GUIDE

Recognition of foreign insolvencies in Guernsey

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Foreign insolvency proceedings (including those ordered by the UK courts) have no direct operation in Guernsey. Therefore foreign insolvency office holders looking to take steps in Guernsey, such a collecting in assets or compelling the production of information from third parties, will need to first be recognised under Guernsey law before steps can be taken in this jurisdiction.

Guernsey has not introduced legislation based on the UNCITRAL model law on cross-border insolvency. It is also not (and was not prior to Brexit) subject to the Recast Insolvency Regulations.

Nevertheless, Guernsey's Royal Court will assist foreign office holder in the conduct of foreign insolvency proceedings. This can be achieved via one of two routes: recognition under section 426 of the Insolvency Act 1986 (the Act); or pursuant to the common law. Which route to adopt will depend on the location of the foreign insolvency.

Recognition under section 426

Section 426 of the Act, through its extension to the Bailiwick of Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989, affords the Royal Court a very effective mechanism for providing judicial assistance to the courts in the UK, Isle of Man and Jersey in insolvency matters. Section 426 of the Act provides for reciprocal assistance, which operates on a two-stage process:

- Letter of Request: The foreign office-holder applies to the appropriate court in its home jurisdiction to issue a letter of request, which seeks the assistance of the Royal Court.
- Giving Effect to the Letter of Request: An application is then made to the Royal Court for an order giving effect to the letter of Request.

The Royal Court has a duty to assist the foreign court absent a compelling reason for the Royal Court to reject the application (eg. that to grant the application would be oppressive or contrary to public policy).[1]

Once effect has been given to the letter of request, the Royal Court may at its discretion apply Guernsey or foreign law to the insolvency process.[2] This gives an office-holder flexibility and access to a range of powers that may not be available to it under its home jurisdiction (or vice versa for powers not available in Guernsey).

For example, in *Slinn and Slinn v Official Receiver and Liquidator of Seagull Manufacturing Company Limited* (Unreported, 3 May 1990), the Court of Alderney applied English Law in order to grant the private examination of directors (resident in Alderney) of an English registered company as per the English office-holder's request. This decision was upheld on appeal despite the argument that the Court of Alderney had no power to make the order as there is no equivalent provision in the Companies (Amendment)(Alderney) Law, 1962.[3]

[1] *Batty v Bourse Trust Company Limited* [2017] GLR 54

[2] s426 (5) Insolvency Act 1986 / s2 Insolvency Act 1986 (Guernsey) Order 1989

[3] *Slinn and Slinn v Official Receiver and Liquidator of Seagull manufacturing Company Limited* (1996) 22 GLJ 83

In *Batty v Bourse Trust*[4], the office holder (Mr Batty) applied to the Royal Court for assistance in obtaining information from the Bourse Trust and orders and/or declarations regarding various company assets. The Deputy Bailiff was satisfied in this case that there was no compelling reason not to apply the English law position and granted the relief sought. The relief sought included a declaration that certain dividends were unlawful pursuant to the English Companies Act 2006 and that the transactions at undervalue identified by the office-holder were made to defraud creditors and are void in accordance with the English Insolvency Act 1986. The Royal Court was persuaded to grant this relief despite the absence of any direct statutory equivalent in Guernsey. The Deputy Bailiff also ordered the disclosure sought.

This case illustrates that wide-ranging relief is available to office holders, under either Guernsey or English legislation, who apply to the Royal Court in Guernsey pursuant to a letter of request.

The process outlined above describes a foreign office-holder seeking assistance in Guernsey. As the arrangement is reciprocal, an equivalent process would apply for a Guernsey office holder seeking recognition in the foreign jurisdictions covered by section 426 of the Act[5].

As set out above, this method of recognition is restricted to the use in insolvency proceedings where the office holder is appointed in the UK or other Crown Dependencies. For other foreign office-holders, the common law route must be used.

The common law route

The Royal Court has confirmed that it will be willing to render assistance to foreign officials, having regard to principles of comity. Under this approach, in order for the Royal Court to provide assistance to an office-holder in foreign insolvency proceedings, there must be a 'sufficient connection' between the office-holder and the jurisdiction in which they have been appointed. However, even where the test is satisfied, the Royal Court retains discretion as to whether or not to grant the relief sought.

Sufficient connection

The criteria for a sufficient connection was set out in *Terry & Durette Bradshaw plc v Butterfield Bank*[6] and is likely to be established where;

- The office-holder is appointed by the court in the country where the company is incorporated
- The defendant submits to the jurisdiction of the court who made the appointment
- The order of the foreign court would be recognised by the law of the country where the company is incorporated, or
- The office-holder is appointed in the jurisdiction that the central management and control of the company is exercised.[7]

Once the foreign office-holder has been recognised by the Royal Court, it is under an obligation to render active assistance in the insolvency proceedings.[8] However, the assistance that the Royal Court may provide is limited because unlike with the statutory route outlined above, the Royal Court does not have flexibility of applying different laws to widen the scope of what powers may be available to an office-holder.

Brittain v JTC (Guernsey) Limited [2015] GLR 248 considered a request to conduct an examination of persons involved in the affairs of an English bankrupt via the common law route. Lieutenant-Bailiff Marshall QC declined to make the orders sought, rejecting the existence of an inherent jurisdiction to treat a power conferred only by statute for local insolvencies as being available in a case not covered by the statute. In the subsequent decision of *Re Lee Douglass (in Bankruptcy)* [2017] GRC 32, Deputy Bailiff McMahon drew a distinction between the 'far reaching' powers of examination being sought in *Brittain* and the more 'ordinary' powers sought in *Lee Douglass*, being for recovery of assets and document, which he considered were part

[4] *Ibid.* 1

[5] See for example *Highbridge Investments LP, INC v King, Chapman and Hunter* [2021] GRC062

[6] *Terry & Durette Bradshaw plc v Butterfield Bank* (2006) GLR 9?

[7] Dicey & Morris on The Conflict of Laws (13th Edition)

[8] *EFG Private Bank (CI) Ltd v BC Capital Group SA* [2013] GLR 354

of the 'consequences of recognition.' Despite not using the section 426 route the applicant was entitled to seek recognition and apply ancillary powers under Guernsey common or customary law.

Conclusion

There are two routes under which an office-holder can apply to have a foreign insolvency recognised in Guernsey – under s 426 of the Insolvency Act or at common law. There are wider benefits to utilising the statutory route (such as the application of foreign and Guernsey law to widen the scope of office-holder powers in the insolvency process); however, the route is only available to UK or Crown Dependency insolvencies. Therefore, other foreign office holders will need to utilise the common law route.

Contacts

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

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