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Global Legal Group

The International Comparative Legal Guide to: Corporate Recovery and Insolvency 2011

A practical cross-border insight into corporate recovery and insolvency

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The International Comparative Legal Guide to: Corporate Recovery & Insolvency 2011

GLG

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GLG Cover Design

F&F Studio Design

GLG Cover Image Source

Stock.XCHNG

Printed by

Ashford Colour Press Ltd
June 2011

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ISBN 978-1-908070-03-6
ISSN 1754-0097



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Cyprus

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Cyprus?

Depending on the kind of assets which are offered as security, the most common types of security are:

- (a) A floating charge over all or various assets.
- (b) A fixed charge over particular assets.
- (c) A mortgage over immovable property.
- (d) A mortgage over a vessel.
- (e) A pledge over shares in a company.
- (f) An assignment of proceeds, receivables, contractual rights, etc.
- (g) A guarantee.

Certain charges created over the assets of a company must be registered with the Registrar of Companies; otherwise they will be void against the liquidator and any secured creditor of the company. Failure to register the charge when required to do so renders the creditor an unsecured creditor of the company. Mortgages over immovable property or ships must also be registered in accordance with the relevant statutory provisions.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

Any charge, mortgage or other act relating to property made or done by or against a company unable to pay its debts as they become due from its own money, within 6 months before the commencement of its winding up, in favour of any creditor, with a view of giving such creditor a preference over the other creditors, shall in the event of the company being wound up be deemed a fraudulent preference of its creditors and be invalid.

If a fraudulent preference is proved pursuant to the above provisions, the person interested in the property mortgaged or charged, who is preferred, shall be subject to the same liabilities and shall have the same rights, as if he had undertaken to be personally liable as surety for the debt to the extent of the charge on the property or the value of his interest, whichever is the less. The value of the said person's interest is determined as at the date of the transaction constituting the fraudulent preference and is determined as if the interest were free of all encumbrances other than those to which the charge for the company's debt was then subject.

Where a company is being wound up, a floating charge on the

undertaking or property of the company created within 12 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, 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 at the rate of 5% per annum or such other rate as may be prescribed by order of the Accountant-General.

Every gift, sale, pledge, mortgage or other transfer or disposal of any movable or immovable property made by any person (including a company) with intent to hinder or delay its creditors or any of them in recovering their debts from it will be deemed to be fraudulent and will be invalid against such creditors. Notwithstanding any such gift, sale, pledge, mortgage, transfer or disposal, the property purported to be transferred or otherwise dealt with may be seized and sold to satisfy any judgment debt due from the person who made the gift, sale, pledge, mortgage or other transfer or disposal. Alternatively, any such gift, sale, pledge, mortgage or other transfer or disposal of any property may be set aside by an order of the court on the application of any judgment creditors.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Cyprus?

If, in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver or the liquidator or any creditor or contributory of the company may, if it thinks proper to do so, declare that any persons who were knowingly a party to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. Additionally, where any business of a company is carried on with the aforesaid intent or purpose, every person who was knowingly a party to the carrying on of the business as aforesaid, shall be liable on conviction to imprisonment not exceeding three years or to fine not exceeding EUR 2,563 or to both such imprisonment and fine. It is noted that an application for fraudulent trading in accordance with the above-mentioned provisions may only be made during the course of the winding up of a company, while the relevant civil and criminal liabilities are not limited to directors but cover other persons engaged in the carrying on of the business of a company.

There is also a more general provision to the effect that if in the course of the winding up of a company it appears that any person

who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator or of any creditor or contributory, examine the conduct of the promoter, director, manager, liquidator or officer and compel him to repay or restore or contribute the money or property or assets or any part thereof by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just. The above-mentioned provision is also not limited to the directors of a company.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Cyprus?

The procedure for the enforcement of each security depends on the type of security which has been granted, the kind of assets which have been charged and the provisions of the relevant security agreement. It is generally possible for the holder of the security to raise a legal action against the party which provided the security, seeking to enforce the provisions of the relevant security agreement and in particular to obtain a judgment for the sale of the secured assets. Such court proceedings would normally be initiated against the principal debtor who would be the main defendant and the parties which provided the security will be joined in as additional defendants.

It is also possible for the creditor to initiate winding up and other formal insolvency proceedings against the relevant company. The winding up of a company in these circumstances may be either by the court or subject to the supervision of the court, while certain restructuring procedures are also available. Please refer to our responses below for more details about these matters.

2.2 What are the tests for insolvency in Cyprus?

While there is no statutory definition of the term insolvency *per se*, a Cyprus company may be considered insolvent if it is unable to pay its debts, something which would require one of the following conditions to be met:

- if a creditor to whom the company is indebted in a sum exceeding EUR 854 has served on the company a written notice to settle the debt within three weeks and the company fails to do so within the said period of time;
- if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- if it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company.

2.3 On what grounds can the company be placed into each procedure?

A company may be wound up by the court if:

- The company has resolved by special resolution of its shareholders that it will be wound up by the court.
- Default is made in delivering the statutory report to the Registrar of Companies or in holding the statutory meeting.

- The company does not commence its business within a year from its incorporation or suspends its business for a whole year.
- The number of the shareholders is reduced, in the case of a public company, below seven.
- The company is unable to pay its debts.
- The court is of the opinion that it is just and equitable that the company should be wound up.

The most common ground upon which creditors of a company rely in order to place a company into winding up by the court is the inability of the company to pay its debts, the conditions of which have been mentioned in question 2.2 above.

A company may be wound up subject to the supervision of the court when it has passed a resolution for creditors' voluntary winding up (for more information, please see further the second part of question 2.5) and the court issues an order, pursuant to a petition for the continuance of the voluntary winding up subject to the supervision of the court, to that effect. The law does not specify any specific grounds for the placing of the company to winding up subject to the supervision of the court.

2.4 Please describe briefly how the company is placed into each procedure.

A company is placed into winding up by the court upon the application made to the court and presented by petition either by the company itself or by any creditors or contributories of the company or by all or any of those parties, together or separately. A creditor of a company should therefore apply to the court requesting the winding up of the company due to its inability to pay its debts.

The winding up subject to the supervision of court requires the issuing of an appropriate court order.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

If a winding up order is issued upon the application made to the court by a creditor of the company, the first step to be taken will be to appoint a liquidator, to whom the administration of the company's affairs and property will pass. The common practice is for the Official Receiver, who is a public officer, to be appointed as the liquidator.

The liquidator may require officers, employees and those who have taken part in the formation of the company to submit to him a statement as to the affairs of the company. He also has a duty to investigate the causes of the failure of the company and to make an appropriate report to the court as he thinks fit. The functions of the liquidator are to secure that the assets of the company are realised and distributed to the creditors of the company and, if there is a surplus, to the shareholders of the company.

In cases of a creditors' voluntary winding up (i.e. a winding up procedure initiated voluntarily by the shareholders, in circumstances where the company is not solvent), the creditors, in whose interests the winding up is undertaken, will again have control of the procedure. The company must summon a meeting of its creditors on the same day or the next day on which the resolution for voluntary winding up is to be proposed. Notices should be sent to the creditors simultaneously with the notices to be sent for the meeting of the shareholders of the company, while the said meeting must be advertised in the Official Gazette and 2 daily newspapers. Moreover, the directors must prepare a statement of the company's affairs and present it at the creditors' meeting. At the said meeting, the creditors may nominate a liquidator and if he is also accepted by

the shareholders of the company, he is appointed as the liquidator. If the shareholders do not approve the liquidator nominated by the creditors, they may apply to the court for an order that their nominee be appointed as the liquidator instead of or jointly with the creditors' nominee or that some other person will be appointed instead of the creditors' nominee.

Both in a creditors' voluntary winding up and in a winding up by the court, the creditors may decide to establish a Committee of Inspection, while the shareholders may, in this case, also appoint their own members to this Committee. The purpose of the Committee of Inspection is to give the liquidator the opportunity of consulting the creditors and the shareholders without having to convene formal creditors' and shareholders' meetings and to provide additional means whereby the members and the shareholders can question the liquidator.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Unsecured creditors can enforce their rights in any manner which they elect which is normally the institution of a legal action against the debtor and enforcement of any judgment which they may obtain. Unsecured creditors may also enforce their rights in the context of the winding up procedures referred to above.

3.2 Can secured creditors enforce their security in each procedure?

Secured creditors can enforce their rights in the same manner as unsecured creditors but in practice, secured creditors would seek to enforce their security independently, without the institution of a legal action (unless required) and outside the formal winding up procedures. Secured creditors would normally seek to enforce their security over the particular secured assets of the company directly or by having redress to any guarantors. For example, the beneficiary of a fixed charge may appoint a receiver and manager of the assets of the company which are subject to the charge, take possession of and/or sell the relevant assets.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

In the case of mutual credits, debts or other transactions between a company and a creditor, an account must be set up as to what is owed by each party to the other in relation to these mutual transactions and the amount which is owed by the company will be set off against the amount owed by the creditor.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

In all the formal winding up procedures referred to above, the liquidator controls the company. All the property of the company is vested in the liquidator, who may, *inter alia*, bring or defend any action or other legal proceeding which relates to that property or

which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

The directors of the company do not have any rights to represent and act on behalf of the company and their powers cease, while its shareholders have certain limited rights in relation to the appointment of the liquidator and the appointment of a Committee of Inspection.

4.2 How does the company finance these procedures?

The liquidator of the company in a winding up by the court has the power to raise any money required for the carrying out of his function on the security of the assets of the company. Moreover, in any form of winding up, all costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims.

4.3 What is the effect of each procedure on employees?

In all formal winding up procedures, the following amounts are paid to the employees of the company in priority to all other debts of the company, together and *pari passu* with the rest of the preferential payments referred to in question 5.2 below:

- any salary owed and any sum withheld by the employer from the employee's salary for the payment of any debts owed to the employee or any amount that the employer has not paid otherwise;
- any other sum or benefit arising from an agreement or employment relationship, including any sum owed to a recognised union;
- all sums that the company must pay an employee as compensation due to bodily harm that the employee has suffered in the course of his employment; and
- all sums for any leave to which the employee is entitled as a result of his employment with the company, for the past one year.

Generally, the employee of a private company who is also a shareholder or director of the company is not entitled to the above-mentioned payments in priority.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

With the exception of transactions which are vulnerable to attack on any of the grounds set out in question 1.2 above, the commencement of a formal winding up procedure does not affect the contracts entered into by the company. In general, the liquidator will not be able to terminate any contracts which the company has entered into before its winding up, unless they may fall into one of the grounds set out in question 1.2 above or the liquidator and the counterparty agree that the relevant contract be terminated.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

In order for creditors to claim amounts owed to them, they must prove their debts to the liquidator by an affidavit.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

In all types of winding up, the following are paid in priority to all other debts with the exception of all the costs of the winding up of the company, including the remuneration of the liquidator, as mentioned in question 4.2 above:

- (a) payments to employees referred to in question 4.3 above;
- (b) local rates due from the company at the time when its winding up commences and having become due and payable within 12 months before that date;
- (c) government taxes and duties due from the company at the date when its winding up commences and having become due and payable within 12 months before that date and, in the case of assessed taxes, not exceeding in the whole one year's assessment; and
- (d) where any payment has been made to any clerk, servant, workman or labourer in the employment of a company, or, in the case of his death, to any other person in his right, on account of wages or salary or accrued holiday remuneration, out of money advanced by some person for that purpose, the person by whom the money was advanced shall have a right of priority in respect of this money up to the amount by which the sum in respect of which the person who received the money, would have been entitled to priority in the winding up has been diminished by reason of the relevant payment.

The above debts rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions. Moreover, these debts have priority over the claims of holders of debentures under any floating charges created by the company.

5.3 Are tax liabilities incurred during each procedure?

There are no particular tax liabilities incurred during a formal winding up procedure, but it cannot be excluded that the company may be liable to taxation as a result of the carrying on of the business of the company by the liquidator (in which case, corporate tax will be paid if the company makes a profit) or the disposal of its assets (where, for example, capital gains tax may be imposed regarding the profit from the sale of immovable property). At the same time, there is an express exemption of certain documents from stamp duty in the context of a winding up of a company.

6 Ending the Formal Procedure

6.1 Is there a process for "cramming down" creditors who do not approve proposals put forward in these procedures?

In general, the winding up of a company is in the hands of the liquidator who may himself or pursuant to the instructions of the court decide as to how the winding up will be carried out. In practice, the majority of the creditors have the ability to choose the person to be appointed as the liquidator, while they may participate in Committees of Inspection whereby appropriate consultation between the liquidator and the creditors may be achieved. It therefore follows that individual creditors and especially minor ones may, in practice, be "crammed down", in the sense that their voting power will be less than that of major creditors.

6.2 What happens at the end of each procedure?

In the case of winding up by the court, when the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved and the Registrar of Companies shall be informed accordingly.

In the case of a creditors' voluntary winding up, as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of and shall call a meeting of the shareholders and the creditors for the purpose of laying the account before the said meetings and give any required explanation. Provided that certain additional formalities and deadlines are complied with, the liquidator is required to send a copy of the accounts and a return about the meeting to the Registrar of Companies. On the expiration of 3 months from the filing of the above documents with the Registrar of Companies, the company shall be deemed to be dissolved.

7 Alternative Forms of Restructuring

7.1 Is it common to achieve a restructuring outside a formal procedure in Cyprus? In what circumstances might this be possible?

It is not very common for a restructuring to be achieved outside a formal winding up procedure in Cyprus. This may be possible where the company and the creditors voluntarily agree to a particular restructuring plan.

7.2 Is it possible to reorganise a debtor rather than realise its assets and business?

A statutory procedure which enables the reorganisation of a debtor is the one whereby a compromise or arrangement may be made between the company and its creditors. This requires the approval of 75% in value of the creditors of the company and the approval by the court.

7.3 Is it possible to achieve an expedited restructuring of the debtor by means of a pre-packaged sale? How is such a sale effected?

In the context of the above-mentioned provision for a compromise or arrangement, it is possible that the court may approve a scheme whereby the whole or part of the undertaking or the property of the company is to be transferred to another company.

8 International

8.1 What would be the approach in Cyprus to recognising a procedure started in another jurisdiction?

In accordance with Regulation 1346/2000 EC on insolvency proceedings, it is possible for insolvency proceedings to take place in relation to a Cyprus company in another EU Member State, within the territory of which the centre of the said company's main interests is situated. The said Regulation facilitates insolvency proceedings taking place in another Member State and requires, *inter alia*, that the relevant judgment opening insolvency proceedings shall be recognised in all other Member States and that the relevant proceedings shall be duly registered with the Registrar of Companies.

It is otherwise not possible for a formal insolvency proceeding in relation to a Cyprus company to take place in another jurisdiction. On the other hand, it is possible for creditors to enforce their rights in relation to property situated outside Cyprus by, for example, appointing a receiver and manager of the company with respect to assets secured by a fixed charge or a floating charge which are outside Cyprus.



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The International Comparative Legal Guide to: Corporate Recovery and Insolvency 2011

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