

Restructuring and Insolvency Jurisdiction Guide: Cayman

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Restructuring and Corporate Recovery Jurisdiction Guide: Cayman

Domestic Procedures

What are the principal insolvency procedures for companies in your jurisdiction?

Liquidation: voluntary and official.

Cayman does not have an equivalent to the English concept of the company administration or to the Chapter 11 process in the United States.

Schemes of Arrangement/"Soft Touch Liquidations" allow the company to enter into an agreement with its shareholders and/or creditors.

Yes. A provisional liquidator can be appointed on the application of a

Are any of the procedures available on a provisional basis?

application of a creditor or member after presentation of a petition but before the making of a winding up order. The Court must be satisfied that: (i) there is a prima facie case for making a winding up order; and (ii) it is necessary to prevent the dissipation or misuse of the company's assets, to prevent the oppression of minority shareholders or to prevent mismanagement or misconduct on the part of the company's directors.

In addition, even if the company is not the petitioner, a company can apply ex parte to appoint a provisional liquidator on the grounds that:

- the company is or is likely to become unable to pay its debts; and
- the company intends to present a compromise or arrangement to its creditors.

- 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

What requirements are to be satisfied for the procedures to be pursued?

Scheme of Arrangement/"Soft Touch Liquidation"

- As mentioned a company can also apply for the appointment of a provisional

liquidator 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 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

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

What is the procedure and how long does it typically take?

- 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 / "Soft Touch" liquidations

The following steps are taken:

- Approach to CIMA (regulated businesses only)
- Filing petition, application for appointment of provisional liquidators and supporting documents

including an affidavit exhibiting the scheme in draft

- First court hearing
– provisional liquidators usually appointed and scheme meeting convened
- Where there are concurrent bankruptcy proceedings
- 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
- Provisional liquidation is thereafter concluded and petition dismissed

Can any procedures be pursued without the involvement of the Court?

res. voluntary
(solvent) liquidations
do not require Court
involvement.

What is the effect upon control of the company and its assets during those procedures?

- 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

	<p>as the Court confers on them</p>
<p>Is there an automatic moratorium and, if so, when does it come into effect and what is its effect?</p>	<p>Yes (save for in the case of a voluntary liquidation). When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with leave of the Court and subject to such terms as the Court may impose. There is also scope to apply for a stay/moratorium in the period after presentation of a petition and before a winding-up order is made.</p>
	<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

Can companies be forcibly wound up other than when insolvent?

- 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

To what extent are the procedures designed to facilitate a rescue of a company's business?

Neither an official nor a voluntary liquidation is designed to facilitate a company rescue but rather to wind up the company by getting in and distributing the assets of the company to stakeholders in accordance with prescribed priorities. The "soft touch"

.. ..

provisional liquidation practice is designed to facilitate the rescue of a company's business by a scheme or compromise with creditors/members with insolvency professionals working alongside management.

Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?

Yes. A 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.

Cross Border

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:

- 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

To what extent do the courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?

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

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.

Yes, if:

- 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)

<p>Are there any limitations typically imposed in respect of the recognition of an overseas appointee?</p>	<p>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 <i>in the matter of Primeo Fund</i> [2016] (2) CILR 26</p>
<p>What kinds of overseas appointees have been recognised in your jurisdiction?</p>	<p>Trustees, liquidators or other officials appointed overseas in respect of a debtor for the purposes of a foreign bankruptcy proceeding.</p> <p>No. The Court has no jurisdiction to provide judicial assistance under statute upon the application of a foreian</p>

foreigner.

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.

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

Do the courts in your jurisdiction assist in applications to subject a company incorporated in your jurisdiction becoming

subject to an insolvency procedure in another jurisdiction?

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. 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 *In re China Agrotech Holidays Limited*).

Creditors

What are the principal forms of security taken in your jurisdiction in respect of movable and immovable property?

Mortgages, charges (fixed and floating), liens and pledges.

What is the effect on secured creditors of the commencement of an insolvency proceeding?

None. The assets fall outside of the liquidation estate. To the extent that their debt exceeds the value of their security, they may prove for the unsecured balance in the estate.

Which creditors are preferred and to what extent?

Employees, debts due to bank depositors and taxes due to the Cayman Islands Government rank in priority to all other debts.

- 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

**What is the position regarding the
recoverability and quantum of liquidator's
fees and expenses of the insolvency
procedure?**

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)

What, if any, categories of transaction can be avoided/set aside

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.

Who is responsible for seeking orders to set aside such transactions?

The liquidator.

Contributions to the liquidation estate and liability of officers

Yes, in the case of:

- 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

Can directors or shareholders be required to contribute to the liquidation estate?

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

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

What liability can directors or other officers attract in respect of an insolvent company?

company's articles of association; however under *Renova v Gilbertson* 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). Statutory offences relating to the management and liquidation of a company, including intention to defraud creditors, can give rise to financial penalties and imprisonment.

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. However, if the

In what circumstances can directors be disqualified as a consequence of a company being wound up?

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.

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