

# Guernsey's Companies Law

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## Introduction

The Companies (Guernsey) Law, 2008 as amended (the **Companies Law**) modernised Guernsey's companies regime, and consolidated all company legislation, including relating to cell companies, financial assistance, share buybacks, amalgamations and migrations, into one place. The Companies Law is intended to be flexible to ensure that Guernsey companies remain appealing when compared to their offshore competitors.

## Online company registry

Guernsey offers an electronic companies registry (the **Registry**). Filing of company submissions, such as appropriate resolutions and annual validations, is all done online. Basic company information can be searched online free of charge. More detailed company information can be searched online by licensed fiduciaries, known as 'corporate service providers' (**CSP**) for a small fee. We are pleased to be able to assist with company searches through our associated company, Mourant Governance Services (Guernsey) Limited (**MourantGS**).

## Types of Guernsey company

The types of company available in Guernsey fall into two categories, namely non-cellular and cellular.

The liability of a company's members will depend on the type of company:

1. a **non-cellular** company:
  - **limited by shares**: the most familiar type of company, a company limited by shares has a share capital and its members (shareholders) have limited liability whereby any liability for the company's debts is limited to the amount (if any) unpaid on the shares held
  - **limited by guarantee (LBG)**: an LBG can, but does not have to, have a share capital. Liability for the LBG's debts is also limited but in the case of an LBG, liability is limited to the guaranteed amount made by its guarantee members, ie the amount a guarantee member has agreed to contribute to the assets of the LBG in the event of its winding up (which continues for one year after ceasing to be a member)
  - with **unlimited liability**: similar to an LBG, an unlimited liability company can have a share capital (but does not have to) however the liability of its members is **unlimited** both while a member of the company and for one year after ceasing to be a member
  - with **mixed liability**: a mixed liability company gives the option of having a share capital (if preferred) and a variety of different types of members, eg guarantee members, unlimited members and shareholders (if it has share capital). Members' liability can be prescribed by the company's memorandum and articles of incorporation or, in the absence of such, members' liability will be joint and several to the maximum extent of their liability.
2. a **cellular** company **with limited liability**:
  - a **protected cell company (PCC)**: a PCC is a company which has a non-cellular core and separate cells. It is a single legal person; however the protected cells (a **cell**) are **not** (although each cell must have its own name or designation and have its own cell capital). Assets in a PCC are either 'cellular', ie attributable to a particular cell or 'non-cellular', ie core assets. Subject to certain exceptions, the assets of one cell are **not** available to shareholders or creditors of another cell, or to shareholders or creditors of the core. Assets held by the PCC which are not distinctly held by a particular cell are deemed to be assets of the core
  - an **incorporated cell company (ICC)**: an ICC is a company with the ability to create its own incorporated cells (**IC**) as part of its corporate structure for the purpose of segregating and protecting the assets of the incorporated cells. An ICC is based on the same principles as a PCC in that an ICC may comprise any number of ICs however, unlike a protected cell of a PCC, an IC is a single legal person separate from its ICC with many of the attributes of a non-cellular company.

## Company incorporation

Incorporation of a Guernsey company can only be arranged by a CSP and is processed online using the Registry's online services portal. We can offer this service through MourantGS.

A standard company incorporation takes 24 hours from the point of application, which can be made once MourantGS has received the requisite documentation, duly completed and signed and client verification requirements have been satisfied. In appropriate cases, and for a higher fee, a Guernsey company can be incorporated in as little as two hour or 15 minutes.

Note that the consent of the Guernsey Financial Services Commission (the **Commission**) is required for the incorporation of cellular companies

### **Articles**

The articles of incorporation (**Articles**) set out the regulations for administering a company. The Registry provides a standard form of Articles which must be used where a company is incorporated in 15 minutes. Alternatively MourantGS can provide either its house form (equivalent to 'Table A' articles) or tailored Articles, in which case the Registry's standard Articles must be expressly disapplied. The Companies Law allows provisions to be entrenched in the Articles either on incorporation or later by amendment subject to a members' unanimous resolution.

### **Registered office and company name**

A Guernsey company is required to have a registered office in Guernsey to which communications and notices may be addressed, at which the company's name must be displayed, and where the register of members must be kept. Certain components in its name are compulsory, for example 'Limited' or equivalent, in the case of a company limited by shares, and 'PCC' or equivalent, in the case of a protected cell company. Further a Guernsey company can be incorporated with, or register, an alternative name, which does not need to be its principal name, expressed in non-Roman alphabet, characters or script. It is possible to apply to the Registrar to reserve a company name, prior to incorporation or on an application to change a company's name, for a period of three months for a small fee. A company can change its name by special resolution or as otherwise specified in its Articles.

### **Migration, amalgamation and conversion**

For some years Guernsey has had in place a statutory basis for company migration which permits Guernsey companies to emigrate from, and non-Guernsey companies to migrate into, Guernsey. In addition, a Guernsey company may amalgamate with one or more other companies and continue as one company, provided in the case of non-Guernsey companies that the law of their jurisdiction of incorporation allows this. The Companies Law also allows for conversions of companies, either concerned with their cellular status, for example a non-cellular company may be converted into a cellular company and vice versa, or with the liability of their members, for example a limited liability company may convert to be a mixed liability company.

### **Unrestricted objects and ratification**

Unless the memorandum of incorporation (**Memorandum**) of a company states otherwise, its objects will be unrestricted and its actions will not be called into question on the basis of lack of capacity. The Companies Law contains express power for members to ratify any conduct by a director which exceeds his powers or amounts to negligence, default, breach of duty or breach of trust in relation to the company.

### **Members and directors**

A Guernsey company must have at least one member and at least one director. It may, but need not, have a secretary. Before they can be appointed as such, directors are required to both be registered on a separate register of directors maintained by the Registrar and to declare that they are eligible to be appointed as a director under the Companies Law. This simply means that they have not been disqualified in Guernsey (or elsewhere) by reason of misconduct or unfitness and that they are not a minor.

### **Directors' indemnity**

A director may not be exempted from or indemnified directly or indirectly by his company (or an associated company) in respect of any liability incurred for negligence, default, breach of duty or breach of trust. A company can, however, purchase and maintain directors' and officers' insurance cover.

## Directors' interests

The Companies Law includes a statutory regime for disclosure of directors' interests. Where, in a worst case scenario, a director's interest is not disclosed to the board of directors (the **Board**) at the time of a transaction, the transaction may be avoided within three months of the date of the company becoming aware of the interest unless it is ratified by shareholders or the company received fair value for the transaction. There is, however, protection for a third party who transacts with the company in good faith, for valuable consideration and without knowledge of the director's failure to disclose his interest.

## Resolutions and meetings

Resolutions of the members of a Guernsey company may be passed at a general meeting or as a written resolution (other than a resolution to remove an auditor) and shall be either passed as an ordinary resolution, a special resolution, a waiver resolution (requiring a 90 per cent majority) or a unanimous resolution. Resolutions not filed by the requisite deadline are not invalid, but an offence will be committed. Provided that a company's Articles allow (or the members have otherwise agreed to that method of notice), the Companies Law permits notices to be sent to members by electronic means, including by posting on the company's website.

## Annual validation

Guernsey companies are required to file an annual validation with the Registry between 1 June and 31 July each year containing basic company information current on the previous 31 May. Failure to file an annual validation by 31 July will incur a penalty (which replaces the previous system of late filing fees).

## No AGM or audit

A Guernsey company, other than regulated companies and certain 'large' companies, are able to waive the requirement to be audited by passing a members' waiver resolution. Except for the first financial year, this must be done prior to the start of the company's financial year in which it is to apply. Such an exemption can apply to any number, or an indefinite number, of financial years. A similar waiver resolution may be passed to exempt a company from the requirement to hold an AGM. All waiver resolutions must be filed with the Registry within 30 days.

## Share capital

There is no requirement for a Guernsey company to have an **authorised** share capital, although it may do so if preferred. There is no document duty payable on the incorporation of a Guernsey company. Shares may have a nominal value or no par value, and in either case the consideration received for the issue of a share must be paid into a single share capital account; there is no requirement to maintain a separate share premium account.

The directors may, to the extent that they are authorised by the company's Memorandum or Articles or by an ordinary resolution of the company, exercise any power of a company to issue shares in the company. Such an authorisation may state the maximum number and/or aggregate value of the shares to be issued and specify the date, event or circumstance on which such authorisation will expire or, in each case, may be unlimited.

## Solvency model

Guernsey has moved away from the capital maintenance doctrine which prevented a company from paying dividends from sources other than distributable profits or from paying capital to shareholders except in the case of a winding up. Instead the Companies Law operates a solvency model and consistently applies a solvency test (see below).

## Distributions and dividends

Subject to the directors being satisfied that the company meets the solvency test immediately after the time of payment, dividends do not need to be paid out of any particular account or source and, specifically, need not be paid from distributable profits or reserves. An equivalent test applies for other 'distributions' such as redemptions, share buybacks, capital reductions, bonus issues and distributions on winding up.

## **The solvency test**

Prior to making payments to shareholders, a Guernsey company must satisfy the solvency test, which requires that the company is able to meet its debts and liabilities as they fall due and has assets which are greater than its liabilities, and the directors must certify that this is the case. In the case of a regulated company any financial resources requirement of the Commission must also be satisfied.

When considering whether a company will pass the solvency test, the directors must have regard to the most recent accounts of the company and all other circumstances that they know or ought to know affect or might affect the value of the company's assets and liabilities. In determining the value of assets and liabilities, directors may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances. There is no express requirement to consider contingent liabilities under the solvency test in the Companies Law although, particularly in relation to the balance sheet test, as a matter of good corporate governance, contingent liabilities ought to be considered.

If the correct procedure is not followed or there are no reasonable grounds for certifying that the solvency test is met, the directors may be personally liable to reimburse the relevant dividend or distribution if it cannot be recovered from members. Directors would not however be liable to repay a distribution where the company satisfied the solvency test immediately after the distribution was made and does, at that time, satisfy the solvency test.

## **Redeemable shares and share buy backs**

A company may issue redeemable shares or acquire its own shares (including redeemable shares) provided that it is authorised by its Memorandum or Articles or, in the case of a share acquisition, by the terms of the issue of those shares. There is no requirement for shares to be acquired out of a particular account or source.

A company may redeem a share (whether or not it is fully paid) provided that the redemption would not result in the company having no members. The acquisition of own shares may either be a market acquisition or pursuant to a contract, in each case authorised by members' ordinary resolution.

## **Treasury shares**

A company may hold up to 100 per cent of the total number of issued shares of any class of shares as treasury shares if authorised to do so by its Memorandum or Articles or, subject to anything to the contrary in its Memorandum or Articles, an ordinary resolution and provided that at least one share is held by a person other than the company. Where it does so, the rights in respect of those shares cannot be exercised, and the obligations in respect of those shares cannot be enforced, by or against the company.

## **Financial assistance**

A company or its subsidiary may give financial assistance directly or indirectly for the purpose of, or in connection with, an acquisition of shares in the company provided that the company follows the procedure for the making of a distribution.

## **Takeovers**

The Companies Law permits the squeeze out of minority members by a proposed purchaser who has agreement to acquire not less than 90 per cent in value of the shares to which the offer relates. This will permit the compulsory acquisition of the remaining shares. The UK Panel for Takeovers and Mergers was formally appointed by the Companies (Appointment of Panel on Takeovers and Mergers) Regulations, 2009 to oversee takeovers and mergers of Guernsey companies.

## **Schemes of arrangement**

There is statutory provision for court sanction of schemes of compromise or arrangement if a majority of 75 per cent in value of members or creditors (as the case may be) vote in favour.

## Protection of members

Members may apply to court for the following protections:

- an order restraining the doing of an act which is beyond the company's capacity or beyond the powers of the directors
- to have a variation of the rights of a class of shareholders cancelled, or
- for an order that the affairs of the company are being, have been or are proposed to be conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members.

## Voluntary strike off

Application for voluntary strike-off of a Guernsey company may be made by the Board and submitted to the Registry online. The company will be struck off and dissolved two months after the Registrar has given notice to the public. Application must not be made if the company has any outstanding liabilities. Further, application cannot be made if in the preceding three months the company has changed its name; traded or carried on business; disposed for value any property or rights; engaged in any other activity; if it is currently party to proceedings; if its affairs have been declared *en état de désastre*; or possession or control of its property or affairs has been taken by or on behalf of creditors. A copy of such application must be given to members and any employees.

## Administration

The Court may make an administration order in respect of a Guernsey company (or a cell of a protected cell company) if it is satisfied that it does not satisfy or is likely to become unable to satisfy the solvency test. The order will be intended to achieve either the survival of the company (or cell), and the whole or any part of its undertaking, as a going concern or a more advantageous realisation of the company's (or cell's) assets than on a winding up.

## Winding up

A company may be wound up voluntarily by ordinary resolution if, as set out in its Memorandum or Articles, a fixed period for the duration of the company expires or an event occurs upon which the company is to be dissolved. Alternatively, a company may be voluntarily wound up by special resolution.

The Court may wind up a company in various circumstances, including where it is unable to pay its debts.

## Fraudulent and wrongful trading

A director may be guilty of the offences of fraudulent trading (broadly, carrying on the company's business with the intent to defraud creditors, whether of the company or of any other person, or for any fraudulent purpose) and wrongful trading (where a director of a company which has gone into insolvent liquidation failed to take every step that he should reasonably have taken to minimise the potential loss to the company's creditors when he knew or ought to have concluded that there was no reasonable prospect of the company avoiding an insolvent liquidation).

## Resident agent

The Companies Law requires that a CSP or, where a company does not have a CSP, a Guernsey resident individual director of the company, must be appointed as a company's 'resident agent'. The resident agent is responsible for taking reasonable steps to ascertain the identity of the beneficial owners of the company, in accordance with the Beneficial Ownership of Legal Persons (Guernsey) Law, 2017, the details of which must be recorded and maintained on an ongoing basis and which must be produced, on request, to the authorities. Companies (and their subsidiaries) listed on a recognised stock exchange, open and closed-ended investment companies (and their subsidiaries) and companies regulated by the Commission are not required to have a resident agent. A member can have their share rights suspended or cancelled if they do not disclose details of any underlying beneficial owners.

## Contacts

Mourant Ozannes' Guernsey Corporate team is well placed to assist with all aspects of Guernsey's Companies Law.

A full list of contacts specialising in the Companies Law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2021 MOURANT OZANNES ALL RIGHTS RESERVED