GUIDE TO INSOLVENCY IN THE ISLE OF MAN

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PREFACE

This Guide is a summary of the law and procedures relating to insolvency in the Isle of Man.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the corporate team, using the contact information provided at the end of this Guide.

Appleby
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1. **OVERVIEW OF THE ISLE OF MAN REGIME**

The Isle of Man’s corporate insolvency procedure is governed by Part V of the Companies Act 1931 (**Act**) and the Companies (Winding-up) Rules 1934 (**Rules**). Companies may be wound up by the court, voluntarily or subject to the supervision of the court (which is unusual and not explored further in this brief guide).

Concepts designed to promote a “rescue culture” such as administration, examination or company voluntary arrangements do not exist in Isle of Man law.

There is no requirement for insolvency office holders to be formally regulated. Any individual may act as a liquidator in a voluntary liquidation, however where the court is appointing a liquidator it is generally reluctant to appoint persons who are not known to it and will usually only appoint a liquidator that (a) is resident within the jurisdiction, (b) has the necessary experience and (c) holds the necessary levels of insurance. It is possible to have an overseas insolvency practitioner appointed, but the court will insist on a joint appointment with a local experienced liquidator. Only individuals can be appointed to wind up Isle of Man companies; however this does not prevent an officer or employee of a body corporate from being appointed.

The Isle of Man does not have the English “cash flow” and “balance sheet” test of insolvency. Instead, the court will consider a company’s ability to pay its debts taking into account its contingent and prospective liabilities. This goes further than the English cash flow test, but falls short of the full balance sheet test.

2. **METHODS OF LIQUIDATION**

2.1 **Voluntary Winding Up (by Creditors or by members)**

The process is normally commenced by the directors convening a general meeting to put a resolution to the shareholders that the company be wound up and a liquidator appointed (**Winding Up Resolution**). However, shareholders could themselves requisition a general meeting without the instigation of the directors.

To be a members’ voluntary winding up, the directors must (prior to the Winding Up Resolution) swear a declaration that the company is solvent and able to pay its debts within a period of one year. In an insolvency situation, where the directors cannot swear such a declaration, the winding up will be a creditors’ winding up.

2.2 **Winding Up by the Court (Compulsory Winding Up)**

A company may be wound up by the court if:

- it has resolved by special resolution to be wound up by the court;
- being a public company, it has not complied with the conditions for the commencement of business required by the Act;
- it does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- except in the case of a private company limited by shares or by guarantee, the number of its members is reduced below two;
- it is unable to pay its debts; or
- the court is of opinion that it is just and equitable that the company should be wound up.
A petition to wind up the company may be brought by:

- the company itself;
- a creditor;
- a shareholder;
- the Isle of Man Treasury;
- the Financial Services Authority.

Note that the Financial Services Authority would only bring a claim to wind up a company if it is clearly in the public interest to do so.

3. **DISTRIBUTION OF PROPERTY**

In both a voluntary and a compulsory winding up the liquidator’s duties are broadly to:

- get in and realise the property of the company;
- pay its debts according to the priorities laid down by law; and
- distribute any balance among the shareholders.

The distribution of net assets in favour of creditors in a creditors’ voluntary winding up or a compulsory winding up is based on *pari passu* ranking of ordinary creditors. In both modes of winding up, this is subject to:

- secured creditors and their priorities inter se, and those whose property interests do not fall within the company’s estate; and
- in the case of the class of unsecured creditors, any rights of preference under the Preferential Payments Act 1908 and any contracted or statutory subordination.

4. **MORATORIA AND PROTECTION OF THE COMPANY’S ASSETS**

There are provisions in the Act which are intended to maintain the assets of the company pending and during the insolvency regime for the benefit of its creditors and to prevent the dissipation of assets, in summary:

- proceeding or commencing an action against the company is not possible without leave of the court. In the case of a voluntary winding up, the liquidator may apply to court to have proceedings stopped;
- in a winding up by the court, any disposition of the property of the company including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up shall be void;
- in a voluntary winding up, the company must cease to carry on its business except so far as is necessary for its beneficial winding up;
- any transfer of shares made after the commencement of a voluntary winding up or any alteration in the status of members without sanction of the liquidator is void;
- a creditor’s benefit of the attachment of a debt or an execution against the property of a company cannot be retained unless execution is completed before the commencement of a winding up;
- where notice that a company is being wound up is served on the coroner before the completion of an execution, the coroner must deliver to the liquidator any goods or any money he has seized or
received in part satisfaction of the execution. The costs of the execution are a first charge on the goods or money delivered, and the liquidator is authorised to sell some or all of the goods for the purpose of satisfying the charge.

5. **CLAW BACK, RECOVERY AND DISCLAIMER PROVISIONS**

5.1 **Fraudulent Trading**

Where the directors of a company (past or present) knowingly carry on the business of the company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose, they commit an offence. If a company is held to have been trading fraudulently the directors of that company would be personally liable for the debts of such company without limitation. Continuing to trade where there is no prospect of a company being able to pay its debts is at least prima facie evidence of fraudulent trading. The Isle of Man law has no equivalent of wrongful trading.

5.2 **Fraudulent Preference**

Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property done by or against a company which would, if made or done by or against an individual, be deemed in a bankruptcy a fraudulent preference, shall be deemed, in the event of its being wound up, a fraudulent preference of its creditors and be invalid. Certain transactions are void as fraudulent preferences if entered into within four months prior to the commencement of liquidation of a company. A payment will be a fraudulent preference if it is made with the dominant intention of giving the creditor a preference over other creditors and if it is a voluntary act. Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors is also void.

5.3 **Floating Charge**

Where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding up will be invalid, unless it is proved that the company immediately after the creation of the charge was solvent, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount.

5.4 **Fraudulent Assignments**

All fraudulent assignments or transfers of a debtor’s goods or effects are void and of no effect against its creditors. Only creditors known at the time the transfer was made are taken into account. If a company is to make any transfer of its assets or enter into any agreement then it must ensure that it receives good consideration to do so otherwise that transaction could be liable to be set aside in the event of the liquidation of that company.

5.5 **Commercial Benefit**

There is no prescribed treatment of transactions at an undervalue in Isle of Man statute, however at common law, where a third party is on notice that directors are acting in breach of their fiduciary duty by not obtaining full benefit for a company, any benefits conferred on that third party as a result of the transaction will be held by it for the company as constructive trustee. In addition, the Act provides that if in the course of a winding up it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or officer of the company, has misapplied, retained or become liable for any money or property of the company, or has committed any misfeasance or breach of trust in relation to the company, the court may order him to repay the money or property with interest to the company.
5.6  **Disclaimer**

A liquidator may disclaimer onerous property at any time within twelve months after the commencement of the winding up (or such extended period as may be allowed by the court). Any person injured by disclaimer is deemed to be a creditor of the company to the amount of the injury, and may prove this amount as a debt in the winding up. Insolvency of itself does not terminate a contract unless the parties have provided for it as an act of termination.

6.  **ENFORCING SECURITY**

6.1  **Receivership**

This is not a collective procedure and can be initiated at any time a fixed or floating charge granted by the borrowing company allows. A receiver owes a duty of care to his appointer, but only limited legal obligations to others. Receivers are not given statutory powers so an Isle of Man law governed security agreement must express in full all the powers the secured creditor would wish a receiver to be able to exercise. The primary duty of the receiver is to try and bring about a situation in which interest on the secured debt may be paid and the debt itself repaid. The receiver must act without dishonesty, improper motive or bad faith. Provided that the receiver can demonstrate good faith, then, subject to certain specific duties, he is entitled to sacrifice the interests of the company in pursuit of that end.

There are no equivalent proceedings in the Isle of Man to administration or examinership.

Other enforcement options will of course depend upon the specific security being enforced and the precise assets over which the security has been taken.

For more specific advice on insolvency in the Isle of Man, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).