ALLEN & OVERY

Restructuring across borders

Guernsey

Corporate restructuring and insolvency procedures | June 2022

allenovery.com

Contents

Introduction

When a Guernsey company faces financial difficulties, there are a variety of restructuring and insolvency options available. The principal restructuring and insolvency regimes for companies under Guernsey law are:

– administration under the Companies (Guernsey) Law, 2008 (as amended) (**the Companies Law**);

– Désastre;

– just and equitable winding up;

– schemes of arrangement;

– liquidation (also known as winding up); and

– receivership in respect of cells of PCCs (as defined below).

In addition to schemes of arrangement under the Companies Law, Guernsey also has the option of out-of-court restructuring transactions. These can involve, for example:

(a) debt-for-equity swaps (with the agreement of all affected creditors);

(b) group reorganisations; and

(c) enforcement of security and set-off provisions.

There is also the Guernsey law procedure for bankruptcy under the law relating to debtors and renunciation, 1929 (the **1929 Law**). Although broad enough to extend to companies, the 1929 Law appears to be intended for individuals. Moreover, the procedures under it are little used even for individuals, with the désastre proceedings referred to below being generally preferred for recovery by creditors.

Insolvency procedures in Guernsey do not combine the parent and subsidiary companies' assets into a single pool. The insolvency is on a company-by-company basis.

Enforcement of security

The main forms of security available under Guernsey law are:

– security interests pursuant to the Security Interests (Guernsey) Law, 1993 (the Security Law); and

– hypothèques.

Guernsey law recognises the concept of a trust.

The appropriate method of enforcement will depend on the type of security granted and the particular case in question.

Guernsey intangible movable property

The Security Law states that, following an event of default as specified in the relevant security interest agreement, the statutory power of sale or application arises. However, such power is only exercisable once the secured party has served written notice on the debtor specifying the event of default complained of.

It is customary in Guernsey for the parties to the relevant security agreement to contractually agree that powers of sale or application can be exercised without the need for an order of the Royal Court in Guernsey. Accordingly on the basis that the relevant security agreement is enforceable in accordance with its terms, there is no requirement in Guernsey for any court order, or similar approval, in order to exercise the power of sale.

Pre-enforcement steps

In addition, there are a variety of pre-enforcement steps available to a secured party (prior to serving written notice on the debtor specifying the event of default complained of). These include:

(a) taking title to secured shares by serving a notice of assignment and instructing the directors/corporate administrators (the Guernsey corporate service providers who assist with the administrative and corporate governance aspects) to update the register of members;

(b) exercising voting rights in respect of secured shares, for example to change the board of directors of the company; and

(c) giving instructions to third parties in respect of the collateral, for example instructing the account bank to block the secured accounts.

Bonds (hypothèques)

A bond is a personal obligation secured against real property. Unless otherwise provided, it secures all the borrower's real property acquired on or before the date of registration of the bond. A bond also confers priority in respect of property acquired by the borrower after the date of registration of the bond, but only if that after-acquired property is still owned by the borrower at the time of enforcement.

Holders of registered bonds can enforce their security by taking "saisie" proceedings against the borrower. The taking of saisie proceedings prevents a creditor from taking action against the borrower's personal property, and consideration must therefore be given to enforcing against personal property before saisie proceedings are entered into.

The priority of bonds and other charges is determined by the date on which the bonds or other charges were registered.

The lowest ranking creditors have the option of having the borrower's real property vested in them, provided they repay all prior ranking creditors. At the end of saisie proceedings the holder of a bond will end up in one of the following positions:

– Owning the borrower's real property;

– Receiving payment of the amount of the secured debt by a lower-ranking creditor; or

– (if the bond in question ranks behind other charges and the borrower's property is not worth enough) electing not to take the borrower's real property and not receiving anything.

The holder of a bond is under a legal obligation to cancel a bond once the underlying debt is repaid.

Insolvency and enforcement

The Security Law provides that upon the debtor becoming insolvent, or upon their affairs being declared in a state of désastre, where the secured party (or some person on their behalf other than the debtor or some person on behalf of the debtor) does not have title to the collateral, to the extent that the collateral is sufficient, the amount due to the secured party in respect of a security interest created under the Security Law shall be paid in priority to all other claims.

Further, where the secured party (or some person on their behalf other than the debtor or some person on behalf of the debtor) has title to the collateral, upon the debtor becoming insolvent, their affairs being declared in a state of désastre, or their property becoming subjected (whether in Guernsey or elsewhere) to any other judicial arrangement or proceeding

Enforcement of security (Cont.)

consequent upon insolvency or a declaration of désastre, the power of a secured party to realise or otherwise deal with the collateral will be the same as if the debtor or their property had not been the subject of such insolvency, désastre or other judicial proceedings or arrangements.

Where the debtor has been declared en désastre:

(a) the arresting creditor may apply to the Court for an order vesting in them the rights of the secured party to the collateral and directing that it be sold or applied by H.M. Sheriff (the executive arm of the Royal Court and the States of Guernsey who undertakes enforcement action in order to, amongst other things, recover sums of money from judgment debtors and collect and enforce fines);

(b) the proceeds of that sale or application of the collateral shall be applied by the Sheriff in accordance with the provisions of the Security Law; and

(c) subject to paragraph (b), the Court may make an order directing such vesting and sale upon such terms and subject to such conditions as the Court thinks fit.

There is no "perfection" of Guernsey security taken pursuant to the Security Law given that there is no public register of Guernsey security for the types of collateral secured pursuant to the Security Law.

Setting aside transactions

A liquidator has the power to commence insolvency-specific actions against third parties under the Companies Law in relation to:

– Preferences. This may apply where the company has been influenced by the desire to prefer a third-party creditor over other creditors.

– Misfeasance. This may apply where a director or former director has misapplied or misappropriated company funds.

– Production of Documents and Information. Until the new amendments under the New Ordinance (as defined below) there was no statutory power or authority allowing a liquidator to demand documents from directors or employees of the company, or to interview directors or former directors. There was common law authority outlined in the decision of *Re Med Vineyards* allowing a director to be interviewed, but the extent of such powers was uncertain and has been previously doubted by Lieutenant Bailiff Marshall QC in *Re X* (*a Bankrupt*), *Brittain v JTC* (*Guernsey*) (*2015*).

More recently the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance (**the New Ordinance**) was passed on 15 January 2020. This New Ordinance has made various changes to insolvency law in relation to both administrations and liquidations which are set out below. However, it is important to note that the New Ordinance has not yet come into force but it is expected to do so shortly.

Under the New Ordinance, a liquidator can demand (by court order if necessary) that all directors, former directors, employees and those who were employed by the company within the past 12 months (before commencement of the liquidation) must provide all the documents that the liquidator might reasonably require to perform their duties. In addition, the liquidator can, upon the commencement of the New Ordinance, apply to the Guernsey Court to interview an officer or former officer of the company about matters such as:

– the formation of the company, its business and affairs; and

– their conduct or dealings in relation to the company.

In addition, a liquidator may require a statement of affairs (summarising assets and liabilities and providing the names of creditors) from past and present officers of the company, present employees and those employed in the year preceding the commencement of the liquidation.

– Breaches of Fiduciary Duty. Where in the course of a company's winding up it appears that any director has otherwise been guilty of any breach of fiduciary duty, the liquidator may apply to the Court for an order against the director personally. The test for a breach of fiduciary duty is a subjective one.

– Fraudulent and Wrongful Trading. The test for fraudulent and wrongful trading is the same in Guernsey as under English law.

– Transactions at an Undervalue. Before the New Ordinance, there was no power to bring an action to avoid a transaction at undervalue under Guernsey law. Liquidators in Guernsey had to rely on a customary law device known as a Pauline Action (or actio pauliana) which

Enforcement of security (Cont.)

has its origins in Roman and Justinian law and which, in the UK, has legislative effect in section 423 of the Insolvency Act 1986. This customary law principle, which allows a liquidator to reclaim assets that have been fraudulently transferred by a company to a third party in order to place assets beyond the reach of creditors, was confirmed in the Jersey case of *Re Esteem JLR 53* (*2002*) and referred to in the Guernsey case of Flightlease Holdings (Guernsey) Limited (2005) by Lieutenant Bailiff Southwell as well as the Deputy Bailiff in *Batty v Bourse GLR 54* [*2017*].

The Guernsey Court can make various orders, including that property be returned to the company, but cannot take action against a third party who had acted in good faith, paid full value and who had no knowledge of the circumstances giving rise to the action, except where the third party was party to the transaction itself.

Pauline Actions will still be useful to liquidators or administrators where the transactions lie outside the six month or two-year period outlined below.

However, the New Ordinance incorporated a section modelled on section 238 of the UK Insolvency Act 1986, which provides the Guernsey Court with the jurisdiction to make various orders against third parties where property has been transferred to them for no consideration, or for consideration that is considerably less than that provided by the third party.

In addition, an administrator can, upon the commencement of the New Ordinance, challenge any transaction entered into at an undervalue within six months of the onset of insolvency or two years where the transaction was with a connected party. A challenge will not be successful where the company can show that the transaction was entered into in good faith, for the purpose of carrying on the business of the company and there were reasonable grounds for believing that the transaction would benefit the company. Under the New Ordinance an administrator can also challenge transactions (within three years of the onset of insolvency) which (i) involve grossly exorbitant terms in relation to the provision of credit, or (ii) grossly offends the principles of fair dealing. The Guernsey Court has the power to set aside these transactions and to amend the terms of the provision of credit.

Désastre

There is no clear code of procedure for désastre, but a brief outline of the process is set out below:

(a) Désastre proceedings arise out of the arrest of a debtor's personal property in Guernsey by HM Sheriff, either (i) at the instance of a judgment creditor (ie following an application to the Royal Court, and a judgment for the arrest of the personal property having been made) or, (ii) where there is good reason for the immediate arrest of the personal property, a creditor without a judgment.

(b) Following confirmation of the arrest by the Court and realisation of the assets, the Court may institute désastre proceedings where HM Sheriff has insufficient resulting funds to cover the debt of the arresting creditor and any other debts notified to them.

(c) The Court will order the arresting creditor, the debtor and other creditors to appear before a Jurat (a Guernsey court official, elected by the "States of Election" which is a body constituted by those who hold certain public offices. Jurats are, amongst other things, the finders of fact in Guernsey court cases in lieu of a jury system) appointed by the Court to act as Commissioner for the purpose of establishing the claims of debtors and any preferences.

(d) At a meeting attended by the arresting creditor and HM Sheriff the Commissioner declares the debtor to be en désastre (in a state of financial disaster) and fixes the place, date and time at and on which he will examine the claims and preferences of the various creditors and declare a dividend amongst them.

(e) The arresting creditor must publish a notice on two occasions in La Gazette Officielle stating that a meeting of creditors is to be held at and on the appointed place, date and time.

(f) At the meeting of creditors, each creditor submits their claims and these are duly marshalled by the Commissioner, having regard to any preferred debts. The debtor is again summoned formally to attend this meeting.

(g) Once this has been done and HM Sheriff has disclosed the amount of the monies in their hands, the Commissioner declares a dividend and makes a report on the proceedings held before them.

(h) The monies in the hands of HM Sheriff are then distributed among the creditors, preferential claims being satisfied in full and the other claims met in part according to the dividend declared by the Commissioner.

Désastre allows all the creditors to share the proceeds of sale of a debtor's chattels, as opposed to a single creditor liquidating assets entirely for their benefit. Désastre is not equivalent to a bankruptcy order, nor does désastre constitute a discharge for the debtor from their liabilities. Creditors may continue to pursue the debtor for the remainder of the debt should assets of the debtor appear after the initial désastre.

Désastre proceedings begin with the arrest of a debtor's property. Once judgment for the arrest is obtained against a debtor, the 'arresting creditor', will either:

(a) provide a certified copy of the Act of Court to Her Majesty's Sheriff who will then arrest as much of the debtor's personal property as amounts to the debt value (*Arrêt Execution*); or

(b) prior to judgment obtain permission from the Bailiff to arrest goods (*Arrêt conservatoire*).

The arrest is usually carried out by way of an inventory and the debtor's undertaking not to dispose of the assets listed. The arresting creditor will summons the debtor to court (a notice will be served on the debtor informing them that a creditor has obtained a judgment for the arrêt, and letting them know the date and time the court will convene to confirm the arrêt) to confirm the arrêt, and for permission for the arrested goods to be sold at public auction after placing notices in La Gazette Officielle.

If no further creditors have come forward in response to the Gazette notice, and the sale of the goods arrested by HM Sheriff has taken place, the arresting creditor serves a notice on HM Sheriff (by way of a summons) to be paid the proceeds of the sales after costs have been deducted.

If there are other creditors who have responded to the Gazette notice, HM Sheriff will declare this in the reply to the arresting creditor's summons. Where there are several creditors and insufficient funds from the proceeds of the auction, désastre proceedings will commence.

In the event that the proceeds of the auction are insufficient to satisfy the arresting creditor's debt in full, the Court will order the arresting creditor, debtor and all other known creditors to appear before a Jurat acting as Commissioner of the Court to establish their claims and preferences.

The Commissioner will fix a date for the creditors' meeting. It is then the responsibility of the arresting creditor to publish in La Gazette Officielle and the Royal Court building notice of the time, place and date of the meeting for two consecutive weeks.

At the creditors' meeting, creditors present will submit their claims to the Commissioner who will then determine whether their debt is accepted, with any disputes being referred to the Royal Court. The Commissioner will verify the debts and once the accepted claims are established, the Commissioner will marshal them according to the preferences governed by the Preferred Debts (Guernsey) Law 1983, the Preferred Debts Désastre Proceedings and Miscellaneous Provisions (Guernsey and Alderney) Law 2006. Proceeds are generally paid as dividends in the order of:

(a) costs of proceedings to HM Sheriff, the arresting creditor, and other creditors (including legal costs);

(b) secured debts on the arrested personal property ie a security interest;

(c) landlord hypothecation (which is used to pay off any rent outstanding to a landlord, and may apply to any personal property found on the premises which appear to be owned by the debtor);

(d) preferred debts (eg wages and tax contributions) – provided the proceeds from the sale of the seized assets are sufficient they are all paid in full. If there are insufficient funds, the debts will abate in equal proportions due to them all ranking equally; and

(e) any unsecured debts.

Administration

The Companies Law provides for companies, protected cell companies (PCCs), incorporated cell companies (ICCs) and cells of PCCs and ICCs (statutorily segregated pools of assets that can (i) have no separate legal personality (in the case of cells of PCCs), or (ii) have separate legal personality (in the case of cells of ICCs)) to be placed into administration and for an administrator to be appointed to manage that entity's affairs whilst the administration order remains in force.

A company, PCC, ICC or cell may be placed into administration by the Royal Court upon the application of certain parties. During the term of the administration order, the affairs, business and property of the company, PCC, ICC or cell are managed by an administrator who is appointed by the court for that purpose. The Royal Court will only make an administration order if various requirements are fulfilled. These are (i) that the entity in question must fail or be likely to fail the "solvency test" as set out in section 527 of the Companies Law, and (ii) that one or both of the purposes of administration (as set out below) may be achieved by the making of the administration order. The Court will expect to see reasons, supported by evidence, as to why an applicant believes an administration order will promote either (or both) purposes, and the Court must specify which of them (or both) it has found as justifying the administration order. For the rest of this factsheet, and for the sake of brevity, the term "company" also refers to PCCs, ICCs and their cells, unless otherwise stated.

The solvency test, which underpins many substantive provisions in the Companies Law, requires a company to:

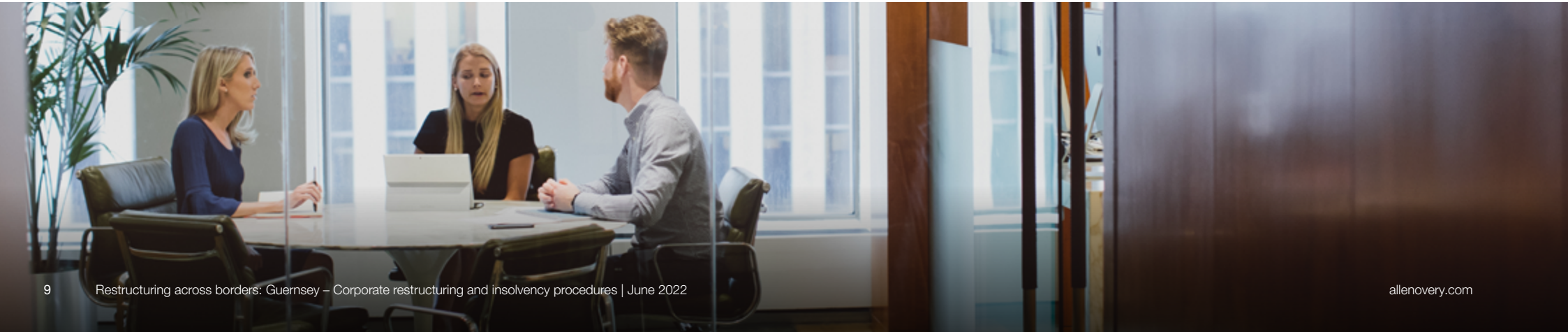
a) be able to pay its debts as and when they fall due (ie the cash flow test);

b) have assets greater than its liabilities (ie the balance sheet test); and

c) pass any of the solvency tests which may be set out in the supervisory legislation (in relation to investment business, insurance, banking or fiduciary businesses that all require supervision in Guernsey, primarily by the Guernsey Financial Services Commission (**Commission**)).

An administration application may be made in respect of a company by the company itself (or in the case of an ICC or PCC by the respective ICC or PCC), its directors or its members, or a creditor as set out in Section 375 of the Companies Law. In addition, if the company is supervised, then the Commission may make the application.

The two purposes for which an administration order is made are either or both of: (i) the survival of the business of the Company, and/or (ii) a more advantageous realisation of assets than would be effected on a winding up. In order to demonstrate that either or both of the purposes can be achieved, the Royal Court will often require evidence, in support of the application, that at least one of the purposes is achievable.



Once an application for an administration order is made, a moratorium prevents any "proceedings" being commenced or continued against the company by unsecured creditors and any existing application for the company's winding up will be dismissed. Furthermore, the company cannot be placed into liquidation (either by its shareholders or by the Court) except with the leave of the Royal Court (albeit that a "fresh" winding up application may be presented to the Court in respect of the company in accordance with the provisions set out in the Companies Law).

The key difference between the Guernsey regime and the regime in other jurisdictions such as England is that secured creditors, including (but not limited to) those creditors with security granted under Guernsey law, remain entitled to enforce their security regardless of the moratorium. In addition, any creditors with rights of set off may also enforce those rights.

The moratorium continues during the course of the administration absent leave of the Royal Court or consent from the administrator.

Where a company has been placed into administration, all correspondence of the company (including e-mails and websites) must contain the name of the administrator and a statement that the affairs, business and property of the company are being managed by the administrator, unless this is obvious from the context of the correspondence or common knowledge between the parties thereto.

Whilst there is no legal requirement in Guernsey for an administrator to be a qualified insolvency practitioner, the practice is now that the Court will need to be satisfied that the nominated person is appropriately experienced and suitably qualified to take on this very important role. The Court also prefers at least one nominee to be resident in Guernsey. Joint appointments are permitted, and are encouraged for risk management purposes.

The administrator's functions are to collect in and realise assets for the benefit of creditors. They have broad management powers, akin to the powers afforded to directors of the company in the company's constitutional documents. A list of the administrator's management powers is set out in schedule 1 to the Companies Law. The directors remain in office, but must not do anything (or omit to do anything) that interferes with the operation of the administrator's functions.

The administrator takes into their custody, and control, all of the property to which the company is entitled upon their appointment and manages its affairs and business of the same in accordance with any directions from the Royal Court. The administrator can commence or continue proceedings brought in the name of the company but they are unable, under Guernsey law, to bring actions in their own name (which is in contrast with the powers of a liquidator to bring statutory-based actions for preferences, wrongful trading and misfeasance).

Once the administrator has realised the company's assets under the New Ordinance, they are able to make distributions to secured creditors and preferential creditors. They may also make distributions which, in their view, are likely to assist with the achievement of any purpose for which the administration order was made. An administrator can additionally make distributions to unsecured creditors if the court's permission is obtained. Under the New Ordinance, it will be possible for a company to proceed immediately from administration to dissolution. In cases where there are no assets to distribute to creditors, Guernsey companies are able to avoid the need of an interim liquidation which may prove costly. This may prove practical and economical, for example, where the company's estate is exhausted in making distributions to secured and preferential creditors and where it is clear that no distributions could be made to unsecured creditors.

Administrations under the New Ordinance will also involve considerable creditor participation. Within 10 weeks of the date of the administration order (unless the Court orders otherwise), Guernsey administrators will be required to send a notice to all creditors inviting them to a meeting and explaining the aims and likely process of the administration.

Once a company has been placed in administration and creditors notified, the creditor may send notification of its claim to the administrator.

At any time when an administration order is in force, a creditor or member of the company (and in the case of a supervised company, the Commission) is entitled to apply to the Royal Court if they feel they are being unfairly prejudiced by the manner in which the administrator is managing the property, affairs and business of the company. If such an application is successful, the Royal Court may regulate the future management of the company by the administrator, restrict the actions of the administrator or, in the harshest circumstances, discharge the administration order.

Court orders

Just and equitable winding-up

A company may be wound up by the court if (i) the company's affairs have not been declared en etat de désastre, and (ii) the court is of the opinion that it is just and equitable to do so. The application to the court for such winding up may be made by the company, a director, a shareholder, a creditor of the company, or by any other interested party, including the Guernsey Financial Services Commission. If the court orders a company to be wound up, it may appoint a liquidator and direct the conduct of the winding up.

There have been various cases in which the Royal Court of Guernsey has ordered the just and equitable winding up of Guernsey companies. Although there is no exhaustive list of situations that may fall within the scope of "just and equitable" in respect of winding up a Guernsey company, there is a wide jurisdiction for the court to order a just and equitable winding up.

Schemes of arrangement

The Companies Law governs schemes of arrangement, which enable a Guernsey company to reach a formal compromise or arrangement with creditors or members to achieve a stated turnaround/rescue or reconstruction strategy.

Guernsey has seen a number of high-profile schemes of arrangement, including in relation to two London Stock Exchange listed companies, Assura Group Limited and Friends Life Group Limited. These were subject to scheme applications which were approved in late January and early April 2015 respectively. In approving these schemes, the Royal Court confirmed the principle from Re Montenegro Investments Limited (in administration) [2013-14] GLR 345 that the four stage test prescribed by English case law applies in Guernsey. Equally, at the jurisdictional stage, the Royal Court follows English case law authorities on class composition issues. As such, English authorities, practice statements and commentary are persuasive, and Guernsey scheme documentation resembles the documentation expected in England. Further, in Re Puma Brandenburg [2017] it was stated that "In the applications under Part VIII of the Companies Law which have come before the Royal Court, decisions of the courts of England and Wales on the comparable provisions of what is now Part 26 of the Companies Act 2006 have been taken (rightly, in our judgment) to offer guidance on the interpretation and operation of the relevant sections of the Companies Law".

A scheme can be either creditor-led or member-led, but a proposal must be put to the relevant stakeholders through a meeting summoned at the direction of the Royal Court for the purpose of approving that proposal. An amendment has been made to the Companies Law to define the meaning of the "majority in number" needed to agree a proposed compromise or arrangement before the court will consider approving the compromise or arrangement, as representing "75% in value". This means:

a) For members: 75% of the voting rights of the members or class of members.

b) For creditors: 75% of the value of the debts owed to the creditors (or classes of creditors) subject to the scheme.

There are specific provisions for company mergers, and it is also possible to use a scheme to amalgamate, migrate or convert companies. However, a Guernsey company cannot be migrated into the UK because there is no statutory regime in the UK that allows this to occur. Solvency is not a relevant factor for a court to take into account when deciding whether to approve a scheme, although specific provisions are made if the company is in liquidation or administration and is proposing a scheme.

Liquidation

There are two separate statutory routes by which a company can be put into liquidation, depending on its solvency.

A solvent company may be put into voluntary liquidation by its shareholders under the Companies Law by ordinary or special resolution (depending upon the provision of the company's constitutional documents) to wind up the company and appoint a liquidator. The resolution, once passed, commences the voluntary winding-up process. The process is therefore not court-driven and creditors have no say in the appointment of the liquidator or in the running of the process generally. There is no requirement for the company or liquidator to call a creditors' meeting. However, creditors can apply to the Royal Court to wind up the company compulsorily and would then be able to remove the current liquidator and seek to appoint their own choice at that stage.

Where a company is to be placed into a members' voluntary winding-up, the directors must declare the company is able to satisfy the statutory solvency test. Pursuant to the New Ordinance, if they are unable to make that declaration, the company must be wound up by an independent third party (unconnected to the directors or members of the company), which will normally be a professional insolvency practitioner. This ensures that where a company is insolvent, and the creditors of that company are at risk of being prejudiced, an independent insolvency professional will be appointed to make sure that creditors are adequately protected and that the assets of the company are preserved pending distribution to the creditors.

In addition, if a declaration of solvency is not signed by the directors, the liquidators must call a meeting of all creditors within one month of their appointment unless in their opinion there are no assets for distribution.

There is no distinction between solvent or insolvent voluntary liquidations (apart from the new requirements regarding the appointment of an independent liquidator). Accordingly, by definition, if the company is solvent there would be a return to the members once the assets have been realised.

Compulsory liquidation is a court-driven process. The process can be instigated by a creditor or certain other parties (such as a company director or member, a partner or general partner of a limited partnership, a trustee of a unit trust, or the Commission) and may be related to the solvency of the company and/or its inability to pay debts as they fall due. A corporate structure can also be wound up on just and equitable grounds. In all cases, a liquidator is appointed to realise the assets of the company and distribute them to creditors after scrutiny from a Commissioner of the Royal Court.

In contrast to administration, the liquidator's powers are more limited, as the company cannot trade, although those powers are clearly set out in section 413 of the Companies Law and also derive from common law. Wherever necessary, a liquidator can seek directions from the court on matters arising in the course of the liquidation. On appointment, the liquidator must seek approval of their proposed remuneration from the court and update the court when that is exceeded or when further work and fees are contemplated.

There are no formal qualifications required to be appointed as a liquidator of a Guernsey company, and in a simple voluntary liquidation, the role of liquidator is often undertaken by a director of that company. The New Ordinance will, when enacted, amend this position preventing the appointment of certain connected parties as the liquidator in insolvent liquidations.

In more complex cases, an accountant or qualified insolvency practitioner is generally appointed.

The appointment of the liquidator in a compulsory liquidation must be approved by the court, which will consider the relevant experience and qualifications of the proposed liquidator. Such court-appointed liquidators or administrators are typically experienced insolvency practitioners.

The Companies Law and other supplementary legislation also provides that certain transactions entered into prior to the commencement of liquidation are voidable by the court. These transactions include, without limitation, unfair preferences which would be set aside by the court if they were entered into at the time the debtor was insolvent or caused the debtor to become insolvent.

Provisional liquidation

When considering an application for the appointment of a provisional liquidator, the court will examine the degree of urgency, the essential need established by the applicant and the balance of convenience. The court has a wide and unfettered discretion on whether to appoint a provisional liquidator. When the appointment is made, the management of the company is effectively under the control of the appointee, and the directors lose the ability to control and manage the company's affairs. The provisional liquidator will usually be empowered to take possession of the company's assets, but does not have the authority to distribute assets, as that is the function of the ultimate liquidator if appointed.

Usually the provisional liquidator is appointed after a winding-up application has been issued but before the court hearing to wind up the company. The powers afforded to a provisional liquidator are usually limited to those set out within the court order for the appointment. The general purpose of the provisional liquidator is to ensure that the company's assets are safeguarded from the risk of dissipation, which is a necessary precaution when there are allegations of fraud or misfeasance. However, a provisional liquidator can also be appointed in other circumstances, such as where an administration order would be inappropriate and the company needs some breathing space to effect a restructuring proposal.

Receivership in respect of PCCs

In respect of PCCs, further relief may be sought through either a receivership order or a recourse agreement. A receivership order (an order in respect of a PCC directing that the business and cellular assets of or attributable to a particular cell be managed by a receiver) may be made if the Court is satisfied that particular grounds are met (as set out in the Companies Law) including the cell's insolvency. The effect of a receivership order is to create a moratorium in respect of the cell, leaving the receiver to perform their functions which are similar to those of a liquidator.

A recourse agreement can be entered into by the PCC with a third party and it typically provides that, pursuant to an arrangement effected by the company, its protected assets may be subject to a liability owed to that third party. The cellular assets attributable to the company may only be available to such creditors who are creditors in respect of a particular cell and such assets are protected from other creditors who are not creditors in respect of the same cell.

Cross-border issues

Guernsey has not adopted the UNCITRAL Model Law on Cross Border Insolvency.

Section 426 of the UK Insolvency Act 1986 has been extended to Guernsey on limited terms by an order of the Privy Council and it is therefore possible for the Guernsey and UK courts to seek reciprocal insolvency assistance from one another by a letter of request process. However, because the Guernsey insolvency regimes are very similar to UK procedures, this process is rarely used (compared to Jersey, which does not have an administration regime, for example). Instead, cross-border insolvency matters in Guernsey often involve applications for recognition in Guernsey by foreign-appointed insolvency and regulatory office holders seeking assistance from the Guernsey court to recover assets held within the jurisdiction (although potentially not information following a decision of the Guernsey court (X (a bankrupt) judgment 36/2015 Royal Court of Guernsey, 6 July 2015)).

Although the use of section 426 is beneficial for those in Britain and the Crown Dependencies, any foreign office holder that is further afield cannot use this route due to there being no reciprocity in Guernsey. In order to be recognised in Guernsey and to allow them to seek relief, they would have to rely on the common law route. This secondary process is governed by the "*sufficient connection*" test. The general position is that Guernsey will co-operate in the recognition of foreign insolvency proceedings where there is sufficient connection between an office holder and the jurisdiction in which they have been appointed.

In the X (a bankrupt) judgment, the Royal Court held that it preferred the minority views of the Board of the Judicial Committee of the Privy Council in Singularis v PricewaterhouseCoopers that, for a foreign liquidator to exercise their powers in Guernsey, those powers must be expressly set out in Guernsey statute. It is insufficient for the foreign liquidator to look for equivalent powers in Guernsey common law. This can be seen as taking the concept of modified universalism in insolvency proceedings a stage further than the rest of the common law world.

In terms of jurisdiction over foreign companies, following the commencement of the New Ordinance, the power exists (similar to section 221 of the UK Insolvency Act) to wind up non-Guernsey companies. According to the legislation, a foreign company can be wound up where:

a) it has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

b) it is unable to pay its debts under section 407 of the Companies Law; or

c) the court is of the opinion that it is just and equitable that the company should be wound up.

The case law in the UK (which is of persuasive authority in Guernsey) suggests that only foreign companies that have a "sufficient connection" to Guernsey will be wound up in Guernsey. As many such companies undertake financial business in Guernsey, it is difficult to conceive of many circumstances in which that would not be the case. Clearly, what a "sufficient connection" is will need to be defined and tested, and will undoubtedly depend on the facts of each case.

Guernsey law allows the enforcement of foreign judgments as a matter of common law or statute, depending on where the judgment was originally made. Civil judgments in relation to sums payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty) obtained in certain specified jurisdictions may be registered and enforced in Guernsey pursuant to the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957, provided that certain stipulated conditions are met. The application for registration of a foreign judgment must be made within six years of the date of the judgment, unless otherwise extended by the court. Alternatively, where the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 does not apply, the judgment creditor may commence fresh proceedings in Guernsey with the original judgment being treated as the cause of action so that no retrial of the issues will be necessary.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

This factsheet has been prepared with the assistance of Ogier (Guernsey) LLP's Insolvency and Restructuring Team. Any queries under Guernsey law may be addressed to the key contacts listed below from Ogier.

Allen & Overy

Jennifer Marshall
Partner
Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Katrina Buckley
Partner, Co-Head of the Global Restructuring Group
Tel +44 20 3088 2704
katrina.buckley@allenovery.com

Sigrid Jansen
Partner, Co-Head of the Global Restructuring Group
Tel +31 20 674 1168
sigrid.jansen@allenovery.com

Lucy Aconley
Counsel
Tel +44 20 3088 4442
lucy.aconley@allenovery.com

Jon Webb
Senior PSL
Tel +44 20 3088 2532
jon.webb@allenovery.com

Mark Pugh
Associate
Tel +44 20 3088 7179
mark.pugh@allenovery.com

Ogier

Paul Chanter
Tel +44 1481 737151
paul.chanter@ogier.com

Mathew Newman
Tel +44 1481 752253
mathew.newman@ogier.com

Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.

For more information, please contact:

London

Allen & Overy LLP
One Bishops Square
London
E1 6AD

Tel +44 20 3088 0000

Global presence

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at www.allenovery.com/global_coverage.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

ROW
CS2206_CDD-69456_Guernsey_ADD-101859