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UPDATE

Changes to voluntary liquidation in Guernsey

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This Update provides an overview the recent changes to Guernsey's insolvency regime affecting voluntary liquidations.

Introduction

The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020, which amends the Companies (Guernsey) Law, 2008 (the **Companies Law**) came into force on 1 January 2023. It is supported by the first set of Insolvency Rules (the **Rules**) which came into force on the same date.

This Update provides an overview of the key changes concerning voluntary liquidations.

For a more general overview of the new provisions, see our Update here.

Solvent or insolvent voluntary liquidation

Declaration of solvency

The previous regime made no distinction between solvent and insolvent voluntary liquidations. Directors are now given the option to make a declaration of solvency, which is a declaration stating that, in the opinion of the board, the company satisfies the solvency test.

If no declaration is made, any liquidator appointed must be independent. As such a director or former director, company secretary or administrator of the company would be ineligible to be the liquidator.

Any declaration must be made within five weeks of the resolution for winding up and must be filed with the Registrar within 30 days after the day of it being made. A company which fails to do so is guilty of an offence and liable to a civil penalty.

The Rules contain a standard form to be used for the declaration of solvency. Declarations must be in substantially the same format as the standard form and contain as a minimum the information set out in it.

What if the Company is later discovered to be insolvent?

The Companies Law also makes provision for what happens in the situation where, following a declaration of solvency being made, it becomes apparent to the liquidator that the company is in fact insolvent.

If the liquidator is not independent (subject to limited exceptions), they must convene a meeting of creditors to sanction their appointment or the appointment of an alternative liquidator or seek the court's sanction of their appointment.

The liquidator is required to also call at least one creditors' meeting within one month of their appointment or (as the case may be) the sanctioning of their appointment. This requirement does not apply where, in the opinion of the liquidator, there are no assets available for distribution to the creditors. Notice of the meeting shall be sent to all the company's creditors at least seven days before the meeting and contain

notice of the liquidator's appointment (or sanctioning thereof as the case may be) and an explanation of the likely process of the voluntary winding up.

These changes are aimed to introduce more independence and oversight into insolvent voluntary liquidations.

Meetings

Creditor meetings

Unless there are no assets available for distribution to creditors, in an insolvent liquidation the liquidator must call a meeting of creditors within 28 days of the liquidator's appointment. Details about the functioning of creditor meetings in liquidations are set out in Part 1 of the Rules.

Under the Rules at least 14 days' notice of creditors meetings should be given. Even if the Companies Law specifies a period of less than 14 days, the Rules state that the liquidator should nonetheless endeavour, where reasonably practicable, to give at least 14 days' notice. The notice of creditor meetings must include the details set out in the Rules, which includes a statement general nature of the business to be dealt with at the meeting.

Provided the liquidator complies with the notice requirements, no proceedings or decisions taken at a meeting will be invalid only because one or more creditors have not received notice of the meeting.

A creditor meeting may be held in Guernsey or elsewhere. In fixing the venue, the liquidator's primary consideration should be the convenience of the creditors entitled to attend. The Rules make provision for creditors to attend the meeting by telephone, video conference, or other electronic medium.

In relation to the conduct of the creditors meeting, the Rules state that unless the Companies Law requires otherwise:

- One creditor present at a meeting (in person or by proxy) is a quorum.
- The liquidator shall be the chair of a creditor meeting, or, if they are unavailable, a suitably experienced person nominated by them. The chair determines the entitlement of persons to vote at the meeting.
- Voting by creditors is by simple majority in value of the creditors present in person or by proxy and voting.

There are provisions about the steps creditors need to go through to be entitled to vote, either in person or by proxy. A creditor may not vote in respect of a claim for an unliquidated amount, or value which is not ascertained, except where the chair agrees to an estimated minimum value of the claim for the purpose of entitlement to vote and admits the claim for that purpose alone. A secured creditor is entitled to vote only in respect of the balance, if any, of the debt after deducting the value of the security interest as estimated by them.

A creditor is entitled to appoint another person to act as proxy to exercise the creditor's rights to attend, speak and vote at any creditor meeting. A template proxy form is annexed to the Rules and any proxy form must be in substantially this form.

General meetings

The Rules provide that the general meeting required under the Companies Law to take place each year if the winding up is not complete shall take place within three months immediately following the expiration of the relevant year.

Other changes

The amendments introduce a number of other changes to the liquidation regime that are relevant in a voluntary winding up:

- Liquidators are required to report 'delinquent' officers to the Guernsey Registry and, in the case of regulated entities, to the Guernsey Financial Services Commission. A delinquent officer is any past or present officer of the company against whom there are grounds for the Royal Court to make a disqualification order under the relevant provisions of the Companies Law. Annexed to the Rules is a standard form which should be used to make such a report.

- Liquidators now have the power to disclaim onerous property, such as unprofitable contracts. This is done by serving a notice on certain persons specified in the Law. There are protections in place for persons affected by the disclaimer. The Rules provide more detail around the requirements for the notice and confirm that any rights relating to netting, set-off, or compensation or enforcement thereof are unaffected.
- Liquidators now have more power to obtain information and documents from officers, employees and those involved in the formation of companies.
- A liquidator has the power to apply to the Court to set aside transactions at an undervalue and extortionate credit transactions, in addition to current powers of a liquidator to bring actions for misfeasance in office or the making of unfair preferences to creditors.
- Companies in liquidation are now exempt from the requirement to have their accounts audited.

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