

# ORDER IN COUNCIL

**XIV**  
**1996**

ratifying a Projet de Loi

ENTITLED

## **The Companies (Amendment) (Guernsey) Law, 1996**

---

(Registered on the Records of the Island of Guernsey  
on the 20th January, 1997.)

---



---

1996

# ORDER IN COUNCIL



IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

*The 20th day of January, 1997 before Sir Graham Dorey, Bailiff;  
present:—Stanley Walter John Jehan, Leonard Arthur Moss, John  
Edward Morris, Charles Anthony Spensley, Lawrence Oscar Ozanne,  
John Richard Rowe Henry, David Charles Lowe, Esquires, Mrs. Eileen  
May Glass, Laurence Lenfestey Guille, Derek Martin Le Page, Stephen  
Edward Francis Le Poidevin and Alan Cecil Bisson, Esquires, Jurats.*

The Bailiff having this day placed before the Court an Order of Her Majesty in Council dated the 19th day of November, 1996, approving and ratifying a *Projet de Loi* entitled “The Companies (Amendment) (Guernsey) Law, 1996”, the Court, after the reading of the said Order in Council and after having heard Her Majesty’s Procureur thereon, ordered that the said Order in Council be registered on the records of this Island of which Order in Council the tenor followeth:—

# At the Court at Buckingham Palace

The 19th day of November, 1996

PRESENT,

## The Queen's Most Excellent Majesty in Council

WHEREAS, there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council for the Affairs of Guernsey and Jersey dated the 22nd day of October 1996 in the words following, viz.:—

“YOUR MAJESTY having been pleased, by Your General Order of Reference of the 22nd day of February 1952, to refer unto this Committee the humble Petition of the States of the Island of Guernsey setting forth:—

“1. That, in pursuance of their Resolutions of the 12th day of July 1995 and the 28th day of February 1996, the States of Deliberation at a meeting held on the 30th day of May 1996 approved a Bill or “Projet de Loi” entitled “The Companies (Amendment) (Guernsey) Law, 1996”, and requested the Bailiff to present a most humble Petition to Your Majesty in Council praying for Your Royal Sanction thereto. 2. That the said Bill or “Projet de Loi” is as set forth in the Schedule hereunto annexed. And most humbly praying that Your Majesty might be graciously pleased to grant Your Royal Sanction to the Bill or “Projet de Loi” of the States of Guernsey entitled “The Companies (Amendment) (Guernsey) Law, 1996”, and to order that the same shall have force of law in the Island of Guernsey.”

“THE LORDS OF THE COMMITTEE, in obedience to Your Majesty’s said Order of Reference, have taken the said Petition and the said Projet de Loi into consideration and do this day agree humbly to report, as their opinion, to Your Majesty, that it may be advisable for Your Majesty to comply with the prayer of the said Petition and to approve of and ratify the said Projet de Loi.”

HER MAJESTY, having taken the said Report into consideration, is pleased, by and with the advice of Her Privy Council, to approve of and ratify the said Projet de Loi, and to order, and it is hereby ordered, that the same shall have the force of Law within the Island of Guernsey.

AND HER MAJESTY doth hereby further direct that this Order, and the said Projet de Loi (a copy whereof is hereunto annexed), be entered upon the Register of the Island of Guernsey and observed accordingly.

AND the Lieutenant Governor and Commander-in-Chief of the Island of Guernsey, the Bailiff and Jurats, and all other Her Majesty's Officers for the time being in the said Island, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

*N. H. Nicholls*

(No.XIV - 1996)

PROJET DE LOI

ENTITLED

# **The Companies (Amendment) (Guernsey) Law, 1996**

Arrangement of sections

1. Amendment of Law of 1994.
2. Rectification of errors in memorandum.
3. Display of company name.
4. Abolition of requirement for common seal.
5. Effect of irregular allotment.
6. Provisions relating to directors, fraudulent trading, etc.
7. Minor amendments in relation to voting.
8. Additional provisions as to resolutions and meetings.
9. Commission may be heard on, or make, winding up application.
10. Dissolution of company in compulsory winding up.
11. Offence in relation to disqualification orders.
12. Ordinances as to purchase of own shares.
13. Interpretation.
14. Citation.
15. Commencement.

# PROJET DE LOI

## ENTITLED

### **The Companies (Amendment) (Guernsey) Law, 1996**

**THE STATES**, in pursuance of their Resolutions of the 12th day of July, 1995(a) and the 28th day of February, 1996(b), have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Island of Guernsey.

#### **Amendment of Law of 1994.**

1. The Companies (Guernsey) Law, 1994(c) ("the Law of 1994") shall be amended in accordance with the provisions of this Law.

#### **Rectification of errors in memorandum.**

2. In section 3(3) of the Law of 1994 after the word "directors" insert "or creditors".

#### **Display of company name.**

3. In section 24(6) of the Law of 1994 the word "unrestricted" is repealed.

#### **Abolition of requirement for common seal.**

4. (1) For section 25 of the Law of 1994 substitute the following sections-

##### **"Company may have common seal.**

**25.** A company may but need not have a common seal upon which its name is engraved in legible characters.

---

(a) Article VII of Billet d'État No. XIV of 1995.

(b) Article XIII of Billet d'État No. III of 1996; and see the Corrigendum to that Billet.

(c) Order in Council No. XXXIII of 1994.

**Abolition of requirement for affixing of common seal.**

**25A.** Any rule of law (whether arising under statute, rule of court or otherwise) which requires a common seal for the valid execution of a document by a company is abolished."

- (2) In section 6(2)(b) of the Law of 1994 for the word "shall" substitute "may".
- (3) In section 12(1) of the Law of 1994 the words "under its seal" are repealed.
- (4) In section 13(1) of the Law of 1994-
  - (a) the words "other than a document required by this Law to be executed under seal," are repealed; and
  - (b) for the word "an" substitute "and".
- (5) In section 26 of the Law of 1994-
  - (a) in subsection (2) for the words "be a facsimile of the common seal" substitute "bear on its face, in legible characters, the name";
  - (b) subsection (3) is repealed;
  - (c) in subsection (4) the words "under its common seal" are repealed.
- (6) In sections 28(1)(a) and (b) and 37(3) of the Law of 1994 the words "under the company's seal" are repealed.
- (7) In section 111(1)(a) of the Law of 1994 the expression "25(2), 25(3)," is repealed.

(8) In section 117(1) of the Law of 1994 in the definition of "common seal" for the words "is required to" substitute "may".

**Effect of irregular allotment.**

5. In section 30(1) of the Law of 1994-

- (a) for the word "within" substitute "at any time before the expiration of"; and
- (b) after the words "and not" insert ", without the leave of the Court,".

**Provisions relating to directors, fraudulent trading, etc.**

6. (1) After section 67 of the Law of 1994 insert the following sections-

**"Disqualification orders.**

**67A.** (1) Where the Court considers that, by reason of a person's conduct in relation to any body corporate or otherwise, that person is unfit to be concerned in the management of a company, the Court may, if satisfied that it is desirable in the public interest to do so, make and subsequently renew (on one or more occasions) an order against him (a "disqualification order") prohibiting him, without the leave of the Court-

- (a) from being a director or other officer of any company or any specified company;
- (b) from participating in, or being in any way concerned in, directly or indirectly, the management, formation or promotion of any company or any specified company.

(2) A disqualification order and any renewal thereof shall have effect for such period not exceeding 5 years as shall be specified therein.



(3) A disqualification order and any renewal thereof may contain such incidental and ancillary terms and conditions as the Court thinks fit.

(4) An application for a disqualification order or for a renewal thereof may be made by the Committee, by the Commission, by Her Majesty's Procureur, by any body corporate of which the person in question is, or has been, an officer, by any liquidator, member or creditor of such a body corporate or, with the leave of the Court, by any other interested party.

(5) A person who contravenes any provision of a disqualification order or a renewal thereof-

(a) shall be guilty of an offence; and

(b) shall be personally liable for any debts and liabilities of the company in relation to which the contravention was committed which were incurred at any time when he was acting in contravention of the disqualification order or the renewal thereof.

(6) A person's liability pursuant to subsection (5)(b) is joint and several with that of the company and of any other person so liable in relation to that company.

(7) In determining whether or not a person is unfit to be concerned in the management of a company, the Court shall have regard to the provisions of Schedule 3, which shall have effect accordingly.

(8) A disqualification order may be renewed at any time before, or within a period of one month immediately succeeding, the date of the expiration of the order.

(9) A person subject to a disqualification order or renewal thereof may apply to the Court for a revocation of the order or renewal on the ground that he is no longer unfit to be concerned in the management of a company; and the Court may grant the application if satisfied that-

- (a) it would not be contrary to the public interest to do so; and
- (b) the applicant is no longer unfit to be concerned in the management of a company.

(10) An application under subsection (9) for the revocation of a disqualification order or renewal shall not be heard unless the person upon whose application the disqualification order or (as the case may be) the renewal was made has been served with notice of the application to revoke not less than 28 days (or such other period as the Court may in its absolute discretion direct) before the date of the hearing; and, without prejudice to the foregoing, the Court may-

- (a) direct that notice of the application to revoke shall also be served on such other persons as the Court thinks fit; and
- (b) for that purpose adjourn the hearing of the application.

(11) For the removal of doubt, a disqualification order or renewal thereof, or an application under subsection (9) for the revocation of a disqualification order or renewal, may, with the agreement of the parties, and in the Court's absolute discretion, be granted by consent.

### **Fraudulent trading.**

**67B.** (1) 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 (whether of the company or of any other person), or for any fraudulent purpose, the following provisions have effect.

(2) The Court, on the application of the liquidator or any creditor or member of the company, may declare that any persons who were knowingly parties to the carrying on of the business in the manner above mentioned shall be liable to make such contributions to the company's assets as the Court thinks proper.

### **Wrongful trading.**

**67C.** (1) Subject to subsection (3), if in the course of the winding up of a company it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the Court, on the application of the liquidator or any creditor or member of the company, may declare that that person shall be liable to make such contribution to the company's assets as the Court thinks proper.

(2) This subsection applies in relation to a person if-

- (a) the company has gone into insolvent liquidation; and
- (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation; and
- (c) that person was a director of the company at that time;

but the Court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) was before the date of the coming into force of this section.

(3) The Court shall not make a declaration under this section with respect to any person if it is satisfied that, after the condition specified in subsection (2)(b) was first fulfilled in relation to him, he took every step with a view to minimising the potential loss to the company's creditors that (assuming him to have known that there was no reasonable prospect of the company avoiding going into insolvent liquidation) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both-

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company; and
- (b) the general knowledge, skill and experience of that director.

(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any function which he does not carry out but which has been entrusted to him.

(6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(7) In this section "director" includes a shadow director, which means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.

(8) This section is without prejudice to the provisions of section 67B.

**Proceedings in respect of fraudulent or wrongful trading.**

**67D.** (1) On the hearing of an application under section 67B or 67C, the applicant may himself give evidence or call witnesses.

(2) Where under section 67B or 67C the Court makes a declaration, it may give such further directions as it thinks proper for giving effect thereto; and in particular, the Court may-

- (a) provide for the liability of any person under the declaration to be a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and
- (b) from time to time make such further orders as may be necessary for enforcing any charge imposed under this subsection.

(3) For the purposes of subsection (2)(a), the expression "assignee"-

- (a) includes a person to whom or in whose favour, by the directions of the person made liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created; but
- (b) does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of

any of the matters on the ground of which the declaration is made.

(4) Where the Court makes a declaration under section 67B or 67C in relation to a person who is a creditor of the company, it may direct that the whole or any part of any debt owed by the company to that person and any interest thereon shall rank in priority after all other debts owed by the company and after any interest on those debts.

(5) Sections 67B and 67C have effect notwithstanding that the person concerned may be criminally liable in respect of matters on the ground of which the declaration under the section is to be made.

**Greffier to keep register of disqualification orders.**

67E. The Greffier shall keep a register of all disqualification orders, and all renewals thereof, made by the Court under section 67A; and the register shall form part of the public records of the Island.

**Company articles, etc, may not exclude remedies.**

67F. (1) Any provision, term or condition, in whatever words, and whether contained in a company's articles or in any contract with the company or otherwise, for exempting any person from, or indemnifying him against, any liability which, pursuant to sections 67A to 67D or any other provision of this Law under which personal liability may be imposed or incurred, would otherwise attach to him shall, subject to subsections (2) and (3), be void.

(2) Subsection (1) shall not, of itself, prevent a company from purchasing and maintaining for any such person insurance against any such liability.

(3) Subsection (1) shall not deprive any person of any exemption or indemnity to which he was lawfully entitled before the date of the coming into force of that subsection."

(2) After Schedule 2 insert the following schedule-

## "SCHEDULE 3

### Section 67A

#### **Directors to be fit and proper persons.**

1. Every person who is, or is to be, a director of the company shall be a fit and proper person to hold that position.

2. In determining whether a person is a fit and proper person to hold a particular position, regard shall be had to-

- (a) his probity, competence, solvency and soundness of judgement for fulfilling the responsibilities of that position;
- (b) the diligence with which he is fulfilling or likely to fulfil those responsibilities;
- (c) whether the interests of members or creditors or potential members or creditors of the company are, or are likely to be, in any way threatened by his holding that position; and
- (d) the rules, standards and guidelines of any relevant professional, governing, regulatory or supervisory authority.

3. Without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question.

4. The States may by Ordinance amend any provision of this Schedule or sections 67A to 67F".

**Minor amendments in relation to voting.**

7. (1) In section 52 of the Law of 1994 after the word "section" insert "69(n)(i) and section".

(2) In section 69(g) of the Law of 1994 before the words "two members" insert "unless the company's articles provide otherwise,".

(3) In section 69(k) of the Law of 1994 before the words "any resolution" insert "unless the company's articles provide otherwise,".

(4) In section 69(m) of the Law of 1994 before the words "any one or more" insert "unless the company's articles provide otherwise,".

(5) In section 69(n)(i) of the Law of 1994 after the words "in person" insert "and entitled to vote".

(6) In section 71(1) of the Law of 1994 after the word "shall" insert "save as otherwise provided in this Law".

**Additional provisions as to resolutions and meetings.**

8. After section 73 of the Law of 1994 insert the following sections-

**"Written resolutions of companies.**

73A. (1) Anything that may be done by resolution (including a special resolution) passed at a general meeting of a company or at a meeting of the holders of any class of shares in a company may, subject to any provision to the contrary in the memorandum or articles of the company, be done by resolution in writing signed by or on behalf of the members who, on the date when the resolution is deemed to be passed, would be entitled to vote on the resolution if it were proposed at a meeting.

(2) A resolution in writing may consist of several instruments in the same form each signed by or on behalf of one or more members.



(3) A resolution in writing shall be deemed to be passed when the instrument, or the last of several instruments, is last signed or on such later date as may be specified in the resolution.

(4) Any document attached to a resolution in writing shall be deemed to have been laid before a meeting of the members signing the resolution.

(5) Sections 53 and 58 (minute books and inspection thereof) apply in relation to a resolution in writing as if it had been passed at a meeting.

(6) This section is without prejudice to any rule of law relating to the effectiveness of the assent of members or any class of members given to a document, act or matter otherwise than at a meeting.

(7) A resolution in writing of a company shall, unless the company's memorandum or articles provide otherwise, be passed by the majority that it would have required if put to the vote on a poll at a general meeting at which the whole of the company's membership was present in person.

(8) Notice specifying the proposed resolution in writing shall be given by the company-

(a) to each of the company's members, not less than 14 days (or such shorter period as all the members may in any particular case agree) before the date on which the members are required to give their vote, by ordinary post to the members' addresses entered in the Register of Members; or

(b) in accordance with such other formalities as may be prescribed by the company's articles.

**Participation in meetings.**

73B. (1) Subject to any provision to the contrary in a company's memorandum or articles, if a member is, by any means, in communication with one or more other members so that each member participating in the communication can hear or read what is said or communicated by each of the others, each member so participating is deemed to be present at a meeting with the other members so participating.

(2) A meeting of members conducted pursuant to subsection (1) shall be deemed to be held in the place in which the chairman of the meeting is present.

(3) Subsections (1) and (2) apply in relation to meetings of directors or committees of directors as they apply in relation to meetings of members."

**Commission may be heard on, or make, winding up application.**

9. After section 96 of the Law of 1994 insert the following sections-

**"Commission may be heard on winding up application.**

96A. (1) An application for an order for the compulsory winding up of a company of a description set out in subsection (3) shall not be heard unless a copy of the application has been served on the Commission not less than seven days (or such other period as the Court may, in its absolute discretion, direct) before the day of the hearing of the application.

(2) At the hearing of the application the Commission may make representations to the Court which the Court shall take into account in deciding whether or not, and in what manner, to exercise its powers under this Part of this Law.

(3) The descriptions of company referred to in subsection (1) are the following-

- (a) a company which carries on or formerly carried on controlled investment business within the meaning of the Protection of Investors (Bailiwick of Guernsey) Law, 1987(d) and which holds or formerly held a licence under section 3 of that Law or an authorisation under section 8 of that Law;
- (b) a company which is registered or was formerly registered as an insurer by the Commission under the Insurance Business (Guernsey) Law, 1986(e) or which is exempt from such registration by virtue of section 8 of that Law;
- (c) a company which is a licensed institution or former licensed institution within the meaning of the Banking Supervision (Bailiwick of Guernsey) Law, 1994(f);
- (d) a company which is of any other class or description prescribed for the purposes of this section by regulations of the Commission.

**Ground on which Committee may make winding up application.**

**96B.** (1) A company may be wound up by the Court if the Court is of the opinion that it is desirable that the company should be wound up for the protection of the public or of the reputation of the Bailiwick of Guernsey.

(2) An application under subsection (1) for the compulsory winding up of a company may be made to the Court only by the Committee or by the Commission on its behalf.

---

(d) Ordres en Conseil Vol. XXX, p. 281.

(e) Ordres en Conseil Vol. XXIX, p. 214.

(f) Order in Council No. XIII of 1994.

(3) An order made by the Court on an application under subsection (1) shall operate for the benefit of all the company's creditors in the same way as if the application had been presented by them.

(4) This section is in addition to and not in derogation from the other provisions of this Part of this Law and any other provision of law relating to winding up."

**Dissolution of company in compulsory winding up.**

10. In section 105(1) of the Law of 1994 for the words "The liquidator shall" substitute "In a compulsory winding up, the liquidator shall".

**Offence in relation to disqualification orders.**

11. In section 111(1)(c) of the Law of 1994 after "66(3)" insert ", 67A(5)(a)".

**Ordinances as to purchase of own shares.**

12. (1) The States may by Ordinance make such provision as they think fit in relation to the purchase by a company of its own shares and concerning the giving by a company, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, of financial assistance for the purpose of or in connection with the purchase or acquisition of, or subscription for, its own shares or the shares of its holding company (within the meaning of the Ordinance).

(2) The provisions of section 1(2) to (5) of the Companies (Enabling Provisions) (Guernsey) Law, 1996 shall apply in relation to an Ordinance under this section as they apply to an Ordinance under that Law.

**Interpretation.**

13. In this Law, unless the context requires otherwise-

- (a) "the Law of 1994" means the Companies (Guernsey) Law, 1994(g);
- (b) expressions used in this Law shall have the same meanings as in the Law of 1994.

**Citation.**

14. This Law may be cited as the Companies (Amendment) (Guernsey) Law, 1996.

**Commencement.**

15. This Law shall come into force on the day appointed by Ordinance of the States, and such an Ordinance may-

- (a) appoint different days for different provisions and different purposes;
- (b) include such transitional, consequential, incidental and supplementary provisions as the States think fit;

and the provisions of section 118(2) and (3) of the Law of 1994 shall apply in relation to any such Ordinance.