GUIDE

Insolvency procedures for Guernsey companies

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Introduction

Guernsey law provides a number of ways to ensure an orderly realisation and distribution of the assets of a Guernsey company which cannot or will not pay its debts (referred to in this guide as a **debtor**). Whilst these procedures are commonly referred to collectively as **insolvency procedures**, it is not necessary in every case that the debtor be technically insolvent. The specific requirements for each procedure are set out below.

The available procedures can broadly be divided into those provided for under customary law – *désastre* and *saisie* – and the more modern corporate procedures provided for under Guernsey's corporate legislation. In the commercial world, it is far more likely that the modern procedures would be used. In addition, it is possible to use out-of-court restructurings and consensual workouts rather than a formal insolvency process.

This guide provides an overview of the key features of each and the factors which should be considered when deciding which procedure is likely to achieve the best result for creditors.

Modern corporate insolvency proceedings

Unlike *désastre* and *saisie*, Guernsey's modern corporate insolvency regimes are not limited to any particular type or class of assets and can therefore apply to both a debtor's moveable property and its real estate.

These modern procedures can also have more significant consequences for the debtor, including sanctions against company directors and, in the case of liquidation, the dissolution of the debtor company.

Corporate insolvency and restructuring is governed by the Companies (Guernsey) Law, 2008 (the **Companies Law**). This applies to Guernsey companies, including protected cell companies (**PCCs**) and incorporated cell companies (**ICCs**) and their incorporated cells.

The Companies Law provides for a number of formal restructuring and insolvency procedures, modelled closely on English law:

- administration orders for debtors that are insolvent or likely to become insolvent
- voluntary liquidation for solvent and insolvent debtors
- compulsory winding up for insolvent debtors (including provisional liquidation)
- schemes of arrangement in order to effect 'in court' restructuring and
- receivership orders, in relation to a cell of a PCC.

Insolvency Rules contained in the Companies (Guernsey) (Insolvency Rules) Regulations, 2022 (the **Insolvency Rules**) provide more detail about certain aspects of Guernsey insolvency procedures, including the functioning of creditor meetings. In particular, the Insolvency Rules make provision for the following aspects of creditor meetings: notice period, notice content, location, quorum, chair, voting, suspension and adjournment, minutes and electronic communications.

There are separate insolvency regimes applying to limited partnerships and limited liability partnerships.

Administration

The court will make an administration order (on application from the debtor itself, its directors, members, any creditor or certain other interested parties) where:

- it is satisfied that the debtor is unable or likely to become unable to satisfy the **solvency test**, because:
  - it is unable to pay its debts as they become due or
  - its liabilities exceed its assets or
  - if it is a supervised company, it is failing to comply with all applicable regulatory requirements and
- it considers that the making of the order will achieve the survival of the debtor as a going concern or a more advantageous realisation of the debtor's assets than would be achieved in a winding up.

The court will appoint an administrator (usually a qualified insolvency practitioner) to take over the running of the debtor, with wide powers to sell the debtor's assets, borrow money and/or make arrangements or compromises on the debtor's behalf. During the administration, a moratorium is imposed, so that no proceedings may be commenced or continued against the debtor without the leave of the court. However, the moratorium does not affect the rights of set-off or creditors having a secured interest.

Unless the court directs otherwise, the administrator must call an initial meeting of creditors and send the known creditors an explanation of the aims of and the likely process of the administration. The initial meeting of creditors must be within 10 weeks of the date of the administration order, or such other period as the court may direct.

The administrator may dispense with the requirement to call an initial meeting of creditors where there are no assets available for distribution to creditors and the administrator has given notice of this fact to all known creditors within 28 days of the administrator's appointment.

Aside from this, there is no set process for the conduct of an administration and no time limit on the length of the order. It is therefore open to the administrator, court and creditors to work flexibly towards the most beneficial realisation of the debtor's assets and the settlement of its liabilities and, ultimately, its survival as a going concern.

The administrator may make a distribution to a creditor of the company if the administrator thinks it likely to assist the achievement of any purpose for which the administration order was made.

Where the administration is successful in reviving the financial health of the debtor, the order may be discharged and the debtor can resume under the management of its directors. In the event that the debtor remains insolvent and it appears to the court that the debtor has no assets which might permit a distribution to its creditors, the court may order that the company is dissolved at the same time as it makes the order for discharge. Otherwise, a separate application is normally made for it to be wound up.

Liquidation

Voluntary liquidation

Subject to the terms of the debtor's articles, the members of a debtor company may pass a resolution for its winding-up. Generally, a special resolution is required unless provided for in the articles. If the debtor is solvent, it may make a declaration of solvency in form prescribed by the Insolvency Rules which states that, in the opinion of the board, the company satisfies the solvency test. If the debtor is insolvent, the winding up resolution may still be passed by members but there are certain consequences which are dealt with further below.

On passing the winding up resolution, members may also appoint a liquidator to undertake the winding-up of the debtor. The liquidator is required to realise the debtor's assets and discharge its liabilities, before distributing any surplus to members. All the powers of the directors cease, except where the debtor by ordinary resolution or the liquidator has approved their continuation. While the debtor's corporate capacity continues until dissolution, the debtor must cease to carry on business unless it is beneficial for the winding-up of the debtor.

If no declaration of solvency is made, the liquidator must be independent. As such, a director or former director, company secretary or administrator of the company would be ineligible to be the liquidator.

If a declaration of solvency is made but it becomes apparent to the liquidator that the debtor does not satisfy the solvency test, subject to limited exceptions if the liquidator is not independent, they must convene a meeting of creditors to sanction their appointment or the appointment of an alternative liquidator or seek the court's sanction of their appointment.

Where a declaration of solvency has not been made, or the appointment of a liquidator has been sanctioned by a meeting of creditors or the court or an alternative liquidator has been appointed in the circumstances referred to above, the liquidator shall call at least one creditors' meeting within one month of the liquidator's appointment or (as the case may be) the sanctioning of their appointment. This requirement does not apply where, in the opinion of the liquidator, there are no assets available for distribution to the creditors. Notice of the meeting shall be sent to all the company's creditors at least seven days before the meeting and contain notice of the liquidator's appointment (or sanctioning thereof as the case may be) and an explanation of the likely process of the voluntary winding up.

During a voluntary winding-up the debtor can by special resolution delegate to its creditors the power to appoint a liquidator or to enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in which they are exercised. Members or the liquidator may seek directions from the court on any aspect of the winding-up.

There is no automatic moratorium on the passing of a winding up resolution, such that creditors may commence or continue proceedings against the debtor and may apply for it to be compulsorily wound up. There is no procedure to adjudicate creditor claims.

There is no provision for the length of time for a voluntary liquidation. A general meeting of the debtor company must be called after one year from the date of winding-up and in each year following. The meeting must take place within three months immediately following the expiration of the relevant year. At the general meeting the liquidator should provide an account of the conduct of the winding-up during the year.

Once the affairs of the debtor are fully wound up the liquidator will prepare an account of the winding-up and call a general meeting to present and explain the account. Once held, the liquidator will give notice to the registrar of companies who will issue a public notice that the debtor will be dissolved. The debtor is dissolved three months after the notice is given.

Compulsory liquidation

An application for the compulsory winding up of a Guernsey company may be made to the Guernsey court by the debtor company, any director, member or creditor or other 'interested party'.

The grounds for making an application for compulsory winding-up of a Guernsey company are set out in the Companies Law. An application may be made in a number of circumstances, including where the debtor is 'unable to pay its debts' or where it is 'just and equitable' that the debtor be wound up. In addition, the Guernsey Financial Services Commission may apply to wind-up any company on the grounds that doing so would be for the protection of the public or the reputation of the Bailiwick of Guernsey.

A company is deemed 'unable to pay its debts' as they fall due if:

- a creditor who is owed more than £750 serves a written demand for payment and the company fails to pay within 21 days or
- the court is satisfied that the company fails the solvency test (see above).

The Guernsey court also has the power to wind up a non-Guernsey company, where:

- the debtor is 'unable to pay its debts'
- it is 'just and equitable' that the debtor be wound up or
- the debtor is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.

As part of the liquidation order, the court will appoint a third party to act as liquidator. From this moment, the liquidator takes control of the debtor's affairs and the directors no longer have any powers to run the debtor except as provided by the court or as agreed with the liquidator. The debtor must cease to carry on business except as may be expedient for its beneficial winding up.

The liquidator has a wide range of powers to manage the affairs of the debtor generally, including the power to unwind preferences, transactions at undervalue and extortionate credit transactions in certain circumstances and the power to take action against directors of the debtor to recover funds. The liquidator also has the power to disclaim onerous property and certain aspects of this are dealt with by the Company Insolvency Rules (Application To Disclaim Onerous Property) Rules, 2023. The liquidator can seek the court's direction on any matter relating to the winding-up. The liquidator also has the power to obtain information and documents relating to the affairs of the debtor from officers, employees and those involved in the formation of companies.

The court also has the power to make interim orders, and these can include an order for the appointment of a provisional liquidator.

There is currently no formal 'proof of debt' procedure in Guernsey. In practice, liquidators will make contact with known creditors and advertise for claims in relevant newspapers. Creditors will be asked to submit claims in the form of 'proofs of debt', but liquidators do not have the role of adjudicating such claims. There is generally no time period within which creditors must lodge their claims. Ultimately, it will be for a

Commissioner appointed by the court to approve distributions to creditors. Where there are disputes over creditor claims these are referred to the court for determination.

Any surplus on winding-up will be distributed to shareholders in accordance with their rights and interests under the articles of association of the debtor. Once the liquidator has made their final distribution, they must apply to the court for an order declaring the debtor dissolved.

Companies in liquidation (voluntary or compulsory) are exempt from the requirement to have their accounts audited.

Scheme of arrangement

Statutory process

The principal statutory restructuring tool in Guernsey is the scheme of arrangement under Part VIII of the Companies Law. The provisions of Part VIII are substantially similar to schemes of arrangement under English law.

A scheme of arrangement is a statutory form of compromise or arrangement between a company and its creditors (or any class of them) or its shareholders. There is no statutory definition of the terms 'compromise' or 'arrangement' and the court will define them to incorporate a broad range of arrangements, provided there is some form of 'give and take' between the debtor and creditors to be bound by the scheme.

A scheme of arrangement can be commenced by a company or by any creditor or shareholder, however, a scheme commenced by a creditor or shareholder must have the company's support.

There is no automatic moratorium that applies when scheme proceedings are commenced. It is possible to propose a scheme of arrangement from within an administration, which would give the debtor a moratorium as regards to claims of unsecured creditors.

Three-stage mechanism

The scheme process involves a three-stage mechanism.

- In the first stage, the court gives directions on how the meeting or meetings of creditors are to be convened. At this stage, the court is primarily concerned that the composition of the classes for each meeting are appropriate, that the material provided to creditors is sufficient for them to reach a decision, and that the meeting will provide a proper opportunity to be present.
- The second stage involves the convening of court ordered meetings at which the proposals are considered and voted on by creditors.
- Where the scheme of arrangement is approved by creditors, it proceeds to the third stage where the court is asked to sanction the scheme.

Approval and challenges

A scheme must be approved by a majority of the creditors of the company in number, representing 75 per cent in value of the creditors (or class of creditors) present voting either in person or by proxy.

After the scheme is approved by the requisite majority of creditors, it must be sanctioned by the court. The court will consider whether the statutory requirements have been met, that each relevant class of creditor was fairly represented by those who attended the meeting, that the majority are acting in good faith and not coercing the minority, and the scheme is one that an intelligent and honest person might reasonably approve.

Provided the requisite majorities are achieved and the scheme comes into effect, the interests of dissenting creditors will be crammed down in accordance with the terms of the scheme.

As the scheme requires a court process it is not confidential and key commercial and economic terms may be accessible by the public.

Receivership

Guernsey law does not provide any means for Guernsey companies to be placed into receivership, save in the case of PCCs where there is a specific procedure for the receivership of individual protected cells (which is more akin to a liquidation of the cell than an LPA receivership in the UK).

The traditional procedures

The traditional procedures of *désastre* and *saisie* are used only rarely in the corporate context, but are nevertheless worthy of note.

The distinction between *désastre* and *saisie* relates to the nature of the assets the subject of the proceedings. *Désastre* applies to a debtor's personal, moveable property (for example, cash, goods and, in certain circumstances, other intangibles), and *saisie* applies to a debtor's real estate.

The first step in either case is usually for a creditor to obtain a court judgment (an **initial judgment**) against the debtor in the amount of its debt[1]. That creditor (known as the **arresting creditor**) can then decide whether to select *désastre* or *saisie* proceedings. Once *désastre* or *saisie* proceedings have been instigated by an arresting creditor, other creditors of the same debtor can join in those proceedings and do not themselves need to obtain judgment for the amount of their own debt.

Désastre

The goal of a *désastre* is to allow all creditors to share in the proceeds of sale of the debtor's moveable assets.

Following the initial judgment, the arresting creditor applies for a court order that the judgment be executed against the debtor's assets. This second judgment is presented to Her Majesty's Sheriff who arrests the debtor's assets and, with the court's consent, sells them by public auction and distributes the proceeds.

Where the proceeds are sufficient to pay all of the debtor's liabilities, this will be the end of the matter. However, where there are insufficient funds to go round, the *désastre* process will begin in earnest. The debtor will be declared *en etat de désastre* and a Commissioner appointed by the court to act as Commissioner and conduct the process. The Commissioner will convene a meeting at which they will assess the various claims and preferences of the creditors and declare the dividend payable to each of them out of the proceeds of sale. The priority of claims in a *désastre* is:

- first, the costs of the *désastre* itself (including Her Majesty's Sheriff's fees and the costs of the arresting creditor)
- second, the claims of creditors holding a security interest under the Security Interests (Guernsey) Law 1993 and
- third, preferred debts (for example, monies owed to landlords, wages, salaries, taxes and social security payments).

All other creditors will rank equally as unsecured and share in the dividend accordingly.

Once the assets have been sold and the proceeds distributed, there is no further consequence for the debtor – it will not be prohibited or restricted or impeded from carrying out any activity or business in the future. Similarly, a *désastre* does not constitute a discharge for the debtor from its liabilities, with the result that creditors can continue to pursue the debtor (including by way of *saisie* proceedings, see below) even if it has received part-payment of liabilities under a *désastre*. As noted above, *désastre* has no impact on the debtor's real estate.

Saisie

Saisie proceedings are also concerned with the realisation and distribution of the debtor's assets among two or more creditors – in this case, however, the proceedings relate not to personal, moveable property but to real estate.

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[1] It is also possible for a creditor to commence désastre proceedings by applying to the Bailiff or Deputy Bailiff for an arrest of the debtor's assets in certain circumstances – for example, where it is feared that the debtor will take assets out of Guernsey.

Following the granting of the initial judgment, the arresting creditor applies for a preliminary vesting order to execute against the debtor's real estate. Once this is granted, if the debtor still fails to pay, the court will make an interim vesting order, the effect of which is that the debtor's real estate is transferred to the arresting creditor to hold on trust for all claimants, leaving the debtor with no further title to or interest in the property and, in most cases, no further involvement in the *saisie* process.

The arresting creditor, as trustee, then places a notice in the Gazette Officielle for two successive weeks, giving other creditors 28 days to register their claims to share in the assets. Once this 28 day period has elapsed, a Commissioner is appointed to assess the various claims of the creditors in order of priority and to set a date for a final vesting order.

On the day of the final vesting order, each creditor must decide in turn, starting with the lowest in priority, if they wish to take the real estate (on the condition that they pay all higher ranking creditors in full) or renounce their claim and lose any right to pursue it.

As with a *désastre*, there is no further consequence for the debtor (beyond the loss of the real estate and any adverse publicity arising out of the proceedings). However, the consequences for the creditors are very different – in a *saisie*, a creditor's claim becomes linked and limited to the real estate in question. A creditor who participates in *saisie* proceedings may not then continue to pursue the debtor (for example, by then participating in a *désastre*). A creditor considering participating in *saisie* proceedings should therefore take care to satisfy himself that the debtor's real estate is sufficient to discharge the debt, taking into account any other creditors.

Out-of-court restructurings and consensual workouts

In Guernsey, like in the UK, it is possible for the debtor to use out-of-court restructurings and consensual workouts rather than the formal insolvency processes detailed above. Given Guernsey's close financial links with the UK market, and the background of most market participants, the approach to out of court restructuring tends to follow the approach and practice adopted in the UK. In order to facilitate consensual restructuring, market participants will in general respect the well-recognised formal consensual restructuring frameworks such as the INSOL principles.

There is no requirement under Guernsey law for consensual restructuring negotiations to take place prior to the commencement of any formal statutory processes.

There are no formal stages involved in an out-of-court restructuring. It is likely that some form of informal moratorium will be agreed with the creditors to enable the provision of information by the debtor and an opportunity for creditors to evaluate any proposals made.

Absent contractual provisions in the creditor agreements, there is no out-of-court cram-down mechanism that will bind dissenting creditors. Where it is intended to bind dissenting creditors, a statutory scheme of arrangement will need to be used.

Conclusion

Guernsey law provides a variety of procedures aimed at satisfying the claims of creditors of corporate Guernsey debtors. In order to determine which of those procedures is likely to produce the best result for a creditor, a number of factors will need to be considered. These include:

- Who are the debtor's creditors? A creditor considering instigating insolvency procedures should always assess and determine how many creditors the debtor has and the value of their respective claims.
- What assets does the debtor have? A key factor will be the type of assets (real estate or moveables) held by the debtor. It is also crucial to determine the value of those assets and measure that value against the debtor's total liabilities.
- Could the debtor survive? Is there a chance the debtor's situation could improve if it is allowed to continue to do business? If it has some chance of becoming successful in the future it may be that administration will give the debtor (and therefore its creditors) the best chance of achieving that success.

Contacts

A full list of contacts specialising in insolvency law can be found here.