

What a creditor needs to know about liquidating an insolvent Cayman company

GUIDE

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Introduction

This guide examines what a creditor needs to know about liquidating an insolvent Cayman company under the Companies Act (2023 Revision) (the **Act**) and the Companies Winding Up Rules (2023 Consolidation) (the **Rules**).

A brief anatomy of a creditor initiated liquidation process is included at the end of this guide.

When is a company insolvent?

The Act provides a number of grounds on which a company may be wound up, including that the company is unable to pay its debts. This is typically the ground relied upon by creditors seeking to wind up an insolvent company.

A company will be deemed to be unable to pay its debts if:

- it fails to satisfy a statutory demand exceeding CI\$100;
- execution of a judgment is returned unsatisfied in whole or in part; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts. The court will apply a cash flow insolvency test for this purpose.

The cash flow test of solvency is not confined to consideration of debts that are immediately due and payable but also permits consideration of debts that will become due and payable 'in the reasonably near future'¹.

What is a statutory demand?

A statutory demand is a formal written request for the payment of a debt given by a creditor to a debtor.

Is it essential to serve a statutory demand?

It is not essential for a creditor to serve a statutory demand before applying to appoint a liquidator because it may demonstrate by other means that a company is unable to pay its debts. In most cases however, it is advisable to serve a statutory demand first because the company will be presumed to be insolvent if it does not satisfy or compound the debt within 21 days of the date of service of the statutory demand.

If a creditor has an unsatisfied judgment against the company, it may prefer to apply to appoint a liquidator on the grounds of insolvency using the unsatisfied judgment as evidence of the company's inability to pay its debts as they fall due. However, to avoid a potential argument being raised by the judgment debtor that, notwithstanding its failure to satisfy any order or judgment for payment of a liquidated sum, it remains able to pay its debts as they fall due, it is advisable that a statutory demand for the judgment sum be issued as a preliminary step.

What must a statutory demand say?

A statutory demand must comply and be served in accordance with the Rules.

It must:

- be in the form prescribed by the Rules;
- be for a debt which is not less than the statutory minimum amount (as at the date of this guide, CI\$100);
- state the amount, the date on which the debt fell due, the currency of the debt and the consideration for it;
- if the amount claimed includes any charge by way of interest not previously notified to the debtor as included in its liability, or any other charge accruing from time to time, the demand must state the grounds upon which the debtor is liable to pay such interest or charges and contain particulars of the way in which interest or charges are calculated;
- be dated and signed by (i) the creditor; or (ii) if the creditor is a firm, any partner of the firm, or if the creditor is a body corporate, any director or officer who is duly authorised to make the demand;

¹ As determined by the Cayman Islands Court of Appeal in *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* 2016 (2) CILR 514.

- contain the creditor's address (or contact details of the signatory who signs it on behalf of the creditor, as the case may be);
- state that if payment is not made within 21 days of the date of service, the company will be deemed insolvent and a winding up petition may be presented against it; and
- state information about the ways in which the company may make payment, including details of a bank account into which the amount owing may be wire transferred.

Setting aside a statutory demand

There is no statutory mechanism by which a debtor can apply to set aside a statutory demand.

Instead, the remedy available to the debtor is to apply for and obtain either an injunction or an undertaking against the creditor within 21 days from the date of service of the demand. The court is likely to grant an injunction preventing the presentation of a winding up petition if it appears that the debtor is solvent and one of the following applies:

- the debt is genuinely disputed on substantial grounds; or
- the debtor has a cross claim or right of set-off against the creditor that exceeds the amount claimed in the demand or reduces the disputed amount of the debt to less than the statutory minimum; or
- the debtor has a reasonable excuse for not paying the debt claimed.

In short, the debtor needs to demonstrate that the presentation of a winding up petition will be an abuse of process.

How may a company be put into liquidation?

The Act provides that a company may be wound up:

- compulsorily by order of the court;
- voluntarily:
 - by virtue of a special resolution of its members;
 - because the period, if any, fixed for the duration of the company by its articles of association has expired; or
 - because the event, if any, has occurred, upon the occurrence of which its articles of association provide that the company shall be wound up; or
- under the supervision of the court.

For the purposes of this guide, we will only consider compulsory liquidations.

Official liquidation

A company may be wound up by the court if —

- (a) the company has passed a special resolution requiring the company to be wound up by the court;
- (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (c) the period, if any, fixed for the duration of the company by its articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which its articles of association provide that the company is to be wound up;
- (d) the company is unable to pay its debts; or
- (e) the court is of the opinion that it is just and equitable that the company should be wound up.

Provisional liquidation

Provisional liquidators are typically appointed to protect the assets of a company and as an interim measure pending the hearing of the winding up petition. However, provisional liquidators may also be appointed for the purpose of presenting a compromise or arrangement to creditors. The company must be, or be likely to become, unable to pay its debts, and demonstrate reasons for why the compromise or arrangement is more advantageous for its creditors than a winding up.

Creditors and members are not able to apply for the appointment of provisional liquidators for this purpose, and instead need to demonstrate that such an appointment is necessary to prevent mismanagement or misconduct by the directors, the dissipation or misuse of assets, or the oppression of minority shareholders. However, once appointed, provisional liquidators may nevertheless consider whether a restructuring is appropriate.

Appointment of liquidator

The proposed liquidator (or provisional liquidator) must consent in writing to being appointed.

Functions and powers of liquidators

Functions and powers of an official liquidator

It is the function of an official liquidator to (i) collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and (ii) report to the company's creditors and contributories on the affairs of the company and the circumstances in which it has been wound up.

A liquidator's powers are prescribed by the Act, and some of these powers are only exercisable with court sanction.

The following powers are exercisable without sanction:

1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as that person considers necessary.
2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.
3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against that person's estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.
4. The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.
5. The power to promote a scheme of arrangement pursuant to section 86 of the Act.
6. The power to convene meetings of creditors and contributories.
7. The power to do all other things incidental to the exercise of that person's powers.

The following powers are only exercisable with sanction:

1. The power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
2. The power to carry on the business of the company so far as may be necessary for its beneficial winding up.
3. The power to dispose of any property of the company to a person who is or was related to the company.
4. The power to pay any class of creditors in full.
5. The power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
6. The power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
7. The power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.

8. The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.
9. The power to raise or borrow money and grant securities therefor over the property of the company.
10. The power to engage staff (whether or not as employees of the company) to assist that person in the performance of that person's functions.
11. The power to engage attorneys and other professionally qualified persons to assist that person in the performance of that person's functions.

The principles to which the court must have regard on a sanction application are well settled². Although the decision to sanction an exercise of a power under the Act is a matter for the court, it must consider the correctness or otherwise of the liquidator's decision, having regard to all of the evidence before it including the financial consequences of the relevant decision for stakeholders, the wishes of stakeholders and if their interests are best served by the relevant decision.

Authorities confirm that while the court should ordinarily respect the commercial judgment of the liquidators and grant sanction unless the course of action proposed is so untenable that no reasonable liquidator should take it, the court must also take into account the wishes of stakeholders who, if uninfluenced by extraneous matters, will be the best judges of where their interests lie³.

Powers of a provisional liquidator

A provisional liquidator's powers are limited to those contained in the court order appointing them.

A 'light touch' appointment is permissible (i.e. where the board may retain day-to-day control of the company subject to oversight by the provisional liquidators) however the decision as to the extent a company's affairs may remain in the control of its board, whilst being in provisional liquidation, is ultimately determined by the court. The 'light touch' provisional liquidation approach has historically been the preferred route in circumstances where there are foreign main proceedings afoot, for example under Chapter 11 of the United States Bankruptcy Code.

As a result of amendments to the Act in 2022, a company seeking to restructure may also now present its own (restructuring) petition to the court seeking the appointment of restructuring officers with power to implement that restructuring. A restructuring officer's powers are also limited to those contained in the court order appointing them. We do not discuss the restructuring officer regime in this guide as the application is one that is made by the company.

Court order

Who may apply?

A company may be wound up and put into official liquidation by the court on a petition presented by the company, a creditor (including any contingent or prospective creditor or creditors), any contributory or contributories, or the Cayman Islands Monetary Authority (the **Authority**).

Where expressly provided for in the company's articles of association, the directors of a company incorporated before the commencement of the amendment have the authority to present a winding up petition on its behalf or where a winding up petition has been presented, apply for the appointment of a provisional liquidator, on behalf of the company without the sanction of a members' resolution passed at a general meeting.

Directors of a company incorporated after the commencement of the amendment may also present a petition on behalf of the company on the grounds that the company is unable to pay its debts or, where a winding up petition has been presented, apply for the appointment of a provisional liquidator. The articles of association of a company may, of course, expressly remove or modify a directors' authority to proceed in the manner above.

A contributory is not entitled to present a winding up petition unless either —

² As summarised in *In the Matter of SAAD Investments Company Limited* (In Official Liquidation) (Unreported, 1 October 2019, Smellie CJ).

³ See generally *In the matter of Pacific Harbor Asia Fund 1, Ltd* (In Official Liquidation) (Unreported, 6 May 2020, McMillan J).

- (a) the shares in respect of which that person is a contributory, or some of them, are partly paid; or
- (b) the shares in respect of which that person is a contributory, or some of them, either—
 - (i) were originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition; or
 - (ii) have devolved on that person through the death of a former holder.

A winding up petition may be presented by the Authority in respect of any company which is carrying on a regulated business in the Cayman Islands on the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law.

Application

Every petition must be supported by an affidavit verifying that the contents of the petition is correct and an affidavit sworn by the person or persons nominated for appointment as official liquidator/s stating, *inter alia*, that they are a qualified insolvency practitioner and willing to act if so appointed by the court.

On hearing the application, the court may appoint a liquidator, dismiss the application, adjourn the hearing conditionally or unconditionally, make a provisional order or any other order that it thinks fit. However, the court cannot refuse to make a winding up order on the sole ground that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

If the petitioner is contractually bound not to present a petition against the company, the court will dismiss a winding up petition or adjourn the hearing.⁴ If a company has presented a (restructuring) petition for the appointment of restructuring officers that has not been withdrawn or dismissed, alternatively if restructuring officers have been appointed, the application for the appointment of a liquidator to the company will not be permitted to proceed except with the permission of the court. That permission, if granted, may be subject to such terms as the court may impose.

The court may also, at any time after an order for winding up, on the application either of the liquidator or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings either all together or for a limited time, on such terms and conditions as the court thinks fit.

Debt should be undisputed

A creditor may apply to appoint a liquidator as a way to pressure a defaulting debtor into paying a debt but such an application should only be made if:

- the debt is undisputed or incapable of being disputed; and
- the application will benefit all creditors of the class to which the applicant belongs.

It is an abuse of process to make an application where a debt is disputed on substantive grounds or to secure a collateral purpose unrelated to the debt.

When does a company's liquidation start?

If, before the presentation of a petition for the winding up of a company by the court:

- (a) a resolution has been passed by the company for voluntary winding up;
- (b) the period, if any, fixed for the duration of the company by the articles of association has expired; or
- (c) the event upon the occurrence of which its articles of association provide that the company is to be wound up has occurred,

the winding up of the company is deemed to have commenced at the time of passing the resolution or the expiry of the relevant period or the occurrence of the relevant event.

⁴ See our update [No-Petition Clauses and the Conflict of Laws: KES Power Limited](#)

In any other circumstance, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up.

What are the consequences of a company being put into liquidation?

Automatic consequences

Upon the making of the winding up order, *inter alia*:

- the liquidators will become obligated to collect, realise and distribute the company's assets to its creditors, and any surplus to its members, and to report to creditors and members on the liquidation;
- the liquidators will step into the role of the directors, and the directors' powers cease, save that directors retain residual powers to allow them to initiate an appeal against the winding-up order;
- no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose. The exception to this rule is that a secured creditor may enforce its security without first obtaining such permission;
- any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void;
- 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; and
- the power to bring proceedings against third parties in the name of the company vests in the liquidator with the sanction of the court. If he fails to pursue remedies against third parties, an aggrieved creditor may apply to the court for his removal.

Restriction on execution and attachment

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, the creditor may not keep the benefit of the execution or attachment against the liquidator unless the execution or attachment was completed before the commencement of the winding up.

Public documents

Once a company's liquidation has started, all public documents issued by or on behalf of the company or the liquidator must state:

- that the company is in liquidation; and
- the name of the liquidator.

Other consequences

Other consequences that flow from a company being placed into liquidation are that:

- the company ceases to be the beneficial owner of its assets and holds them on a statutory trust for the benefit of its creditors to be distributed in accordance with the Act; and
- a liquidator may seek to:
 - challenge transactions entered into by the company (eg as an unfair preference, undervalue transaction or transactions defrauding creditors);
 - take action against the directors (eg for breach of duty, misfeasance or fraudulent trading); or
 - take action against the shareholders / contributories (eg to make a call).

Effect on contracts

Any contracts entered into by the company before the start of its liquidation will not generally be affected by its liquidation, except as noted below.

- **Termination of contract:** the terms of the contract may automatically terminate, or give another party the right to terminate, the contract.
- **Application for rescission:** a person who is entitled to the benefit, or subject to the burden, of a contract made with the company, may apply to the court for an order rescinding the contract. The

court may rescind the contract on any terms regarding payment by or to the person of damages for the non-performance of the contract or otherwise as it considers just. If the person is entitled to payment of damages under the order, the person may claim the damages as a debt in the company's liquidation.

- **Liquidator challenges:** as noted under '*Other consequences*' above, the liquidator may seek to challenge transactions entered into by the company.

How do creditors claim in a company's liquidation?

Making a claim

An unsecured creditor may make a claim against a company in liquidation by submitting to the liquidator a proof of debt in the prescribed form.

The proof of debt shall state, amongst other things:

- the total amount of the creditor's claim as at the date the company went into liquidation;
- particulars of the claim; and
- particulars of the security held by the creditor (if any), and the value which the creditor puts to the security and the basis of his valuation.

Copies of all documents evidencing the existence and amount of the debt must be annexed to the proof of debt. The liquidator may require the creditor to submit further and better particulars of his claim, including additional supporting documents, and/or may require the proof of debt to be verified by affidavit.

Currency

The liquidator determines the currency of the liquidation, which shall be the currency of the primary economic environment in which the company operated at the time of the commencement of the liquidation.

If a creditor's debt is in a currency other than the currency of the liquidation, the amount claimed will be converted accordingly at the applicable exchange rate.

Contingent debts

Where a claim is subject to a contingency or its amount is uncertain, the liquidator shall estimate the value of the claim at the start of the liquidation and notify the creditor of the same.

If the creditor does not agree to the liquidator's estimate, he is entitled to appeal to the court for an order that the liquidator's decision be reversed or varied. The creditor must do so no later than 21 days after receipt of the liquidator's notification to the creditor of the estimate of his contingent claim.

Interest

A creditor may prove for contractual interest accruing up to the date of the commencement of the liquidation, but not after.

However, only in a situation where the liquidation of the company lasts more than 6 months, and if a surplus remains after the payment of all claims in the company's liquidation, such surplus is to be applied in paying interest accrued on claims after the start of the liquidation.

All interest ranks equally, whether or not the debts on which it is payable rank equally.

Admitting or rejecting claims

Where the liquidator has admitted a creditor's proof in full, he shall notify the creditor of the same. If the liquidator rejects the creditor's proof or admits it only in part, he shall also notify the creditor of this fact and include (i) his reasons for rejecting the whole or part of the claim and (ii) a statement of the creditor's right to apply to the court for his decision to be reversed or varied.

What is a liquidation committee?

Establishing the committee

Unless the court otherwise directs, a liquidation committee shall be established in respect of every company being wound up by the court. The liquidation committee shall comprise of not less than three and no more than five creditors at the first meeting of the creditors. A liquidation committee cannot be established unless and until it has the requisite minimum number of members. Where the committee cannot be formed with the requisite minimum number, the court will usually dispense with the formation of a committee.

A creditor (other than one whose debt is fully secured) is eligible to be a member provided that he has lodged a proof of debt that has not been wholly disallowed for voting purposes or wholly rejected for the purposes of distribution or dividend.

It is the liquidator's duty to report to the members of the liquidation committee on all matters relating to the liquidation. The liquidator shall provide each member with a written report and accounts and convene the first meeting within 3 months of the committee's establishment.

Distributions

Pari passu principle

Like many other common law based jurisdictions, the *pari passu* principle applies under the Act. It is one of the most fundamental principles of insolvency law.

Under this principle, all unsecured creditors of an insolvent company should share equally and rateably in the assets of the company (that are not subject to a valid security interest) remaining after payment of any preferential claims and the liquidation expenses.

Excluded assets

The company's assets exclude any asset:

- held by the company that does not belong to it (eg an asset held on trust or subject to retention of title terms); and
- that is subject to a valid security interest which secures an existing payment obligation.

Order of distribution

The liquidator is required to apply the proceeds of realising the company's assets in paying the claims in the liquidation in the following order of priority:

- the costs and expenses properly incurred in the liquidation in the order of the prescribed priority set out in the Rules;
- the claims of any preferential creditors provided for under the Act (which rank equally and rateably among themselves). See more below at '*Preferential debts*';
- all other claims admitted by the liquidator (which rank equally and rateably among themselves);
- any claims for interest allowed in connection with the liquidation (which rank equally and rateably among themselves); and
- any surplus remaining to the shareholders in accordance with their rights and interests in the company.

How are secured creditors affected by a company's liquidation?

General position

A creditor who has security over the whole or part of the assets of a company is entitled to enforce his security without leave of the court and without reference to the liquidator.

The restrictions on taking actions against a company in liquidation or its assets described under '*What are the consequences of a company being put into liquidation?*' above do not prevent a secured creditor from taking possession of, realising or otherwise dealing with, assets of the company over which the secured creditor has a valid security interest.

Liquidator challenge

If the liquidator considers that there is an irregularity in connection with a creditor's security, the liquidator may seek to challenge it (see '*Other consequences*' above).

Claiming in the liquidation

A secured creditor shall value his security. If the liquidator is dissatisfied with such value, he may require the property to be offered for sale.

If the creditor's debt is more than the value of his security, he may prove in the liquidation for the unsecured balance.

The proof of debt submitted by a secured creditor must state particulars of the security held by the creditor and the value which he puts on the security.

If a secured creditor omits to disclose his security in his proof of debt, he shall surrender his security for the general benefit of creditors, unless the court otherwise directs on the ground that his omission was inadvertent or the result of an honest mistake.

What are preferential debts?

Preferential debts

The Act creates a class of unsecured creditors whose debts are preferred over, and rank ahead of, other unsecured creditors other than the liquidator in respect of the costs and expenses of the liquidation (these rank ahead of all unsecured creditors).

The following are the general categories of preferential debts:

- debts due to employees;
- debts due to bank depositors; and
- taxes due to the Government.

Priority

If the assets of the company available for distribution to its unsecured creditors are insufficient to pay the liquidator's costs and expenses and the claims of the preferred creditors in full, claims in respect of preferential debts will rank in priority and be paid ahead of all other unsecured creditors.

Preferential debts rank equally amongst themselves and are paid in full unless the assets available (after taking into account any rights of set-off or netting of claims) are insufficient to meet them, in which case they abate in equal proportions.

Where the assets of the company are insufficient to meet the claims of the general unsecured creditors, preferential debts also have priority over the claims of floating charge holders and are paid out of any property comprised in or subject to that charge.

What are the claims of current and past shareholders?

The current and past shareholders of an insolvent company are unable to claim in the company's liquidation for any sums due to them in their capacity as shareholders. These amounts would normally be unpaid dividends or unpaid share redemption payments.

However, these amounts will be taken into account for the purposes of the final adjustment between current and (if relevant) past shareholders.

The Judicial Committee of the Privy Council in *Pearson v Primeo Fund*⁵ confirmed that redeemed but unpaid shareholders are to be treated as creditors in a liquidation, whose claims rank ahead of amounts payable to current unredeemed shareholders.

⁵ [2017] UKPC 19.

Do shareholders have to contribute towards the company's debts?

Current shareholders

Shareholders of a limited company have no liability (in their capacity as shareholders) for the liabilities of the company.

Any liability of a shareholder (in that capacity) to the company is limited to:

- the amount unpaid on any share held by the shareholder; and
- the amount the shareholder has undertaken to contribute to the company (as set out in its memorandum and articles) on its winding up in the case of a company limited by guarantee.

Past shareholders

In the case of a company limited by guarantee, in the event of it being wound up within a year after such time a person is a member of the same, such member shall contribute to the assets of the company for payment of the debts and liabilities of such company, up to the specified amount set out in the memorandum and articles.

Who may be appointed as liquidator?

Status

A liquidator is both an agent of the company and an officer of the court.

On appointment, the liquidator effectively takes over the powers of the directors and controls the company's affairs, subject to the supervision of the court.

Eligibility

To be eligible to be appointed as liquidator, an individual must:

- be a licensed insolvency practitioner in a relevant country;
- be qualified as a professional accountant by an approved institute with the requisite number of years of relevant work experience;
- be a resident in the Cayman Islands;
- hold a trade and business licence that authorises him or his firm to carry on the business as professional insolvency practitioners;
- be independent as regards the company, and he shall not be regarded as independent if, within 3 years immediately before commencement of the liquidation, he had acted as the company's auditor;
- have the requisite insurance coverage; and
- have consented in writing to act as liquidator.

Overseas insolvency practitioners

An overseas insolvency practitioner who meets the independence and insurance requirements for local insolvency practitioners may be appointed as an official liquidator jointly with a, qualified Cayman insolvency practitioner (but not as a sole official liquidator).

What are the liquidator's duties?

Core duties

The core duties of a liquidator under the Act are to:

- take possession of, protect and realise, the company's assets;
- distribute the company's assets (or the proceeds of their realisation) in accordance with the Act; and
- distribute any surplus assets remaining, or the proceeds of their realisation, in accordance with the Act.

Common law duties

Skill and care

A liquidator owes a common law duty to act with skill and care in the performance of the liquidator's duties. The standard of care required of a liquidator is that of a reasonably skilled and careful insolvency practitioner. A liquidator is required to act with a high standard of care because the liquidator is entitled to take legal advice and to submit any matter concerning the liquidation to the court for guidance.

The actions of a liquidator will not be open to challenge if the liquidator exercises the liquidator's powers in good faith after taking proper advice.

Fiduciary duties

A liquidator occupies a fiduciary position and owes fiduciary duties, including:

- to act in good faith;
- not to make a secret profit from dealings with the company's property;
- to avoid conflicts of interest;
- to act impartially; and
- to exercise powers in the company's interests.

To whom are the duties owed?

The liquidator's duties are owed to the insolvent company itself and the liquidator must act in the best interests of all the stakeholders generally. A liquidator does not owe a fiduciary duty to any individual stakeholder in the liquidation.

What is the liquidator's role?

In practical terms, the liquidator's role is to:

- ascertain the assets and debts of the company;
- preserve the company's property and seek to maximise the assets available to unsecured creditors;
- make claims on the company's current and past shareholders for amounts payable by them to the company (if relevant);
- assess the creditor claims and accept, reject or compromise them;
- collect, realise and distribute the company's assets to its unsecured creditors and (if any surplus remains) shareholders;
- potentially bring proceedings against the company's directors or professional advisers; and
- potentially challenge transactions and reclaim the company's property or to avoid liabilities on the grounds of (among other things):
 - an undervalue transaction;
 - an unfair preference; or
 - a transaction to defraud creditors.

What are the liquidator's powers?

General powers

The liquidator has all powers necessary to carry out the functions and duties of a liquidator under the Act as described under '*Functions and powers of liquidators*' above.

Certain powers may only be exercised with the sanction of the court.

Investigative powers

The liquidator may seek an order requiring (among others) any director, former director, employee, shareholder or former shareholder to:

- deliver documents or other property belonging to the company;
- answer interrogatories verified by affidavit; and/or

- attend an oral examination under oath.

What is a provisional liquidator?

See '*Provisional liquidation*' above.

Who may apply for appointment?

An application to appoint a provisional liquidator may be made by (among others) a person who has made an application to appoint a liquidator; eg a creditor, the company or a shareholder.

When will a provisional liquidator be appointed?

The usual basis on which a provisional liquidator is appointed is that there is a risk of dissipation of the company's assets or the company's books and records will be lost or destroyed between the presentation of the petition and the hearing of the same at which a liquidator is appointed. The appointment of a provisional liquidator before a winding up order is made may also be necessary to prevent the oppression of minority shareholders or mismanagement or misconduct on the part of the company's directors.

A provisional liquidator may also be appointed if the company is unlikely to pay its debts and the company intends to present a compromise or arrangement to its creditors.

Powers

See '*Powers of a provisional liquidator*' above.

When does the appointment end?

The appointment of a provisional liquidator ends on the appointment of a liquidator. The order may also be varied or discharged upon the application of the provisional liquidator, the petitioner, the creditor, the contributories or the company (acting by its directors), as the case may be.

Who may apply to remove a liquidator?

An application to remove a liquidator may be made by a creditor or contributory of the company.

Good reasons would need to be demonstrated to justify the application for removal and care needs to be exercised when removing generally effective and honest liquidators. It is sufficient to satisfy the court that the removal of the liquidator would be for the general advantage of the majority of the persons interested in the liquidation. In the absence of impropriety, the court would have regard to the wishes of the majority of those interested but, where impropriety was shown, the court might override their interests⁶.

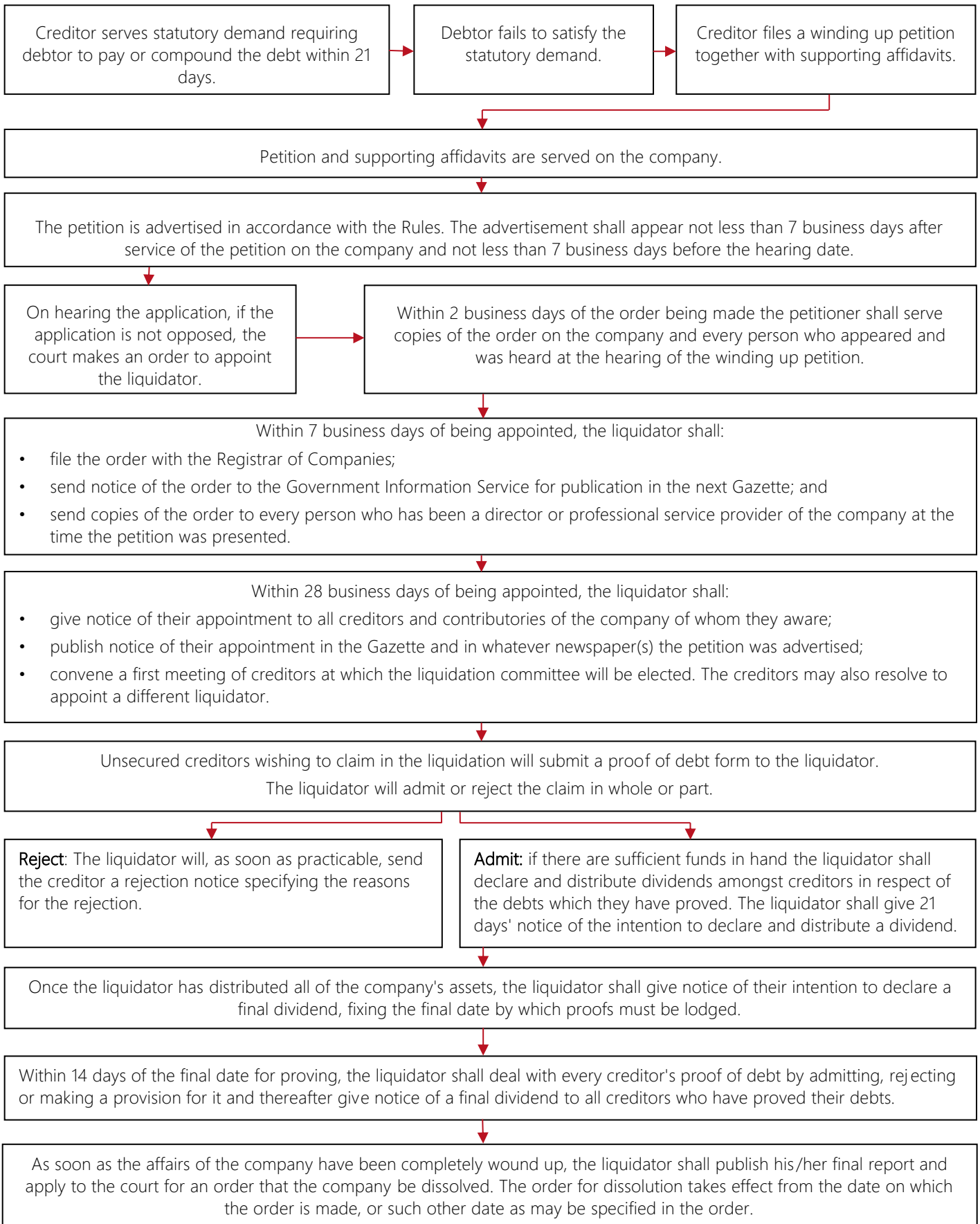
Does set-off apply on insolvency?

An agreement made between the company and a creditor for set-off or non set-off before the start of a company's insolvent liquidation is binding on the company and shall be enforced by the liquidator.

Where there are mutual credits, mutual debts or other mutual dealings between the company and a creditor of the insolvent company, insolvency set-off shall apply to set-off such mutual outstanding balances, and only the balance (if any) of the account is provable. Alternatively, as the case may be, the amount shall be paid to the official liquidator.

⁶ *In Re BTU Power Company (in official liquidation)* 2019 (1) CILR Note 7.

A brief anatomy of a creditor initiated and uncontested liquidation process



Contacts

To find out more, please get in touch with your usual Mourant contact. Alternatively, a full list of contacts specialising in Cayman Islands restructuring and insolvency 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). © 2024 MOURANT ALL RIGHTS RESERVED