

# Guernsey Companies Law - Compulsory Winding Up of Companies

This memorandum has been prepared for the assistance of our clients in connection with the provisions relevant to compulsory winding up of Companies under the Companies (Guernsey) Law, 2008 (as amended) (the "**Companies Law**"). It is intended to provide only a summary of the main legal and general principles and it is not intended to be comprehensive in scope. It is strongly recommended that you seek specific legal advice on such matters and we would be pleased to assist in this respect. A series of briefings on other specific aspects of Guernsey companies has been produced by Ogier and is available on our website [www.ogier.com](http://www.ogier.com). Transitional provisions have also been made (a separate briefing addresses the operation of these).

The memorandum has been prepared on the basis of the law and practice in Guernsey as at 1 April 2010.

## Introduction

The Companies Law came into force on 1 July 2008 and contains provisions in relation to the nature, type, establishment and conduct of Guernsey incorporated companies ("**Companies**" or "**Company**" as the context requires), including limited liability companies, companies limited by guarantee, protected cell companies ("**PCCs**"), protected cells ("**PCells**"), incorporated cell companies ("**ICCs**"), incorporated cells ("**ICells**"), unlimited liability companies and mixed liability companies.

The Companies Law also contains provisions for winding up a Company. Winding up is the process by which the affairs of the Company are brought to an end, its assets realised, its liabilities determined and any available funds distributed to those legally entitled to them subject to the general law concerning preferences and preferential payments. Under the Companies Law winding up of a Company may be voluntary or compulsory.

## What is Compulsory Winding Up?

A Company may be compulsorily wound up by the Royal Court of Guernsey (the "**Court**") under the Companies Law if:

- the Company has resolved by special resolution that the Company be wound up by the Court;

- the Company does not commence business within one year of the date of its incorporation;
- the Company suspends business for a whole year;
- the Company has no members (other than the Company itself where it holds its own shares as treasury shares);
- the Company is unable to pay its debts as described below;
- the Company has failed to comply with a direction of the Registrar of Companies (the "**Registrar**") to change its name;
- the Company has failed to hold a general meeting of its shareholders in accordance with the Companies Law or the directors have failed to comply with their obligation under the Companies Law in respect of the annual general meeting. Pursuant to section 200 of the Companies Law, ICCells are exempt from the requirement to hold general meetings and pursuant to section 201 of the Companies Law, all companies can waive the requirement to hold general meetings via a resolution passed by the members of not less than a 90 % majority called a "waiver resolution" under the Companies Law;
- the Company has failed to send its members a copy of its accounts or reports in accordance with the Companies Law; or
- the Court is of the opinion that it is just and equitable that the Company be wound up.

An application for the compulsory winding up of a Company can be made to the Court by the Company itself, or any member or creditor thereof, or any other interested party. On hearing an application for the compulsory winding up of a Company, the Court may grant the application on such terms and conditions as it sees fit, or make such other order as it thinks fit. An order made by the Court on such application operates for the benefit of all the Company's creditors in the same way as if the application had been presented by them.

The Guernsey Financial Services Commission (the "**Commission**") can also initiate winding up proceedings in accordance with the Companies Law in respect of: (i)

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supervised Companies; (ii) Companies engaged in financial services business; or (iii) Companies prescribed by the Commission in accordance with the Companies Law. At the hearing of the application the Commission may make representation to the Court which the Court will take into account in its decision whether or not to exercise its powers.

If a creditor makes an application to the Court for the compulsory winding up of the Company on the grounds that the Company is unable to pay its debts then the Company is deemed to be unable to pay its debts if a written demand for payment, served through the office of Her Majesty's Sergeant, for a sum exceeding £750 has remained unpaid for 21 days, or if it is otherwise proved to the satisfaction of the Court that the Company fails to satisfy the solvency test (as described below).

## The Solvency Test

A Company is deemed to satisfy the solvency test if:

- the company is able to pay its debts as they become due;
- the value of the company's assets is greater than the value of its liabilities, and
- in the case of a supervised company, the company satisfies any other requirements as to solvency imposed in relation to it by or under certain other legislation.

## What happens after a company commences a Compulsory Winding Up?

On the granting of an application to wind up the Company the Court may appoint a liquidator nominated by the applicant or, where no person has been nominated, make such appointment as it thinks fit. The Court must be satisfied that the person taking office as liquidator is qualified to be appointed.

Once appointed, the liquidator has extensive powers to bring in the Company's assets, pay off its debts and distribute any surplus subject to the control of the Court. The Court may also restrain any action pending against the Company on the application of a creditor.

Upon the appointment of a liquidator the powers of the directors cease unless sanctioned by the liquidator or the Court. The Company must cease to carry on its business except in so far as it is expedient for the beneficial winding up of the Company. The liquidator shall within 7 days after his appointment send a copy of the compulsory winding up order to the Registrar. The Registrar shall give notice of the Company being wound up in such manner and for such period as he thinks fit.

Once the liquidator has realised the Company's assets, he must apply to the Court for the appointment of a Commissioner of the Court to examine his accounts and

to distribute the funds derived from the assets. The Commissioner arranges a creditors' meeting for examining and verifying the financial statements and creditors' claims and preferences and to fix a date for distribution of the Company's assets. Any dispute over a claim is resolved by the Court.

A notice on two occasions falling in successive weeks is placed in *La Gazette Officielle* stating the date of the creditors meeting or, as the case may be, the distribution (which day cannot be less than 14 days after the second notice).

Once the distribution has taken place the liquidator causes an application to be made to the Court for the dissolution of the Company.

All costs, charges and expenses properly incurred in the compulsory winding up of a Company, including the remuneration of the liquidator, are payable from the Company's assets in priority to all other claims.

The Companies Law also provides for voluntary winding up of Companies (for further information in relation to this topic please refer to our Client Briefing entitled "*Voluntary Winding Up of Companies*"), administration orders in relation to Companies (including for the avoidance of doubt, PCCs and ICCs), PCells and ICells and receivership orders in respect of PCells.

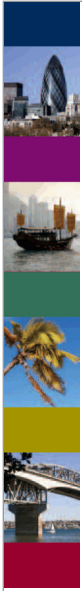
## Variation of the Rules for PCCs

PCCs are subject to modified liquidation rules (as compared to companies, ICCs and ICells)

Broadly this means that, notwithstanding any statutory provision or rule of law to the contrary, in the liquidation of a PCC the liquidator:

- is bound to deal with the PCC's assets in accordance with the requirement to keep cellular assets separate and separately identifiable from non-cellular assets and to keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells; and
- in discharge of the claims of creditors of the PCC, shall apply the PCC's assets to those entitled to have recourse thereto in conformity with the relevant provisions of the Companies Law relating to PCCs and PCells.

There are also a number of special rules in relation to the assets and liabilities of the PCells and the PCC and the manner in which these are to be dealt with (see the Ogier Client Briefing on PCCs).

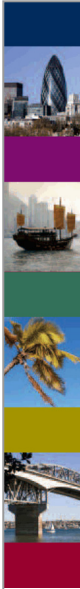


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Ogier is an award winning offshore legal and fiduciary services provider. The Group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and associated fiduciary services through a global network of offices covering all time zones and key financial markets.

Ogier continues to be recognised as a leading law firm by the principal legal directories, including Legal 500 and Chambers.



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