Restructuring and Insolvency Guides

BVI, Cayman Islands, Guernsey, Ireland, Jersey and Luxembourg

September 2023

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A guide to establishing a fund in Guernsey

Ogier provides legal advice on BVI, Cayman Islands, Guernsey, Jersey and Luxembourg law. Our office network also includes Hong Kong, London, Shanghai and Tokyo.

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We advise banks, trustees, financial intermediaries and corporates, and have extensive international experience advising on contentious and non-contentious offshore restructuring and insolvency matters. We often advise in conjunction with onshore counsel and other professional services providers in connection with company structures.

Ogier has excellent relationships with regulators in each of BVI, Cayman Islands, Guernsey, Jersey and Luxembourg. We are the only legal services provider advising clients on restructuring and insolvency matters across these offshore jurisdictions and onshore in Luxembourg for non-contentious

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IFLR Middle East Awards 2017

BVI

Restructuring and Insolvency Guide

Domestic Procedures

Question	Answer
What are the principal insolvency procedures for companies in your jurisdiction?	• Liquidation: insolvent, voluntary or compulsory • Creditors' Arrangement • Scheme of Arrangement Plans of Arrangement and solvent liquidations are outside the scope of this summary. Receivership is dealt with in the Insolvency Act 2003 ("the Act"), but is a method of enforcement for secured creditors, not an insolvency procedure. Part III of the Act, dealing with Administration, is not in force.
Are any of the procedures available on a provisional basis?	Yes. A provisional liquidator can be appointed if: (i) an application to appointa liquidator (with good arguable grounds) has been made but not yet determined; and (ii) the company consents or the Court is satisfied that: it is necessary for the maintenance of assets; or it is in the public interest. Importantly, following the decision in Constellation Overseas Ltd BVIHC COM 2018/206, a "light-touch" or "soft-touch" provisional liquidator can be appointed in aid of restructuring.
What requirements are to be satisfied for the procedures to be pursued?	**Compulsory Liquidator** • Application by: the company; a creditor; a member; the supervisor of an arrangement; the FSC; or the Attorney General • Potential grounds are: the company is insolvent; the Court considers it just and equitable; or that it is in the public interest • A company is insolvent where: i) it fails to comply with, or set aside, a statutory demand ii) execution or process of a judgment, decree or order is returned unsatisfied iii) the company is unable to pay its debts as they fall due; or iv) the value of its liabilities exceeds that of its assets • The application must be served at least 14 days before the hearing and is typically heard on specified Liquidation Days (usually one or two Mondays per month) • It must be advertised (in the BVI and in any jurisdiction appropriate to bring it to the attention of creditors) not less than 7 days after service and not less than 7 days before the hearing • The application must be determined within 6 months of issuing unless, before then, an extension is granted **Insolvent Voluntary Liquidation** Resolution of 75% of the members (unless the M&As require a higher %); the prior written consent of a BVI licenced IP; and no pending application before the Court to appoint a liquidator. **Creditors' Arrangement** The company must be insolvent and a 75% majority by value of creditors must approve the arrangement. **Scheme of Arrangement** A scheme has to be approved by a majority in number and 75% in value of the creditors.

<table>
<tr><td>What is the procedure and how long typically does it take?</td><td>

Liquidations
The Liquidator:

Must, within 14 days of appointment: advertise his appointment; file a notice of appointment with the Registrar; and serve notice on the Company
Must, within 21 days of appointment, hold a meeting of creditors
Take possessions of, protect and realise the Company's assets; distribute the assets or the proceeds of their realisation to creditors; and distribute any surplus to the members; and
Provide to all creditors and the Registrar a final report

Depending upon the nature of the assets and the adjudication of claims by creditors, the procedure can take from a few months to many years.

Creditors' Arrangement
A proposal is made between creditors and the company. An interim supervisor is appointed (with notice to the Registrar). A creditors' meeting occurs to approve the arrangement. A supervisor is appointed (with notice to the Registrar) in order to implement the arrangement. Any modification of the initial proposal requires adjournment of the creditors' meeting.

The time taken depends on the compliance and agreement of the creditors but can be relatively quick.

Scheme of Arrangement
This is a three stage process: a Court hearing convening the creditors' meeting, followed by the creditors meting and then a hearing to seek sanction by the Court. The process can be relatively quick, subject to the notice requirements for the meeting (usually not less than 14 days).
</td></tr>
<tr><td>Can any procedures be pursued without the involvement of the Court?</td><td>Yes: voluntary insolvent liquidation does not necessitate the involvement of the Court. Also, a Creditors' Arrangement can be pursued without the involvement of the Court.</td></tr>
<tr><td>What is the effect upon control of the company and its assets during those procedures?</td><td>

Liquidation
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.

Provisional Liquidation in Aid of Restructuring
The day-to-day management of the company is generally left to the directors and managers of the company, subject to the terms of a Court-approved protocol and the supervision of the provisional liquidator.

Creditors' Arrangement and Scheme of Arrangement
The only effects are those agreed between the company and the creditors.
</td></tr>
<tr><td>Is there an automatic moratorium and if so when does it come into effect and what is its effect?</td><td>Yes. Upon the appointment of a liquidator no one may continue or commence an action against the company or in relation to its assets or enforce or continue to enforce any right against or over its assets. This does not affect the rights of secured creditors.</td></tr>
</table>

Can companies be forcibly wound up other than when insolvent?	Yes, if: • It does not have a registered agent • It fails to file any return, notice or document required to be filed under the Act • The Registrar is satisfied the company has ceased to carry on business • The Registrar is satisfied it is carrying on a business of the Virgin Islands without having such licence, permit or authority • It fails to pay its annual fee or any late payment penalty by the due date; or • The Court considers it is just and equitable, or in the public interest, that it should be wound up
To what extent are the procedures designed to facilitate a rescue of a company's business?	Traditionally the BVI has essentially been a creditor friendly jurisdiction. The purpose of liquidation is to realise the company's assets and to make distributions according to the priority of creditors. It is not designed to rescue the company and there is no equivalent of Chapter 11 protection from creditors. However, the recent common law development in Constellation Overseas Ltd, permitting provisional liquidation in aid of restructuring, facilitates the restructuring of BVI companies and of multi-jurisdictional groups containing BVI companies. Additionally, both Creditors' Arrangements and Schemes of Arrangement can facilitate a permanent or temporary rescue of the business.
Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?	A liquidator has the power to sell the business and assets of the company. Either a Creditors' Arrangement or a Scheme of Arrangement could include a proposal for sale.

Cross Border

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	Statutory Recognition: the BVI can provide assistance to overseas appointees from designated "relevant" foreign jurisdictions, being: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA. The BVI court will take into account: • The just treatment of all persons claiming in the foreign proceedings • Protection of persons in the BVI who may have claims in the foreign proceedings • Prevention of preferences and fraud • The need for ranking for foreign claimants to be in order with BVI claimants • Comity Permissible orders are very wide: • Restrain proceedings • Delivery of property of the company to a foreign representative • Co-ordinating BVI insolvency with foreign insolvency • Authorising the foreign representative of any person who could be examined in BVI insolvency proceedings Common Law Recognition: the current BVI position is that common aw assistance can be given to overseas appointees, but only to those from the "relevant" jurisdictions for the purposes of statutory recognition.

Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	• The BVI Court cannot grant any assistance that adversely affects set-off rights or the rights of preferential or secured creditors (without their consent) • Under common law assistance, relief will only be granted that is available to the overseas appointee in their home jurisdiction and available at common law in the BVI
What kinds of overseas appointees have been recognised in your jurisdiction?	A Hong Kong trustee in bankruptcy has been recognised. A US receiver was refused recognition on the basis that the receivership was intended to protect US investors and was not for the purpose of a "reorganisation, liquidation or bankruptcy" as required by s. 273 of the Insolvency Act 2003.
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?	No. Although Part XVIII of the Act contains provisions based on the UNCITRAL Model Law on cross-border insolvency, that Part has not been brought into force. The existence of a foreign insolvency process in respect of a BVI company does not prevent the BVI court appointing a BVI liquidator and, as a matter of common law, the BVI proceedings will be treated as the primary proceedings.

Creditors

Question	Answer
What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?	**Moveable Property** Shares in a BVI company are the most commonly secured BVI asset. Typically an equitable charge will be taken over the shares with the title to the shares remaining with the chargor subject to a commercially agreed enforcement scenario. **Immovable Property** Land and other immovable property situated in the BVI is not an asset class that is typically the subject of security.
What is the effect on secured creditors of the commencement of an insolvency procedure?	None (without their agreement in writing)
Which creditors are preferred and to what extent?	Employees up to $10,000 and the BVI Government in varying amounts.
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	• Fees and expenses are payable out of the estate, subject to Court assessment • Typically liquidator's fees charged at market hourly rates. Rarely fixed as a percentage

Avoidance transactions

Question	Answer
What if any categories of transaction can be avoided/set aside?	Potentially "Voidable Transactions" comprise: • Unfair preferences • Transactions at an undervalue • Voidable floating charges • Extortionate credit transactions Other than extortionate credit transactions, the transaction must be an "insolvency transaction": one entered into when the company is insolvent or which causes the company to become insolvent. The vulnerability period is: • 2 years prior to the onset of insolvency for a 'connected person' • 6 months prior to the onset of insolvency for any other person • 5 years in the case of extortionate credit transactions Onset of insolvency" = the date the application to appoint a liquidator was issued or the date the members' resolution was passed. A "connected person" includes related companies, and directors and members of the company and related companies.
Who is responsible for seeking orders to set aside such transactions?	The liquidator.

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	Yes, in the case of: • Delinquent Officers: misapplication of assets, misfeasance or breach of duty • Fraudulent Trading: intention to defraud creditors or the company had some other fraudulent purpose • Insolvent Trading: director knew or ought to have known there was no reasonable prospect of avoiding insolvency (unless they also took every reasonable step to minimise loss to creditors)
What liability can directors or other officers attract in respect of an insolvent company?	**Delinquent Officers** Possible orders against delinquent officers are: • To repay, restore or account for money or other assets • Pay compensation • Pay interest **Fraudulent Trading or Insolvent Trading** The Court may order the payment of a contribution to the company's assets.

In what circumstances can directors be disqualified as a consequence of a company being wound up?	When a director has been convicted on indictment: • Of an offence in connection with the promotion, formation, management or dissolution of a company that is or becomes insolvent • Of an offence under the Act that related to a company that at any time becomes insolvent When the director: • Had an order for fraudulent trading or insolvent trading made against him • Is guilty of fraud in relation to an insolvent company or of any misfeasance or breach of duty to it as a director • In the opinion of the Court, conducted himself as a director of an insolvent company (and other companies) in such manner as to make him unfit to be a director

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Cayman Islands

Restructuring and Insolvency Guide

Domestic Procedures

Question	Answer
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.
Are any of the procedures available on a provisional basis?	Yes. A provisional liquidator can be appointed on the application of a creditor or member after presentation of a petition but before the making of a winding up order). Court to 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: a) the company is or is likely to become unable to pay its debts; and b) the company intends to present a compromise or arrangement to its creditors
What requirements are to be satisfied for the procedures to be pursued?	**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: i) It fails to comply with, or set aside, a statutory demand ii) Execution of a judgment or order obtained from the Grand Court of the Cayman Islands (Court) is returned unsatisfied iii) 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 his debt is unpaid and the company is insolvent, it is the duty of the Court to direct a winding up **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 under court supervision **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 the creditors/members with 75% present who vote to agree to the arrangement. Once subsequently sanctioned by the Court, Schemes are binding on all creditors/members

What is the procedure and how long typically does it take?	**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 must be placed in a suitable newspaper having circulation in the Cayman Islands (requirements for advertisements in foreign newspapers apply where company carries on business outside of the Cayman Islands) • The advertisement must be made to appear not less than 7 days after service of the petition on the company and not less than 7 days before the day of the hearing • A directions hearing will be listed in respect of contributory's petitions. • 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. Court to consider 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 • Considerations for the liquidators where 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 withdrawn
Can any procedures be pursued without the involvement of the Court?	Yes. 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 confers on them

Is there an automatic moratorium and, if so, when does it come into effect and what is its effect?	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.
Can companies be forcibly wound up other than when insolvent?	Yes, if: • 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 expiring, 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?	An official or voluntary liquidation is not designed to facilitate company rescues 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.
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

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	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 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 • 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 based on its common law jurisdiction.
Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	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) 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 Singularis v PWC and adopted in the Cayman Islands in the matter of Primeo Fund [2016] (2) CILR 26
What kinds of overseas appointees have been recognised in your jurisdiction?	Trustees, liquidators or other officials appointed overseas in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

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?	No. The Cayman 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. Although the Cayman Islands are not a signatory to any international treaties relating to bankruptcy or insolvency, liquidations that come before the Cayman Courts 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, the Court welcomes concurrent appointments of 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.

Creditors

Question	Answer
What are the principle 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 their debt exceeds the value of their security commencement of an insolvency procedure?	The assets fall outside of the liquidation estate. To the extent that 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.
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	• The expenses of the liquidation are payable out of the assets of the company in accordance with published rules on priorities • Liquidators can perform their function 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

<table>
<tr><th>Question</th><th>Answer</th></tr>
<tr><td>What if any categories of transaction can be avoided/set aside?</td><td>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 un able to pay its debts

In order to demonstrate an intention to prefer
• 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
• At an undervalue (for no consideration or for consideration the value of which is significantly less that 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.</td></tr>
<tr><td>Who is responsible for seeking orders to set aside such transactions?</td><td>The liquidator.</td></tr>
</table>

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	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 liable to be clawed back from a shareholder where a company is insolvent CI$15,000 fine and imprisonment of 5 years 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 and, unlike dividends, are not
What liability can directors or other officers attract in respect of an insolvent company?	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 Renova v Gilbertson the "irreducible core" of a fiduciary's obligations, that is the duty to act honestly and 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.
In what circumstances can directors be disqualified as a consequence of a company being wound up?	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 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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Guernsey

Restructuring and Insolvency Guide

Domestic Procedures

Question	Answer
What are the principal insolvency procedures for companies in your jurisdiction?	Liquidation (winding up) and Administration. A scheme of arrangement procedure can also be used for a company to come to an arrangement with creditors.
Are any of the procedures available on a provisional basis?	Yes. Compulsory liquidation can be made on a provisional basis.
What requirements are to be satisfied for the procedures to be pursued?	**Compulsory Liquidation** • The main reasons are that a company in 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 **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 that on liquidation **Scheme of Arrangement** • A three stage process: (a) Court to establish that it has jurisdiction to call meetings of reditors/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

What is the procedure and how long typically does it take?	**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 – civil penalty • Company (by ordinary resolution) to appoint a liquidator and fix his 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** The process can be relatively quick, and will be reviewed on a case by case basis.
Can any procedures be pursued without the involvement of the Court?	Yes. Voluntary Liquidation is a process which can take place without the involvement of the Court.

What is the effect upon control of the company and its assets during those procedures?	• 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 and 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
Is there an automatic moratorium and if so when does it come into effect and what is its effect?	No. There is no moratorium in either a compulsory or voluntary liquidation. Whilst 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.
Can companies be forcibly wound up other than when insolvent?	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.
To what extent are the procedures designed to facilitate a rescue of a company's business?	• 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
Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?	Yes. • 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

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	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)
Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	Yes, if: • An insolvency office holder seeking to exercise powers overseas must not only be exercising those powers under the law of the jurisdiction where he was 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
What kinds of overseas appointees have been recognised in your jurisdiction?	Overseas administrators, liquidators, trustees in bankruptcy, regulatory court-appointed receivers and fixed charge receivers.
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?	Yes. The assistance described above is reciprocal. Under section 426 (as extended to Guernsey) reciprocity is only with the UK and Crown Dependency courts. Under the common law it is, in theory, with any court worldwide.

Creditors

Question	Answer
What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?	Moveable Property • 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 Immovable Property • 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
What is the effect on secured creditors of the commencement of an insolvency procedure?	• 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
Which creditors are preferred and to what extent?	Preferred debts include rent to a landlord, wages, accrued holiday remuneration, income tax and social insurance. Preferred creditors do not, however, have priority over secured creditors.
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	• 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 regulates the information 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

Question	Answer
What if any categories of transaction can be avoided/set aside?	• Preferences • Guernsey law does not allow office holders to claw back transactions at an undervalue, although it does allow clawback under the Customary Law notion of "fraudulent preferences" • Pauline Actions enable transactions to be set aside if they have defrauded creditors
Who is responsible for seeking orders to set aside such transactions?	The liquidator (preferences) and the victims/creditors (Pauline Actions).

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	Yes, in the case of: • 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 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)
What liability can directors or other officers attract in respect of an insolvent company?	See above.
In what circumstances can directors be disqualified as a consequence of a company being wound up?	• When director is considered unfit to be concerned in the management of a company by reason of his 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

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Ireland

Restructuring and Insolvency Guide

Domestic Procedures	
Question	**Answer**
What are the principal insolvency procedures for Companies in your jurisdiction?	• Liquidation (i) creditors' voluntary (ii) Court ordered • Receivership • Examinership • Small Company Administrative Rescue Process (SCARP) • Scheme of Arrangement There are other insolvency procedures, including administration, which are applicable only in very limited circumstances.
Are any of the procedures available on a provisional basis?	Yes. S573 of the Companies Act, 2014 provides for the appointment of a provisional liquidator. The process for making the application is prescribed by Order 74 Rule 14 of the Rules of the Superior Courts. The provision is reserved for serious cases where urgent action is required to preserve assets and value. The appointment is made by the High Court where the Court is persuaded that the appointment will likely benefit creditors including where information exists suggesting the imminent dissipation of assets. It is almost always an emergency application and it is often made ex parte. The application avoids delay caused by the requirement for certain statutory notices and notice periods prior to the presentation of a winding up petition. An interim examiner is often appointed in the first instance as the application is usually an urgent one. The interim examiner will retain that status until the hearing of the petition when their appointment as examiner will be affirmed or they are removed as interim examiner. The appointment of an examiner will displace the appointment of a provisional liquidator although a provisional liquidator may be appointed as examiner.
What requirements are to be satisfied for the procedures to be pursued?	**Creditors' Voluntary Liquidation (CVL):** The company must be unable to pay its debts as they fall due. That is determined on the basis of one of two tests, the balance sheet test and the cash flow test. Of the two, the cash flow test is likely the more important. **Compulsory or Court Ordered Liquidation:** The High Court has jurisdiction to wind up a company and appoint a liquidator on the basis either that it is just and equitable to do so or that the company cannot pay its debts. **Receivership:** The secured creditor must have a valid mortgage, charge or debenture and an event of default as prescribed in the security document must have occurred before a receiver can be appointed. Any other creditor may apply to the High Court in limited circumstances for the appointment of a receiver on the basis that is just and equitable to do so. (Note that in certain circumstances a receiver may be appointed by the Court pursuant to a specific statutory power). ...continued

Domestic Procedures

Question	Answer
What requirements are to be satisfied for the procedures to be pursued?	**Examinership:** The company must be unable or will shortly become unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern. **SCARP:** The company must be unable or will shortly become unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern. In addition the company must be either a small company (turnover <€12M + balance sheet <€6M + <50 people) or a micro company (turnover <€700K + balance sheet <€350K + <10 people). **Scheme of Arrangement:** This is a voluntary process for which there are no prescribed requirements for initiation. Once approved by its members and creditors (and subject ultimately to Court sanction) a company can use a scheme to implement a range of possible objectives including for example restructuring, reorganisation, merger and demerger.
What is the procedure and how long typically does it take?	**Creditors' Voluntary Liquidation (CVL):** This is usually initiated by the company's directors. A shareholders' meeting and a creditors' meeting are called. The shareholders resolve that the company is insolvent and a liquidator is appointed. A statement of affairs is compiled and presented by the directors at the creditors' meeting, including a list of creditors and amounts owed and realisable value of the company's assets. Ten days' notice of the meeting must be issued to all creditors and shareholders. The meeting must also be advertised in at least two daily newspapers. Creditors have the right to interrogate the Statement of Affairs. A majority of creditors may appoint a different liquidator to that appointed by the company. There are any number of factors that contribute to the duration of a liquidation but the size and complexity of the company's trading operation is a significant factor as is the extent of cooperation of the directors of the company with the liquidator. **Compulsory or Court Ordered Liquidation:** Where the application is being made on the basis that a company is unable to pay its debts as they fall due then the application is usually initiated by a creditor. The process begins with the delivery of a statutory demand to the registered office of the debtor. If payment is not made within 21 days the company is deemed to be unable to pay its debts as they fall due. The creditor will then file a winding up petition with the High Court supported by a grounding affidavit. The company is entitled to oppose the petition including by seeking an injunction to prevent either the filing of the petition or its post filing advertisement. Where a petition is not opposed then a liquidator can be appointed usually in matter of 3 to 4 weeks. Where the petition is opposed then the appointment might be delayed by usually 1 to 3 months but possibly more depending on the complexity of the matter. Where an application to wind up a company is made on the basis that it is just and equitable to do so, for example in a minority oppression action, then that can take longer usually between 12 and 18 months. ...continued

Domestic Procedures

Question	Answer
...continued What is the procedure and how long typically does it take?	**Receivership:** Once the secured creditor has a valid mortgage, charge or debenture and an event of default as prescribed in the security document has occurred then appointing a receiver is relatively straightforward process which can be completed in a matter of days. The receiver must be appointed strictly in accordance with the charging document the terms of which must be reflected accurately in the deed of appointment. The appointment is usually preceded by a demand letter and there is usually little delay between the issuing of the demand and the appointment. Where there is no opposition to the appointment of a receiver then the process takes as long as is required for the receiver to secure the asset and sell it. The appointment of a receiver usually does not require publication as it is a matter of private contract. Where a receiver is appointed over a company then the Registrar of Companies must be notified within 7 days and furthermore the notice of appointment must be published in Iris Oifigiuil (Ireland's official gazette). **Examinership:** The application to appoint an examiner is usually made on an ex parte basis and it is grounded on a petition and grounding affidavit which must exhibit an Independent Expert Report. The IER must demonstrate that the company is unable or will shortly be unable to pay its debts as they fall due and no resolution has been passed, nor any court order made, to wind up the company and there is a reasonable prospect of survival for the company and all or part of its undertaking as a going concern. The application is made in the first instance on an ex parte basis when the Court may or may not appoint an interim examiner. The hearing of the petition itself will be adjourned for a short period to enable notice to be given to parties including those who may wish to object. On appointment by the Court the examiner will examine the state of affairs of the company and prepare a restructuring plan to enable the company to continue as going concern. In this regard the examinership process in Ireland is modelled on US Chapter 11 proceedings and to a lesser extent administration proceedings in the UK. Creditors are segregated into classes of generally similar interests. Voting by creditors to approve the restructuring plan has been complicated by the implementation of the EU (Preventative Restructuring) Regulations, 2022. For a plan to be approved, a majority of classes of creditor must agree and one of those classes must rank ahead of ordinary unsecured creditors or must be *'in the money'* creditors. The process takes the 100 days the examiner is given to present the rescue plan (currently extended to 150 days) plus the time it takes the Court to approve it. These timelines can be extended by application to the Court in certain exceptional circumstances. ...continued

Domestic Procedures

Question	Answer
...continued What is the procedure and how long typically does it take?	**SCARP:** The process is designed to avoid the costs associated with the examinership process by limiting the Court's involvement. Before the start of the formal process the company will prepare a Statement of Affairs and an independent insolvency expert, the Process Advisor, will prepare a Report confirming the Process Advisor's opinion that the company has a reasonable prospect for survival. 7 days after receipt of the Report the company will pass a resolution to begin the formal process. The Process Advisor will then engage with creditors who must detail their claims within 14 days after which the Process Advisor will prepare a draft Rescue Plan. This plan must satisfy the 'best interests of creditors' test being that the plan will put each creditor in a better position than in a liquidation. A meeting between the Process Advisor and each creditor must be completed by day 42 and each creditor must have 7 days' notice of the meeting. Creditors must be invited to vote on the plan by day 49. A 60% majority in number and a simple majority of value in respect of at least one class of creditors is required to approve the Rescue Plan. If approved by creditors and there is no other objection the plan becomes binding after 7 days. There is no requirement for Court approval. Any objector has 21 days within which to file an objection which is done in the Circuit Court. **Scheme of Arrangement:** This process is the least complicated recovery process analysed in this note. It begins with the company convening a scheme meeting of different classes of creditor and of its members. (The High Court can be asked to determine the constitution of classes if necessary). Once convened notice of the meeting known as a circular is issued to members and creditors explaining the effects of the arrangement on various stakeholders. The meeting itself is usually limited to a vote on the arrangement which must be passed by a special majority. If approved the company will apply to the High Court to sanction the proposed arrangement. The company is required to advertise the fact of the vote and the court application in two newspapers and in Iris Oifigiuil. The entire process can be completed within a relatively short timeframe of for example two months. More complicated schemes, for example those requiring an application for a reduction in capital, can take much longer.
Can any procedures be pursued without the involvement of the Court?	**Creditors' Voluntary Liquidation (CVL):** This can be pursued without the involvement of the Court. However, liquidators can seek the assistance of the High Court in determining any issue that has arisen in the liquidation. **Receivership:** Again this can be pursued without the involvement of the Court. However, the Court can become involved where a debtor objects to the appointment of the receiver or the exercise by the receiver of their power. And the receiver can apply to the High Court to determine any issue in the receivership. **SCARP:** The process was designed to allow small companies avail of a cost effective rescue process by avoiding the requirement for court intervention. However, the Rescue Plan can be opposed and this can lead to a very significant amount of Court intervention, delays and costs.

Domestic Procedures

Question	Answer
What is the effect upon control of the company and its assets during those procedures?	**Creditors' Voluntary Liquidation (CVL):** Once the liquidator is appointed the directors' powers cease and the liquidator assumes management of the company. The liquidator is obliged to administer and distribute the property of the company as prescribed by the Companies Act, 2014. Creditors will engage with the liquidator to prove their claim in the winding up. Creditors are also entitled to establish a committee of inspection to oversee the liquidator's activities. **Compulsory or Court Ordered Liquidation:** Where a Court appoints a liquidator that liquidator assumes the same status and role as a liquidator appointed in a CVL. In addition to being the agent of the company the liquidator will also be an officer of the Court. **Receivership:** Where a receiver is appointed over an asset of a company, this in theory would not of itself impact on the control of the company or other assets. Where a receiver is appointed over a company, then ostensibly at least there is no impact on the board. However, in reality the directors' powers will be limited by the charging document which will mean in effect that the board's power will be significantly curtailed. **Examinership:** The directors usually remain in control of the company and its day-to-day operations. The examiner can apply to the High Court to assume the powers of the directors where the Court, on the examiner's application, is of the view that the directors are impeding the process. An examinership is usually predicated on new investment and therefore usually results in the change or alteration of control of the company and of its assets. The examiner's focus is on saving jobs and dealing with creditors including by repudiating onerous contractual obligations. However the examiner may apply to the court for permission to sell assets that are free from claims and even secured assets, if the secured creditor receives the value of the asset. **SCARP:** Again the directors usually remain in control of the company and its day-to-day operations. The process can involve new investment which can result in a change of ownership. **Scheme of Arrangement:** The process itself has no effect on the control of the company and its assets which are matters to be determined and agreed if at all by the members and creditors.
Is there an automatic moratorium and if so when does it come into effect and what is its effect?	**Creditors' Voluntary Liquidation (CVL):** Apart from certain employee claims, no claim against the company can be continued or started once the liquidator has been appointed without the permission of the High Court. **Compulsory or Court Ordered Liquidation:** As above. **Receivership:** The appointment of a receiver does not inhibit the appointment of a liquidator save where a receiver manager has been appointed they will continue to manage the business. A receiver cannot be appointed to a company to which an examiner has been appointed and an examiner will not be appointed to a company where a receiver has been appointed for 3 days. **Examinership:** On the appointment of an examiner a 100 day moratorium on claims against the company begins. This is currently extended to 150 days. **SCARP:** There is no automatic moratorium on proceedings as this would require a court application which the process is designed to avoid. However an application for protection can be made to the Circuit Court if deemed necessary. **Scheme of Arrangement:** As with SCARP there is no automatic moratorium on proceedings but an application for protection can be made to the High Court if deemed necessary.

Domestic Procedures

Question	Answer
Can companies be forcibly wound up other than when insolvent?	Yes. The High Court has jurisdiction to wind up a company and appoint a liquidator on the basis either that it is just and equitable to do so the company cannot pay its debts. Petitions to wind up a company can be presented by creditors, members, the company or by the Director of Corporate Enforcement. Petitions filed on just and equitable grounds are frequently filed in shareholder oppression actions. It is an abuse of process for a creditor to use the winding up procedure for the purpose of collecting a debt. However, creditors frequently use or threaten to use the process to recover debts.
To what extent are the procedures designed to facilitate a rescue of a company's business?	None of the creditors' voluntary winding up, compulsory winding up or receivership processes are designed to facilitate a rescue of the company's business. They are designed to protect the interests of creditors. By contrast each of the examinership, SCARP and Scheme of Arrangement processes is specifically designed to rescue a company's business and to allow it continue as going concern on a restricted basis.
Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?	Liquidators have the power of sale over the company's business and that is the liquidator's primary function. Unless secured, those assets can be sold 'free and clear'. Receivers are appointed specifically for the purpose of an asset or company sale depending on the nature of the charge. Pre-packaged sales are allowed and are most often a feature in provisional liquidations and receiverships. Any of the rescue processes (examinership, SCARP or Scheme of Arrangement) could be used to facilitate the sale of all or part of the business. In the case of examinership and SCARP, new equity investment is often an inherent part of the process.

Cross Border

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	As a preliminary note, the European Insolvency Regulation (Recast) applies to all collective insolvency proceedings and to some restructuring proceedings involving a company with its COMI in the EU. Under EIR (Recast) the Irish courts will automatically recognise foreign restructuring or insolvency main proceedings commenced in another Member State. Ireland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency Proceedings. Where the company's COMI is outside the EU, the foreign IP can apply to the High Court pursuant to common law for recognition and an order in aid of the foreign proceedings.
Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	In determining whether or not to recognise the foreign, non-EU proceedings, the High Court will consider several factors including: • Is recognition being sought for a legitimate purpose • Will recognition prejudice any creditor in Ireland • Will recognition infringe any Irish law • Is the foreign insolvency procedure sufficiently similar to that in Ireland • Will recognition infringe public policy in Ireland

Cross Border

Question	Answer
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?	Yes. See answers to 12 and 13 above. Note in terms of the EIR (Recast) where the Courts will recognise primary proceedings initiated in another EU state, EIR (Recast) allows for the initiation of secondary proceedings. These secondary proceedings are designed to protect local creditors whose claims might be treated differently in the primary proceedings due to differences in legal frameworks.

Creditors

Question	Answer
What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?	Immoveable: real estate including land, the buildings on the land and anything immovable on the land or permanently fixed to it. • Legal mortgage • Equitable mortgage • Fixed charge • Floating charge (in certain limited circumstances) Moveable: e.g. goods, trading stock, agricultural stock, plant machinery, ships and aircraft. • Fixed charge • Floating charge • Statutory ship mortgage Other common forms of security include retention of title, pledges, liens and guarantees.
What is the effect on secured creditors of the commencement of an insolvency procedure?	Generally, the assets securing a secured creditor's debt are ringfenced in an insolvency. If the funds realised by the sale of a secured asset are insufficient to repay the debt then the balance of the debt is pooled with the general class of unsecured creditors. Secured creditors are entitled to enforce their security outside of the liquidation. Secured creditors are usually able to enforce their security in Ireland without having to make applications to court for example by way of the appointment of receiver pursuant to the terms of the charge. It is important that the receiver is appointed strictly in accordance with the contractual terms of the charge.
Which creditors are preferred and to what extent?	The following is the general priority ranking in an insolvency: • Super preferential claims (payments in respect of certain unremitted social welfare payments) • Examiner's fees, costs and expenses • Fixed charge claims • Liquidator's costs and expenses • Preferential claims of employees and the Irish Revenue Commissioners • Holders of a floating charge that did not crystallise before the date of liquidation • Unsecured creditors Within each class of claimant, the pari passu rule applies so that if realisations are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts. The order of priority of claims is established through a combination of legislation, contract law and common law.

Creditors

Question	Answer
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	In any liquidation, the liquidator's costs including their fees have priority. Those fees and expenses are usually discharged by the proceeds sale of unsecured assets. The costs recoverable by the liquidator include: • Costs and expenses of the creditors' meeting • Costs and expenses of preparing the statement of the company's affairs • Necessary disbursements • The liquidator's legal costs • The liquidator's professional fees It is prudent for a liquidator and their legal advisors to keep *'proper and contemporaneous records'* of time expended on a matter. However, in Re Custom House Capital Ltd (in liquidation) [2018] IEHC the High Court found that, notwithstanding the requirement to keep timely and proper records, a liquidator was not required to produce contemporaneous timesheets in support of an application for renumeration. The requirement was only to satisfy the court that the amount sought was reasonable in respect of the work done.

Avoidance transactions

Question	Answer
What if any categories of transaction can be avoided/set aside?	A fraudulent preference can be avoided or set aside. Any transaction which has the effect of preferring one creditor over another may be set aside as can any transaction that has the effect of prejudicing the general pool of creditors or that was made at an undervalue. Any transaction or disposal made within 6 months prior to the start of the winding up process will be reviewed by the Court. If the disposal is to a connected party the 6 month period will be extended to two years and the Court will presume that the disposal was intended to prefer and the onus will then fall to the connected party to demonstrate that the transaction was legitimate. Any third party who obtains an asset at arm's length and in good faith will not be prejudiced. A floating charge created within 12 months (two years if a connected party is involved) before the start of the winding up process may be voided unless it is proven that the company was solvent immediately after the creation of the charge.
Who is responsible for seeking orders to set aside such transactions?	The liquidator.

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	Yes. A director is required to act honestly and responsibly. At the point that a company is unable to pay its debts, or where it appears that creditors may not be repaid, a director's duty becomes primarily due to the creditors of the company. Where a court determines that a director has breached their fiduciary duty then that director can be made personally liable for the debts of the company. Some specific acts or omissions which can result in personal liability for a director include: • Reckless trading • Fraudulent trading • Breaching a disqualification or restriction order • Breaching obligations in respect of transactions with directors • Failure to keep adequate accounting records • Making a declaration of solvency unreasonably • Executing a statement of satisfaction of a charge knowing it to be false Subject to the rights of creditors in each company, the High Court can order that a related company must contribute to the whole or a part of the debts of the insolvent company. In making such a pooling order the High Court will consider several factors including: • The extent of involvement by one company in the running of the other • The conduct of each company towards the creditors of the other • The effect of the order on the creditors of the related company
What liability can directors or other officers attract in respect of an insolvent company?	Depending on the nature of the act or omission a range of liabilities and sanctions may be imposed on a director including: • Criminal conviction with fine and/or imprisonment • Personal liability for some or all of the dets of a company • Restriction • Disqualification In every insolvent liquidation, the liquidator is obliged to apply to the High Court for a restriction order and against all of the company's directors unless relieved of the obligation by the Corporate Enforcement Authority.
In what circumstances can directors be disqualified as a consequence of a company being wound up?	A director can only be disqualified if their wrongdoing is found to have been culpable for example where the director has committed fraud or has otherwise demonstrated that they are unfit to be a director. The disqualification period is 5 years or another term to be determined at the discretion of the Court.

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Jersey

Restructuring and Insolvency Guide

Domestic Procedures	
Question	**Answer**
What are the principal insolvency procedures for Companies in your jurisdiction?	Désastre; creditors' winding up; just and equitable winding up. A scheme of arrangement procedure can also be used for a company to come to an arrangement with creditors.
Are any of the procedures available on a provisional basis?	No.
What requirements are to be satisfied for the procedures to be pursued?	**Désastre:** • Application by the debtor; creditor; the JFSC • The debtor must: i) Be ordinarily resident in Jersey or at any time in the preceding 12 months ii) Be carrying on business in Jersey or at any time in the preceding 3 years iii) Hold immovable property in Jersey capable of realisation iv) Be a Jersey company or limited partnership or limited liability partnership • To have standing to apply, a creditor must have an unsecured net and undisputed debt of at least £3000 • A debtor is insolvent if it is unable to pay its debts as they fall due **Creditors' Winding Up** • A special resolution of the shareholders of the company • No declaration en désastre already been made • The directors must give at least 14 days' notice calling a creditors' meeting to be held immediately after the shareholders' meeting • At the creditors' meeting, the directors must give a statement of affairs of the company verified by affidavit **Just and Equitable Winding Up** • Application the the Royal COurt by the company, a director, a shareholder, the Minister for External Relations, Minister for Treasury and Resources or the JFSC • No declaration en désastre already made and; • The court is of the opinion that it is just and equitable, or expedient in the public interest, to do so • A wide jurisdiction and may be available if désastre or creditors' winding up not available/in the interests of creditors **Creditors' Scheme of Arrangement** • Court convened meeting of creditors • Support of 75% in value of creditors or class of creditors **Désastre** • Commenced by Demande supported by a standard form statement and affidavit • Typically ex parte and so full and frank disclosure obligation • The Viscount (Chief executive officer of Royal Court of Jersey) must receive at least 48 hours' notice of the application and be provided with the drafts of the order sought and the supporting documents • Court has discretion whether to grant the declaration and can adjourn for notice to be given to the debtor Time to make application varies but likely a number of weeks (depending on time to prepare evidence)

What is the procedure and how long typically does it take?	**Creditors' Winding Up** • Members' meeting on at least 14 days' notice to pass special resolution to wind up the company and recommend a person to be appointed as liquidator • Creditors' meeting convened to occur immediately following (on the same day) the members' meeting to appoint a liquidator and consider the company's statement of affairs • Creditors to be given at least 14 days' notice by post of the meeting and an advertisement is to be published in the Jersey Gazette a minimum of 10 days prior to the meeting • The creditors may appoint a liquidation committee **Just and Equitable Winding Up** • Application by Representation supported by affidavit • Interested parties can be convened or directed to be given notice • Court has discretion whether to order the winding up / appoint a liquidator **Creditors' Scheme of Arrangement** • Initial application to Court to convene meeting(s) of creditors or classes of creditors • Holding of meeting(s) of creditors or class(es) of creditors • Second hearing to obtain Court sanction for the arrangement The time to complete the administration of a winding up or désastre will be fact specific and can be years.
Can any procedures be pursued without the involvement of the Court?	Yes. Creditors' winding up.
What is the effect upon control of the company and its assets during those procedures?	**Désastre** • All the property and powers of the debtor company, save property held on trust by the debtor for another person, will immediately vest in the Viscount • No transfer of the company's shares without the sanction of the Viscount; and • The Viscount will realise the company's assets, discharge its liabilities and distribute realisations to the creditors **Creditors' winding up** • Powers of the directors will cease, (except so far as sanctioned by the creditors) upon appointment of a liquidator/committee • The liquidator/committee will have all the powers of the directors, which must be exercised as may be required for the company's beneficial winding up **Just and Equitable winding up** • Court will direct the conduct of the winding up and often directs that general winding up provisions in the Companies Law will apply **Creditors' Scheme of Arrangement** • Dependent upon the terms of the arrangement

Is there an automatic moratorium and if so when does it come into effect and what is its effect?	**Désastre** • Yes. Upon the appointment of the Viscount no one may continue or commence an action against the company or in relation to its assets or enforce or continue to enforce any right against or over its assets, without the Viscount's sanction. This does not affect the rights of secured creditors **Creditors' winding up** • Yes. Upon the appointment of a liquidator no one may continue or commence an action against the company or in relation to its assets or enforce or continue to enforce any right against or over its assets, without the Court's sanction. This does not affect the rights of secured creditors
Can companies be forcibly wound up other than when insolvent?	Yes. Just and equitable winding up.
To what extent are the procedures designed to facilitate a rescue of a company's business?	Jersey does not have a prescribed corporate rescue procedure. There has been an increasing use of the just and equitable winding upprocedure (eg, pre-pack sale, complete contract, trade stock).
Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?	Yes.

Cross Border

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	**Statutory Recognition:** Jersey can provide assistance to overseas appointees from designated "relevant" foreign jurisdictions, being: Australia, Finland, the UK, Guernsey and Isle of Man if requested by way of a letter of request. The Royal Court may still have regard to where the debtor company's centre of main interest as well as to the UNCITRAL Model on Cross Border Insolvency Law and is required to regard to the rules of private international law. **Common Law Recognition:** the Royal Court has inherent jurisdiction founded in comity and reciprocity to assist foreign courts. The Royal Court typically requires a letter of request from the foreign court and confirmation of reciprocity.
Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	Under statutory recognition the overseas appointee may have the same powers as granted by the law of the requesting jurisdiction or pursuant to Jersey law. It is a matter for the Court as to which powers might be granted.
What kinds of overseas appointees have been recognised in your jurisdiction?	Foreign liquidators, administrators, trustees in bankruptcy, provisional liquidators and fixed charge receivers have been recognised in Jersey.

Creditors

Question	Answer
What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?	**Immovable property** • Security over freehold property is taken by way of a registered encumbrance known as an hypothec. A judicial hypothec involves registering the obligation (e.g. a promissory note, a bond or a judgment debt) with the Public Registry; a hypothec conventionelle results from agreement between the parties; a hypothec légale is constituted by operation of law (e.g. rights of légitime) **Movable property** • Tangible movable property – a pledge (physical delivery of the tangible movable property) • Intangible movable property – a security interest created under the Security Interest (Jersey) Law 2012 (various conditions must be satisfied)
What is the effect on secured creditors of the commencement of an insolvency procedure?	For a security interest created under the Security Interest (Jersey) Law 2012 which has been perfected there is no effect on the power of the secured part to enforce. Immovable property will vest in the Viscount subject to any hypothec. The hypothec will be extinguished upon sale of the property by the Viscount.
Which creditors are preferred and to what extent?	Secured creditors in respect of immovable property are paid first out of the proceeds of sale of the property against which the hypothec is registered. Employees (6 months salary and holiday pay and bonus), health insurance, income tax, parochial rates and rent (to the extent permitted under customary law).
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	• Fees and expenses (including commissions in a désastre levied by the Viscount against the value of assets realised (up to 10%) and distributed (up to 2.5%)), are payable out of the estate • Liquidator's fees are those as agreed with the liquidation committee or creditors or, failing agreement, as fixed by the Royal Court (typically by reference to market rates)

Avoidance transactions

Question	Answer
What if any categories of transaction can be avoided/set aside?	**Potentially "Voidable Transactions" comprise:** • preferences • transactions at an undervalue • extortionate credit transactions Other than extortionate credit transactions, the transaction must be a transaction entered into when the company is insolvent or which causes the company to become insolvent, unless the transaction was with a connected person, in respect of whom the transaction, if within the relevant period, is voidable unless it is proved that the company was not insolvent or caused to become insolvent by the transaction. **The relevant period is:** • 12 months prior to the declaration of désastre or passing of the special resolution commencing the creditors' winding up in the case of an unfair preference or • 5 years in the case of transactions at an undervalue or extortionate credit transactions A "connected person" includes related companies, and directors and members of the company and related companies.
Who is responsible for seeking orders to set aside such transactions?	The Viscount or the liquidator.

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	**Yes, in the case of directors:** • Wrongful Trading: director knew or ought to have known there was no reasonable prospect of avoiding insolvency (unless they also took every reasonable step to minimise loss to creditors) or • Fraudulent Trading: business carried on with the intention to defraud creditors or for some other fraudulent purpose **Yes, in the case of shareholders:** • To the extent of their liability in respect of capital contributions • If the shareholder had received payment in respect of the redemption of shares within the 12 months prior to the désastre or passing of the special resolution commencing the creditors' winding up and such payment was not made from distributable profits/proceeds of a share issue

What liability can directors or other officers attract in respect of an insolvent company?	**Directors may attract liability for:** • Wrongful trading – a director or officer could be held liable for debts of the company arising after the time where there was no reasonable prospect of the company avoiding winding up/désastre • Fraudulent trading – a director or officer knowingly party to the fraudulent carrying on of business could be liable to contribute to the company's assets as the Court thinks proper
In what circumstances can directors be disqualified as a consequence of a company being wound up?	Where, upon an application by the Minister for External Relations, or the Attorney General or the JFSC the Court is satisfied that the relation to a company makes the person unfit to be concerned in the management of a company.

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Luxembourg

Restructuring and Insolvency Guide

Domestic Procedures

Question	Answer
What are the principal insolvency procedures for Companies in your jurisdiction?	• Bankruptcy (faillite) • Controlled management (gestion contrôlée) composition to avoid insolvency (concordat préventif de faillite) • Reprieve from payment procedure (sursis de paiement) Draft legislation was introduced in the Luxembourg Parliament in February 2013 aiming at favouring modernizing, reorganisations and insolvencies.
Are any of the procedures available on a provisional basis?	**Reprieve from payment procedure (sursis de paiement)** • It allows a business experiencing financial difficulties to suspend its payments for a limited period of time in order to restructure its debt • It has to be approved by creditors representing 75% of all the outstanding amounts **Composition to avoid insolvency (concordat préventif de faillite)** • Agreement between a company experiencing financial difficulties and its creditors under the control and with the approval of the court in order to avoid insolvency • Proposal must have the support of a majority of the creditors representing 75% of the outstanding amount For practical reasons, these two procedures are rarely used and will not be discussed further in this paper.
What requirements are to be satisfied for the procedures to be pursued?	**Bankruptcy (faillite)** • A company is considered bankrupt when (a) it is unable to pay its debts as they fall due, which characterises a state of cessation of payments (cessation de paiements), and (b) has lost its creditworthiness (ébranlement de crédit). These are cumulative conditions: a balance sheet test is not sufficient under Luxembourg law to ascertain whether a company is legally in a bankruptcy situation **Controlled management (gestion contrôlée)** • The purpose is to assist the company which has difficulties in meeting all of its commitments when due to reorganise its business or to convert its assets into cash under the supervision of the court and with the approval of the creditors

What is the procedure and how long typically does it take?	**Bankruptcy (faillite)** • It can be initiated either by the company itself, by the court of the district where its registered office is located, or by a creditor of the company • A receiver (curateur) in charge of the liquidation and a judge (juge commissaire) to supervise the proceedings are appointed by the court • There is no specific time limits for a bankruptcy proceeding. The length of the procedure depends on the complexity of the bankruptcy. It typically lasts 2 to 4 years **Controlled management (gestion contrôlée)** • Application is filed by the debtor to the commercial court • If accepted, a judge is assigned to prepare a report on the financial situation of the company • The plan must be approved by more than 50% in number of the creditors representing more than 50% in value of the debtor's liabilities • The length of the procedure varies depending on the specific timeframe for the suspension set by the court
Can any procedures be pursued without the involvement of the Court?	While out-of-court restructurings can be achieved on a contractual basis, all the above listed insolvency procedures are judicial procedures.
What is the effect upon control of the company and its assets during those procedures?	**Bankruptcy (faillite)** • The receiver administrates the winding-up of the insolvent company under the supervision of the judge-commissioner **Controlled management (gestion contrôlée)** • The company retains the power to manage its assets but is no longer allowed to act without the authorisation of the judge-commissioner
Is there an automatic moratorium and if so when does it come into effect and what is its effect?	**Bankruptcy (faillite)** • The insolvency judgement has the effect of stopping all attachment or garnishment proceedings brought by creditors (except for those benefiting from a security interests governed by the law of 5 August 2005 on financial collateral arrangements (the Financial Collateral Law)), although creditors may still commence or continue court proceedings against it **Controlled management (gestion contrôlée)** • Both secured (except for security interests governed by the Financial Collateral Law) and unsecured creditors are prevented from enforcing claims or court decisions against the debtor, although creditors may still commence or continue court proceedings against it
Can companies be forcibly wound up other than when insolvent?	Compulsory liquidation can be ordered by the court if a Luxembourg commercial company (i) either has pursued illegal activities, or has seriously infringed the provisions either of the Luxembourg commercial code or the provisions of the Luxembourg law on commercial companies or (ii) upon the request of a shareholder, or a group of shareholders if it is established that such shareholder has a solid ground for this request. This is typically the case when a conflict between shareholders creates a permanent paralysis of the corporate bodies of the company.

To what extent are the procedures designed to facilitate a rescue of a company's business?	**Bankruptcy (faillite)** • Its main purpose is to realize the assets of the debtor and to distribute the proceeds to the creditors **Controlled management (gestion contrôlée)** • It aims at assisting a company in financial difficulties in reorganising its business or converting its assets into cash
Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?	Yes, the receiver can, with the authorisation of the court, sale all or part of the company's business, either by public auction or private contract. While "pre-pack" sale is not available in Luxembourg, in certain circumstances (depending on the facts and the structure), a similar result can be achieved through the enforcement (by way of private sale or out-of-court appropriation) of a Luxembourg law pledge.

Cross Border

Question	Answer
To what extent do the Courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	**Recognition of foreign insolvency proceedings** • A formal recognition (exequatur) is required in order to give effect to the enforcement measures contained in a foreign judgment in relation to assets located in Luxembourg **EU cross-border insolvency proceedings** • The powers of an insolvency office holder appointed by the courts of the jurisdiction where the debtor has its centre of main interests are recognised as part of main proceedings without any further formalities
Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	As a general principle foreign insolvency proceedings regularly opened in another state not being a EU Member State, are recognised directly without any specific formalities except to the extent such recognition would require local enforcement measures, in which case formal recognition (exequatur) needs to be sought from the Luxembourg courts.
What kinds of overseas appointees have been recognised in your jurisdiction?	See above.
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?	Luxembourg courts would not assist in such applications.

Creditors

Question	Answer
What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?	**Immovable property** • Mortgage over real estate (hypothèque) **Movable property** • Pledge (gage) of moveable assets • Pledge (gage) and transfers of ownership as a security (transfert de propriété à titre de garantie) granted on financial instruments (eg. shares) and claims (eg. bank accounts, receivables) governed by the Financial Collateral Law • Pledges over a going concern (gage sur fonds de commerce)
What is the effect on secured creditors of the commencement of an insolvency procedure?	**Bankruptcy (faillite)** • An insolvency judgement has the effect of stopping all attachment or garnishment proceedings. However, the stay of enforcement does not apply to Luxembourg law security interests (like pledges) governed by the Financial Collateral Law **Controlled management (gestion contrôlée)** • Secured (except for security interests governed by the Financial Collateral Law) and unsecured creditors may not enforce against the debtor
Which creditors are preferred and to what extent?	• Insolvency receiver • Super-privileged employees (last 6 months' wages with a maximum of six times the minimal social salary) • Employees' contribution to social security (from salary) • Taxes • Employer's contribution to social security • Lessor and pledgor and special secured debts • Unsecured debts
What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?	Insolvency receivers are entitled to a fee for their service corresponding to a certain percentage of the assets realised and dividends paid to the creditors. If the assets of the company are not sufficient to cover these fees, the Luxembourg State will bear them and the receiver will receive a fixed fee.

Avoidance transactions

Question	Answer
What if any categories of transaction can be avoided/set aside?	Following contracts are automatically null and void if concluded during the "suspect period" (période suspecte) (ie. less than 6 months and 10 days before the judgment opening the insolvency proceeding): • Transaction at an undervalue • Payment made in respect of debts that are not yet due • In-kind payment made in respect of debts that are due • Security granted to secure obligations incurred before the security contract was entered into
Who is responsible for seeking orders to set aside such transactions?	The insolvency receiver. Additionally, notwithstanding the time when they were made (including prior to the suspect period), any contracts or payments can be annulled by the insolvency court if they were made in fraud of the creditors' rights.

Contributions to the liquidation estate and liability of officers

Question	Answer
Can directors or shareholders be required to contribute to the liquidation estate?	**Extension of a company's bankruptcy to a manager** • Bankruptcy can be extended to any legal or de facto director who either: (i) While acting under the corporate veil, has entered into commercial transactions for his own account or benefit (ii) Disposed of the company's assets as if they were his own or (iii) Pursued a loss-making business activity in his own interest and in an abusive manner **Debt contribution action** • Legal and de facto managers of a bankrupt company can be held personally liable for the company's outstanding debts, in whole or in part and, jointly or severally, if the bankruptcy results from serious and obvious faults (fautes graves et caractérisées) for which they are accountable
What liability can directors or other officers attract in respect of an insolvent company?	**Criminal liability: negligent bankruptcy (banqueroute simple)** • "Simple" bankruptcy convictions are, for example, failing to declare the company bankrupt in accordance with the legal provisions or not keeping regular accounting records **Criminal liability: fraudulent bankruptcy (banqueroute frauduleuse)** • Fraudulent bankruptcy convictions are, for example, fraudulently embezzled or diverted part of the company's assets or partly or entirely removed the books or accounting documents, or fraudulently removed, deleted or altered their contents

In what circumstances can directors be disqualified as a consequence of a company being wound up?	Directors who have committed serious offences or breaches of duty which have contributed to a company's bankruptcy can be prohibited from carrying out any commercial activities or being appointed as a director, manager, statutory auditor, approved external auditor or any similar position which includes the power to represent a company, for a period ranging from 1 to 20 years.

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