

UPDATE

Reform of Guernsey's Insolvency Laws

Update prepared by Abel Lyall (Partner, Guernsey)

The States of Guernsey has approved proposals for reforming Guernsey's insolvency laws and directed that the necessary legislative amendments be prepared. When introduced, the reforms will enhance the current corporate insolvency laws, giving greater protection to creditors and investors.

On 9 February 2017, the Committee for Economic Development recommended the enactment by the States of Guernsey of amendments to the Companies (Guernsey) Law, 2008 (the **Companies Law**) to reform and enhance Guernsey's corporate insolvency provisions.

In proposing these reforms, the Committee recognised that '*effective, equitable and clear insolvency laws are an essential ingredient of a modern economy. Exit strategies for business are an increasingly important factor when choosing where to establish a venture ... since they enable creditors to understand at the outset how a liquidation or administration will progress. In turn this can lead to willingness on the part of credit providers to lend in a jurisdiction; so allowing businesses improved access to finance to facilitate growth.*'

On 31 March 2017, Guernsey's legislative body, the States of Deliberation, approved the Committee's proposals and directed that the legislation necessary to give effect to the reforms be prepared.

Overview of the key proposals

Administration

The introduction in 2008 of the option for companies to enter into administration instead of liquidation was a significant step forward in Guernsey's insolvency regime and it has proved to be a popular mechanism particularly when dealing with major insolvencies where a more advantageous realisation of the company's assets may be realised than would be the case if the company was wound up. In order to assist the development of this area of law, three key changes have been introduced to the current law.

Creditors' Committee Procedures

The proposals provide that administrators shall call at least one initial meeting of the company's creditors within a set number of days following their appointment. If the current practice in England is adopted, then that is likely to be 28 days. The administrators will be required to send a notice of their appointment to creditors with an explanation of the administration process and its aims. The procedure following the initial meeting will remain as flexible as possible so as to ensure that the administrators can tailor the administration process to the size and complexity of the administration and the number of creditors.

Powers of Administrations

The powers currently afforded to administrators under Schedule 1 of the Companies Law do not expressly permit administrators to make distributions to creditors. The proposals introduce an express power for administrators to make distributions to all types of creditors, provided that such distribution is in accordance with the objects of the administration. This reform paves the way for a more simplified exit from administration.

Exit from Administration

At present an administrator must apply to the court for the administration order to be discharged and for the company to be handed back to its directors or placed into liquidation. More often than not, the assets have already been realised and there is nothing for the liquidator to do except make distributions. The proposals give the Court the power to permit dissolution of the company at the same time as discharging the administration order where the court agrees that making a winding up order would be an unnecessary extra step. This reform dovetails with the additional powers given to administrators to make distributions to all types of creditors.

The simplification of the discharge procedure whilst ensuring that creditors are adequately safeguarded (without an excessive number of additional rules and law to effect this change) is to be welcomed.

Winding Up

Under the reforms, the objective of winding up in Guernsey (irrespective of whether the company is solvent or insolvent) will be codified. In summary, these objectives will be to: safeguard and collect in assets, realise the company's assets and distribute the proceeds to the companies' creditors in order of priority after liquidation costs and the payment of any surplus assets to the entitled recipients. These duties will need to be carried out in an efficient and reasonable manner.

Proof of debt procedure

At present, whilst it is possible to seek directions to establish a proof of debt procedure, this is time consuming and often increases the costs involved in the liquidation. The proposals will introduce a clear procedure for the establishment of a claim in a winding up, and there will now be rules and guidance as to advertising for claims, how claims should be submitted and the factors a liquidator should consider when determining the validity of a claim. Liquidators will be given statutory powers to accept or reject claims and provisions will be made for creditors to challenge a liquidator's decision in Court.

Disclaimer of onerous assets

Liquidators will be given statutory powers to disclaim onerous property and unprofitable contracts, subject to the requirement that notice should be given to all relevant parties including Her Majesty's Receiver General where property may become *bona vacantia*. It has been recommended that interested parties be given the right to challenge a liquidator's decision to exercise this power.

Unclaimed dividends

The proposals include a statutory scheme whereby unclaimed dividends may be paid to the States, from whom it can be reclaimed within a specified period of time.

Winding up of foreign companies

The Royal Court will be given the power to compulsorily wind up an insolvent foreign company. It has been proposed that the statutory provisions afforded to the Royal Court reflect the position in England (see section 221(1) of the English Insolvency Act 1986), so that the Royal Court may take account of English jurisprudence, which would be of persuasive authority in this regard.

Reforms specific to voluntary liquidations

In summary the proposals provide for:

- The requirement for liquidators appointed by an insolvent company in a voluntary winding up to be independent, subject to the court having the power to approve a liquidators who do not meet the independence criteria.
- Where the company being voluntarily wound up is insolvent, notice of the liquidator's appointment should be sent to all creditors of the company and there will be an ongoing statutory obligation to report to creditors and shareholders.
- The final meeting in a voluntary winding up will not be invalidated by reason alone of the meeting being inquorate (for example, because there are insufficient members present to form the necessary quorum under section 213 of the Companies Law).

General Amendments

Insolvency rules

At present, there is no set of procedural rules for corporate insolvency in Guernsey. One of the main advantages to supplementing primary legislation with statutory insolvency rules is that aside from the certainty which it provides, the rules can be updated swiftly and adapted as need be with the need to enact primary legislation. The Committee's suggestion that statutory power be given to the Committee to make insolvency rules, advised by a standing rules committee (to include industry practitioners) has been adopted by the States.

Reporting misconduct

The Committee's proposal that administrators and liquidators be under a statutory duty to report any findings or suspicion of misconduct on the part of officers or directors of a company has been approved. Once the amendments are incorporated into law, reports will be made to the Registrar of Companies in respect of non-GFSC licensed entities and to both the Registrar of Companies and the GFSC in respect of licences or former licensees.

Transactions at an undervalue and extortionate credit transactions

Under the current law, liquidators have limited powers to challenge antecedent transactions, and in particular do not have statutory power to attack transactions at an undervalue and extortionate credit transactions. Under the proposals approved by the States, liquidators and administrators will be able to apply to court to set aside such transactions. The changes, once enacted, will bring Guernsey's regime broadly in line with that in the UK.

Statement of affairs and examination powers

Under the proposals as approved, liquidators will be given the same powers as administrators to require the production of a statement of affairs from the company's directors and officers about the company's financial position. In addition, liquidators will be given the power to apply to Court to request an order for the production of documents and information from the company's directors, accountants, bookkeepers, bankers and any other person with knowledge of the company's affairs. Liquidators will also be given the power to apply to Court to require the attendance of directors and former directors for the purpose of examination.

Next Steps

With the States having considered the proposals and directed that legislation be prepared to effect the proposed changes, the next step will be the production of draft legislation to implement the proposals. This will be a significant undertaking, but a welcome step and one which will provide greatly improved clarity and functionality to corporate insolvency in Guernsey.

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