CAREY OLSEN

Guernsey Insolvency Law consultation

Service area / Restructuring and Insolvency
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On 11 February 2016, the Guernsey Commerce and Employment Department published a consultation response document to set out the proposals the Department is going to take forward for the reform of Guernsey's personal and corporate insolvency laws (the Consultation Response).

Introduction

The Consultation Response can be found here.

The Consultation Response was collated following detailed responses to a consultation paper disseminated to a range of stakeholders including banks, lawyers and insolvency practitioners. Advocate David Jones from Carey Olsen's Restructuring and Insolvency Group sits on the working party of practitioners that assisted in formulating the consultation paper and that will ultimately assist in shaping the new laws.

The purpose of this note is to highlight and comment on:

- some of the key proposals that the Department will be taking forward by, in the first instance, including them in policy letters for consideration by the States of Deliberation (the First Phase);
- the projects that the Department would like to consider further (the Second Phase); and
- those projects the Department has decided not to take forward.

A. The first phase

Insolvency rules

A clear majority of respondents to the consultation were in favour of introducing insolvency rules to offer guidance on procedural matters. This was always viewed as sensible way to create a flexible framework within which common procedural issues could be clarified. It appears likely that the rules will necessitate a Standing Rules Committee (akin to that in England & Wales) to keep the rules updated and relevant. Examples of issues that the rules may deal with are the procedures for calling meetings in insolvency proceedings and/or standard form documents for reporting suspicions of misconduct by directors.

Comment

The creation of a set of insolvency rules is a welcome and sensible step towards simplifying procedure and filling some of the current lacunae in the provisions currently contained in the Companies (Guernsey) Law 2008, as amended (the Companies Law). The new rules will likely be augmented by a set of practice statements that are proposed by ARIES's Legal and Regulatory Committee (the Channel Island member association of INSOL), which is in the process of producing four Statements of Insolvency Practice for Guernsey. Those statements will set out a "best practice" approach to a number of core issues such as costs statements and pre-packs that it is hoped will be followed by Guernsey practitioners on a voluntary basis.

Office holders

There is currently no licensing system for insolvency practitioners in Guernsey. In court appointments (compulsory winding up and administration), scrutiny is applied to the choice of appointee by the Royal Court and suitability must be evidenced. In voluntary winding up, there is no scrutiny (beyond that of the members of a company) on the choice of appointee nor is there any requirement for independence. After further consideration, and having reviewed the various responses to the consultation paper, the Department was not convinced that the benefit of licensed insolvency practitioners would compensate for the loss to companies of the ability to use in house liquidators in some instances and for the increased administrative and costs burdens of registration and/or licensing. However, the Department recommended that in insolvent processes, the Companies Law be amended to introduce a requirement that liquidators be independent (as to which see later).

Comment

The practical reality of the present regime, without licensing for IPs, is that applications for court appointments must include brief CVs for the proposed appointees evidencing their experience to deal with the assignment. In the majority of cases, the appointees will be experienced local practitioners (who may or may not hold UK licenses) together with a joint appointee from another jurisdiction where the case requires it. Again, the joint appointees tend to be experienced and/or licensed in their home jurisdictions and consequently, problems do not arise with inappropriate appointees.

Exits from administration

Presently, an administrator must apply to the Royal Court for the appointment to be discharged and for release from office at the end of the administration. Additionally, they must apply for either the company to be handed back to its directors as a going concern, or for it to be placed into liquidation. Frequently, the only significant act any liquidator has is to make distributions prior to the dissolution of the company. There is no more straightforward route to ending the company's life at that stage because currently the Companies Law does not contain an express power for an administrator to pay unsecured claims. The winding up framework does contain a formal procedure for paying those claims by way of an advertised Commissioner's Hearing designed to protect creditors' interests.

Whilst some respondents felt that the move to liquidation (or even straight to dissolution) should be able to take place out of court as a costs saving measure, the Department's proposal is for the end of an administration to remain a court process, however for the Court, if appropriate, to allow dissolution of the company at this stage.

Comment

This is a sensible and welcome simplification to the current regime that would have otherwise led to a significant increase in cost and time in administrations where paying claims is otherwise straightforward. The ability to move straight to dissolution will increase efficiency. Additionally, the proposed changes will incorporate an express power for administrators to pay unsecured claims although it remains to be seen if the process will mirror that in a compulsory winding up.

Voluntary winding up

Whilst respondents generally felt that the voluntary winding up regime was straightforward and flexible, there was unanimous support for inserting greater protection for creditor interests in respect of insolvent voluntary liquidations. With that mandate in mind, the Department reiterated the need for independent appointments in an insolvent winding up (see above) and notice of a liquidator's appointment to be sent to creditors with the aim of explaining the process as well as an obligation to call at least one initial meeting of creditors.

Comment

Voluntary winding up is a useful and effective tool for winding up solvent entities with flexibility and is useful as a quick and cost effective solution in insolvencies. The current lack of any court scrutiny does, however, leave it open to abuse. The compromise of requiring independence on the part of the liquidator in insolvent appointments should address that risk, although it will increase costs in terms of funding the appointee. This is a difficult balancing act between discouraging abuse and ensuring directors have an option to wind up when resources to liquidate are limited and in the absence of an official receiver in Guernsey.

Additional powers for office holders

Following unanimous support from respondents, the Department proposes that administrators and liquidators in a compulsory liquidation should have the power to require:

- the production of a statement of affairs (albeit this power already exists under administration provisions);
- the production of documents and information from directors, officers, employees, shareholders, accountants and any other person involved in the promotion of the company or with knowledge of its affairs; and
- that, if necessary and/or sought by the liquidator, directors and former directors attend and be examined.

At this stage, whilst no proposals were made for improving enforcement of any of the amended provisions, by seeking a court order if necessary, the Department will continue to consider ancillary enforcement powers.

Comment

The current powers of office holders in the Companies Law to require cooperation from those associated with a failed company are not as sophisticated as the statutory tools available in other jurisdictions. Enhancing and codifying these powers was a universally popular proposal.

Continued

Creditors' committee procedures in administration

Unlike most jurisdictions, including the UK, administrators in Guernsey are currently under no obligation to call a meeting of creditors when conducting an administration. The majority of respondents agreed with the proposal that administrators should be obliged to:

- provide notice of their appointment to all creditors; and
- call a meeting of the company's creditors within a set period of time after appointment.

It is proposed that any legislation and rules in relation to this will be flexible to allow the process to be tailored to the size and complexity of the administration and the number of creditors.

Comment
In practice, administrators in Guernsey may call a meeting of creditors, or make informal contact with key creditors, but there is no statutory obligation to do so. The implementation of revised legislation and/or rules will simply formalise the process and provide further protection to creditors in the administration process.

Preferences and antecedent transactions, disclaimer of onerous assets and unclaimed dividends

The Companies Law currently contains provisions akin to those in England & Wales regarding transactions constituting a preference in the period leading to insolvency. Conversely, there is no codified law dealing with transactions at an undervalue albeit similar actions may have been available to liquidators under Guernsey's customary law. There was unanimous agreement between respondents that introducing statutory provisions was sensible.

Comment
This additional statutory power for liquidators is a sensible step and it seems inevitable that the provision will largely be borrowed from those in the English Insolvency Act. It also seems likely that liquidators will be afforded some other additional powers borrowed from the English Insolvency Act including disclaimer and the ability to set aside extortionate credit transactions.

B. The second phase

Official receiver

A clear majority of respondents, whilst acknowledging likely funding problems, thought an office exercising official receiver functions would be a positive addition to Guernsey's insolvency regime. The Department considered that further consideration needed to be given to the functions of an official receiver and the funding thereof before any proposals were made.

Comment
There would be significant logistical and financial hurdles to overcome to establish the office of an official receiver for Guernsey. There are also many areas where the role may overlap with existing public offices like that of HM Sergeant, HM Receiver General and the Public Trustee. Whilst voluntary liquidation remains a viable option for liquidations with limited assets, the need may not be strong enough to overcome those hurdles.

Register of fixed or floating charges

The Department recognised that introducing such a register would likely increase the availability of credit for Guernsey businesses and provide greater certainty for lenders when making lending decisions. However, as agreed by most respondents, it was outside the scope of this consultation for the time-being.

Comment
It is outside the scope of this note to consider how Guernsey security laws might be improved at present. However, the absence of a register of security held by Guernsey companies has impacted on other areas of the proposed reforms, in particular in relation to the out of court appointment of administrators.

C. Unpursued projects

Out of court appointment of administrators

Currently, only the Royal Court can appoint an administrator on application by, amongst others, directors, creditors and members. Responses on this issue were mixed with some strongly in favour and others more cautious.

Ultimately, the Department felt that in light of some of the other proposals, including:

- increasing administrators' powers; and
- dismissing the need for a register of insolvency practitioners, the Court's scrutiny of appointments should continue.

Comment
There is no doubt that out of court appointments in England & Wales have been a very effective tool for increasing efficiency in administration appointments and in saving cost. The Guernsey process does take a little more time in both the preparation and sometimes in the court hearing itself. This can be problematic if coordinated appointments across a number of jurisdictions are required simultaneously.

The Royal Court has been accommodating to the insolvency profession in trying to increase the efficiency of the court process, for example by setting up a dedicated companies court for Guernsey (see here).

Guernsey has traditionally been and remains a creditor friendly jurisdiction on insolvency. The ability for a board to appoint out of court was viewed by some (rightly or wrongly) to offer the opportunity for abuse by directors. Moreover, the lack of a register of charges in Guernsey would have made it difficult to draft an out of court appointment mechanism that offered adequate protection to creditors through the giving of notice. Ultimately, caution has prevailed in this regard.

Comment

The proposed changes to Guernsey's insolvency regime will enhance the existing flexibility with bespoke rules enabling practitioners to undertake their roles with greater powers and certainty. This will only further improve Guernsey's reputation as a well-regulated jurisdiction.

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