy - such as an order that the company buy out the petitioner's shares

Schemes of Arrangement

The following steps are taken:

- approach to CIMA (regulated businesses only)
- application for appointment of restructuring officers
- filing petition and supporting documents including an affidavit exhibiting the scheme in draft
- first court hearing - Court convenes scheme meeting
- scheme circular once finalised and approved by Court will be sent to creditors/members and the meeting occurs within notice periods
- meeting outcome reported to the Court and a second hearing takes place at Court where the Court can sanction the Scheme
- if sanctioned, the registrar of companies will be notified
- application to discharge restructuring officers

	<ul style="list-style-type: none"> • upon appointment (by members or the Court) the liquidator controls the company's affairs. The powers of the directors and members cease, save for very limited exceptions • any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void upon the making of a winding up order • provisional liquidators are subject to the Court's supervision and only carry out the functions that the Court orders with such powers as the Court confers on them
	<p>Yes, if:</p> <ul style="list-style-type: none"> • the Court considers it is just and equitable • the company passes a special resolution requiring it to be wound up by the Court • it fails to commence business within a year of incorporation • it suspends its business for a whole year • the period (if any) fixed by the company's articles for the company's duration expire, or an event occurs which under the articles initiates the company's winding-up • it is carrying on a regulated business in the Cayman Islands without being duly licensed or registered to do so
	<p>The restructuring officer regime is designed to facilitate the rescue of a company's business by a scheme or compromise with creditors / members.</p> <p>The "light touch" provisional liquidation practice is designed to facilitate the rescue of a company's business by allowing insolvency practitioners to work alongside management to facilitate the rescue of a company's business.</p>

	<p>A voluntary or official liquidator has the power, exercisable with Court sanction, to sell any of the company's property by public auction or private contract. Powers of sale may also be conferred on provisional liquidators and exercised with Court sanction. Restructuring officers and provisional liquidators may be granted similar powers on a case by case basis.</p>
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Cross border

	<p>Statutory recognition: the Cayman Islands can provide assistance to foreign representatives in respect of foreign entities and make orders ancillary to a foreign bankruptcy proceeding for the below statutory purposes:</p>
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- recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of the debtor
- enjoining the commencement or staying the continuation of legal proceedings against a debtor
- staying the enforcement of any judgment against a debtor
- requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative
- ordering the turnover to a foreign representative of any property belonging to a debtor

In making such an order, the Court will take into account:

- the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled
- the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding
- the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate
- the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Law
- the recognition and enforcement of security interests created by the debtor
- the non-enforcement of foreign taxes, fines and penalties
- comity

Outside the above statutory purposes, the Court may also provide assistance at common law.

	<p>Yes, if:</p> <ul style="list-style-type: none"> • the recognition under statute is limited to the purposes set out above • under common law, the Court will only assist foreign liquidators in cross- border insolvencies if the relief sought: (a) could be granted by the foreign court conducting or controlling the winding-up; and (b) is available at common law in the Cayman Islands. These principles were set out in the Privy Council decision (on appeal from Bermuda) of <i>Singularis v PWC</i> and adopted in the Cayman Islands in the matter of <i>Primeo Fund</i> [2016] (2) CILR 26
	<p>No. The Court has no jurisdiction to provide judicial assistance under statute upon the application of a foreign representative of an insolvent company appointed by a court in any country other than the country of its incorporation. This is to be contrasted with the approach reflected in the UNCITRAL Model Law which has not been adopted in Cayman.</p> <p>Although the Cayman Islands are not a signatory to any international treaties relating to bankruptcy or insolvency, liquidations that come before the Court frequently involve an international element so the Court will usually adopt a co-operative approach to facilitate the effective winding up of the company. While the Court will not generally assist a foreign officer appointed to a Cayman company, it welcomes concurrent appointments with Cayman insolvency practitioners and has experience of approving international protocols in circumstances where Cayman Islands insolvency practitioners are appointed jointly with representatives from other jurisdictions.</p> <p>The Court may also recognise and assist a foreign liquidator appointed in a place other than the place of the company’s incorporation where the relief being sought is an order authorising the liquidators to make an application to present a parallel scheme of arrangement (such that there is unlikely to be a winding up order) and provided that the company has a substantial connection to and has submitted to the jurisdiction of the appointing court, (see <i>In re China Agrotech Holidays Limited</i>).</p>

Creditors

	<ul style="list-style-type: none"> • the expenses of the liquidation are payable out of the assets of the company in accordance with published rules on priorities • liquidators can be remunerated based on time spent, a percentage of recoveries achieved or a combination of the two (such fee arrangements are subject to regulation and approval by a liquidation committee and the Court) • liquidators can receive payment of an amount not in excess of 80% of the remuneration sought in the liquidator's reports and accounts pending approval by the Court • for voluntary liquidations brought under Court supervision (i) expenses and disbursements of the liquidators; (ii) costs of making the supervision order; and (iii) remuneration of the liquidator shall rank equally with the expenses and disbursements incurred by the official liquidator but in priority to the remuneration of the official liquidator

Avoidance transactions

Potentially “Voidable Transactions” comprise:

- unfair preferences
- transactions at an undervalue

“Voidable preferences”

- where the transaction was made “with a view to giving the creditor a preference over other creditors”
- within 6 months preceding the commencement of the liquidation
- at a time when the company was unable to pay its debts

In order to demonstrate an intention to prefer one creditor over others

- there is no requirement to demonstrate dishonesty
- the intention to prefer must be the “dominant intention”
- if the payment is motivated by other factors (eg duress) the transaction may not be voidable
- it is irrelevant if the payment was a mistake

Transfers to related parties are deemed to have been made with a view to giving the creditor a preference. A “related party” includes an entity which has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

Avoidance of dispositions made at an undervalue

- a disposition of property was made by the company
- the disposition was made at an undervalue (for no consideration or for consideration the value of which is significantly less than the value of the property the subject of the disposition)
- the disposition was made with an intent to defraud the company’s creditors. There must be an intention to willfully defeat an obligation or liability (which includes contingent liability) owed to a creditor which existed on or prior to the date of the disposition

The burden of establishing intention to defraud is upon the liquidator and proceedings must be commenced within 6 years of the disposition.

The liquidator.

Contributions to the liquidation estate and liability of officers

	<p>Yes, in the case of:</p> <ul style="list-style-type: none"> • delinquent directors: breaches of fiduciary duty (e.g. in making preference payments or for fraudulent trading) • fraudulent trading: intention to defraud creditors of the company or creditors of any other person or for any fraudulent purpose • shareholders paid a dividend: payment of a dividend is liable to be clawed back from a shareholder where a company is insolvent. A CI\$15,000 fine and imprisonment of up to 5 years may be imposed for knowing and willful breach • claw-back claims against the recipients (shareholders) of preferential redemption payments: under certain circumstances - the developing law in this area indicates that such claims are difficult in practice. Note: redemption payments made from a company's share premium account are not payments out of capital.
	<p>Directors, including shadow directors, may be liable for breach of their common law or equitable duties, or negligence for failure to exercise skill and care (note the exculpation and indemnity provisions in a company's articles of association; however under <i>Renova v Gilbertson</i> the "irreducible core" of a fiduciary's obligations, that is the duty to act honestly and in good faith, remains despite the terms of any indemnity).</p> <p>Statutory offences relating to the management and liquidation of a company, including intention to defraud creditors, can give rise to financial penalties and imprisonment.</p>
	<p>There are no provisions contained in the laws of the Cayman Islands for the disqualification of directors as a consequence of a company being wound up.</p> <p>However, if the company is regulated by CIMA for which directors are required to be registered and licensed by CIMA, directors may find that their license is revoked if CIMA becomes aware of relevant fraud or dishonesty offences or regulatory sanctions applicable to the registrant.</p>

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