

## Snapshot: Compulsory liquidation in Cayman

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A Cayman Islands company (**CayCo**) may be wound up either voluntarily according to the terms of its articles of association or compulsorily by the Cayman Islands Court (**Court**). This Snapshot provides an overview of the compulsory process. In certain circumstances, the Court may recognise the appointment of foreign liquidators to a CayCo, but this Snapshot focuses upon winding up proceedings within the Cayman Islands. Similarly, it is possible to seek the winding up in the Cayman Islands Court of non-Cayman entity, but that is beyond the scope of this Snapshot.

A petition seeking the winding up of a CayCo (**Petition**) may be presented to the Court by the CayCo itself, any creditor or creditors of the CayCo (including any contingent or prospective creditors), any contributory or contributories of the CayCo or the Cayman Islands Monetary Authority (**CIMA**).

### The Petitioner

The standing of the petitioner may require further analysis:

1. If the petitioner is the CayCo itself, then the Court must be satisfied that its board of directors has the requisite authority under its articles of association to present a petition without a shareholder resolution;
2. A petitioning creditor must have a debt that is due, payable and not disputed. If the CayCo denies the liability to repay the debt then the Court may determine the standing of the creditor, although the existence of an arbitration clause or foreign proceedings relating to the debt in question may lead to a dismissal or stay of the Petition;
3. A petitioning contributory must have held the legal title to the relevant shares for at least six months, be fully paid up and must not have agreed not to present a Petition.

The primary grounds for winding up petitions which come before the Court are that (a) the CayCo is unable to pay its debts or (b) that it is "just and equitable" to wind up the CayCo.

### Insolvency

For these purposes, solvency in the Cayman Islands is determined by reference to a cash flow test. There is a statutory provision deeming a CayCo to be unable to pay its debts if it has neglected to pay (or secure or compound) for three weeks a statutory demand for a sum of at least \$100.

That presumption is rebuttable, in particular where there are grounds to suggest that the debt is disputed on bona fide and substantial grounds (see "[Snapshot: Determining whether a petition debt is disputed on substantial grounds](#)"). The Court has discretion to determine such disputes in favour of the petitioner or may stay or dismiss the Petition as an abuse of process. If the statutory presumption of insolvency is not available, the creditor may nonetheless establish to the satisfaction of the Court that the CayCo is unable to pay its debts and the Court may infer an inability to pay from an unreasonable refusal to pay on the part of the CayCo.

### **Just and equitable**

The alternative basis for compulsory winding up on the just and equitable ground provides the Court with a broad discretion to make a winding up order, or grant alternative remedies. Just and equitable winding up petitions may proceed against the CayCo as defendant (like an insolvency petition) or, if the Court considers that the CayCo is more appropriately the subject of a dispute between shareholders, the Court may allow the Petition to continue as an *inter partes* dispute between the shareholders.

Examples of circumstances in which the Court may wind up a company on the just and equitable ground include loss of confidence in management arising from lack of probity, failure of purpose, fraud or a falling-out of shareholders whose relationship amounted to a quasi-partnership.

### **Consequences of Presentation of a Petition**

If a winding up order is granted, there is a moratorium on creditor action and therefore no race to enforcement – although secured creditors may enforce security at any time. If the Court makes a winding up order, the date of presentation of the Petition is the deemed commencement date of the winding up and therefore the look-back periods for any avoidance actions crystallise as at that date. Given that any disposition of the assets of a CayCo are void following the deemed commencement date of the liquidation, this can make counterparties wary following the presentation of a petition but the act of presenting the Petition does not itself change the CayCo's contractual rights and a prospective validation of the Court may be sought in circumstances where a transaction is objectively in the best interests of the CayCo's stakeholders.

### **Discretion of the Court**

Ultimately, the decision to make a winding up order is discretionary and the Court may always order an adjournment or stay of the Petition, require further evidence or give directions concerning outstanding issues. If the Court considers it appropriate to wind up the CayCo, then it will appoint an Official Liquidator (often Joint Official Liquidators for practical purposes). The nominated Official Liquidator must have the requisite independence, qualification and expertise to conduct the liquidation of the

CayCo but can be appointed jointly with a foreign liquidator, such as an office-holder based in the primary jurisdiction in which the CayCo has assets.

Ogier has acted for creditors, debtors and office-holders across the spectrum of contentious insolvencies. Please contact your usual Ogier contact if you require any further information.

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