Restructuring and Insolvency Jurisdiction Guide: Guernsey

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Domestic Procedures

	Answer
	Liquidation (winding up) and administration. A Scheme of Arrangement procedure can also be used for a company to come to an arrangement with creditors.
	The main reasons are that a company is unable to pay its debts or that it is just and equitable to do so. A recent Guernsey case has also seen a company wound up because it failed to provide accounts to its members. **Voluntary liquidation - whether company is solvent or insolvent** • Ordinary resolution (as provided in the M&As) • Special resolution

- If the directors cannot sign a declaration of solvency within the 5 weeks preceding the resolution to wind up a company then an independent liquidators must be appointed

Administration

The company must be insolvent and the Court must be satisfied that an administration order can either

(a) Ensure that the company survives or can be sold as a going concern or
(b) that there will be a more advantageous realization of the company's assets than on liquidation

Scheme of Arrangement

- A three stage process:

  (a) Court to establish that it has jurisdiction to call meetings of creditors/members
  (b) Holding the meeting themselves in order to obtain the 75% approval of the scheme; and
  (c) Seeking the court's sanction in respect of the scheme

Compulsory liquidation – no specific time and the Court does not tend to impose time limits.

- An application can be made by the company, any director, member or creditor or any other interested party (or by the Guernsey Financial Services Commission (GFSC) in certain specified circumstances)
- Company should be notified of the date, time and place of a winding up application, and unless the Court is satisfied of this, it will not hear the application
- Applications are typically filed on a Thursday and heard the following Tuesday (so a company can be placed into liquidation within a few days). The court is also able to sit on an urgent basis if required

The liquidator:

- Must, within 7 days of the compulsory winding up order, send a copy of the order to the registrar
- Will be appointed by the Court at the hearing of the winding up application

Voluntary liquidation – no specific time limits

- The winding up commences upon the passing of the resolution for winding up
- Once the resolution has been passed, a copy must be delivered to the Registrar within 30 days after the date it was passed. Failure to do so will result in a civil penalty
- Company (by ordinary resolution) to appoint a liquidator and fix their remuneration (company can delegate to creditors its power to appoint a liquidator)

Administration – no timeframe as to how long an administration order remains in force. Court can set a time limit but rarely does so

- Company, its directors, members, creditors and the GFSC can apply for an administration order
- Notice of the hearing must be given to the company, the GFSC, and anyone else the Court directs including the creditors so those parties can choose to make representations to the Court
- Notice of the application for administration order should be given to the registrar at least 2 clear days prior to the making of the application. Application usually filed on a Thursday and heard the following Tuesday. The Court is able to sit on an urgent basis if required
- The administrators will be appointed by the Court at the hearing, and sworn into office

The administrator:

- Must within 7 days of the administration order, send a copy of the order to the registrar
- Must within 28 days send notice to creditors of the appointment

Scheme of Arrangement

	• Upon appointment (by the members or the Court) the liquidator has custody and control of the assets of the company. The powers of the directors and members of the company cease, save for very limited exceptions • In a compulsory liquidation the company ceases to carry on business and commits an offence if it continues to do so, with some limited exceptions. Liquidators are given powers which include bringing or defending civil actions • Wide powers of management are granted to administrators of Guernsey companies (Schedule 1 to the Companies Law) • A Scheme is not a formal insolvency process and so the company, under its directors, remains in control of the company's assets during and after the scheme process
	No. There is no moratorium in either a compulsory or voluntary liquidation. While the administration order is in force, no resolution may be passed or order made for the winding up of the company, and any application on foot for the company's winding up shall be dismissed. No proceedings can be commenced or continued against the company except with the consent of the administrator or the leave of the Court, and if the Court gives leave, to such terms and conditions as the Court may impose. This is a creditor-friendly moratorium so that creditors with security and creditors with set off may enforce those rights notwithstanding the moratorium in place.
	Yes, if: • It does not commence business within one year of its incorporation • It suspends business for a year • It has no members • It has failed to comply with a direction of the Registrar of Companies to change its name or to hold a general meeting of members • It has failed to send its members a copy of its accounts or reports under specific provisions of the Companies Law • The Court is of the opinion that it is just and equitable that the company should be wound up The GFSC can make an application for the winding up of a company which will be granted if the Court is persuaded that the company should be wound up for the

	protection of the public or the reputation of the Bailiwick.
	• One of the primary aims of administration is to ensure that the company, or the whole or part of its business, survives or can be sold as a going concern. Contrast this to liquidation where the primary role of the liquidator is to realise the company's assets and to make distributions according to a statutory order of priority • A Scheme can be used as a rescue procedure because the company can come to a formal compromise with its creditors
	• In the case of administration and liquidation, the office holder can sell the business and assets of the company • An administration process is better suited to facilitating a sale of the business as a whole because of the moratorium which allows the company to trade with a degree of protection • Guernsey has also recently recognised the concept of the "pre-pack" which allows the sale of the business to a buyer immediately upon the appointment of administrators, allowing for the seamless continuation of the business • In a liquidation, one is more likely to see a piecemeal sale of business and assets in order to generate realisations

Cross Border

	Answer
	Yes it can under new powers given to it in recent legislative changes. The company in question must have assets or be administered in Guernsey, so as to have a sufficient connection to it. These changes reflect the same powers that the English courts have to wind up foreign companies and will be a useful tool where a company, whilst not registered in Guernsey, is managed and operated from the island.
	Statutory recognition: Guernsey will provide judicial assistance in relation to insolvency matters to the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man and Jersey.

	• Liquidator or administrator will apply to the court in their jurisdiction and that court will send a letter of request to the Court in Guernsey • The Court in Guernsey will not comply with the letter if the result would be contrary to public policy or oppressive. The Court can apply the insolvency law of either Guernsey or the foreign jurisdiction in relation to comparable matters falling within its jurisdiction • Court will seek to assist foreign insolvency procedures where possible (and insolvency office holder can seek recognition under the common law). However, the common law concept of “modified universalism” has been restricted following the 2015 Guernsey case of Re X (a bankrupt)
	• An insolvency office holder seeking to exercise powers overseas must not only be exercising those powers under the law of the jurisdiction where they were appointed, but there is also a corresponding common law or legislative power in the foreign jurisdiction (view of the majority of the Board in Singularis) • The minority of the Board in Singularis limited this further by suggesting that the office holder can only exercise the power if there are specific legislative provisions both in the home and foreign jurisdictions. A Re X (a bankrupt) held that the Guernsey court prefers this minority view

Creditors

	• Tangible assets - liens, a pledge, a landlord's right to priority for unpaid rent, a mortgage and a reservation of title clause • Intangible assets - security interest under the Security Interests (Guernsey) Law 1993 or a security under the Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979 • Security over real estate by either Rente hypothèque, securing a fixed annual sum or Hypothèque conventionnel (a bond) • Bonds - general charge or a specific charge. Bonds in Guernsey are slightly different to bonds in other jurisdictions, and have a number of specific characteristics and requirements which must be complied with before they are effective
	• Secured creditors will be repaid from the proceeds once a property over which they hold security is sold • Where a creditor has a security interest granted under the Security Interests Law then that creditor is entitled to the proceeds of the sale of the collateral when it is sold. However, that creditor must apply the proceeds in the order specified by section 7 of that law
	• For both compulsory and voluntary liquidation, all costs, charges and expenses properly incurred in a voluntary winding-up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims • Practice directions of 2015 regulate the information that office holders should give to the court regarding their remuneration and expenses. The Court will then fix the office holder's remuneration

	upon appointment based on that information and can review fee increase requests periodically

Avoidance transactions

	• Preferences • Transactions at undervalue • Guernsey also has a customary law remedy for transactions at undervalue (similar to section 423 of the UK Insolvency Act 1986) known as Pauline Actions, which enable transactions to be set aside if they have defrauded creditors

Contributions to the liquidation estate and liability of officers

Can directors or shareholders be required to contribute to the liquidation	• Delinquent officers: appropriation or misapplication of company assets, breach of fiduciary duty, personal liability for company debts • Fraudulent trading: intention to defraud creditors or for any fraudulent purpose • Wrongful trading: director knew or ought to have suspected at some time

estate?	prior to the commencement of the winding up that there was no reasonable prospect of the company avoiding going into insolvent liquidation (unless they also took every reasonable step to minimise loss to creditors)
	• When director is considered unfit to be concerned in the management of a company by reason of their conduct in relation to a company or otherwise • Relevant factors for the Court to consider include the director's conduct in connection with any company that has gone into insolvent administration. Disqualification orders can last for up to 15 years • Liquidators now have a positive duty to report directors where they consider there may be grounds for disqualification

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Key Contacts

Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: +44 1481 752253

Paul Chanter

Partner

Guernsey

E: paul.chanter@ogier.com

T: +44 1481 737151

Alex Horsbrugh-Porter

Partner

Guernsey

E: alex.horsbrugh-porter@ogier.com

T: +44 1481 752272

Christopher Jones

Partner

Guernsey

E: christopher.jones@ogier.com

T: +44 1481 752337

Sandie Lyne

Partner

Guernsey

E: sandie.lyne@ogier.com

T: +44 1481 752224

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