



Guernsey to introduce practitioner guidelines on insolvency

Service area / [Restructuring and Insolvency](#)

Location / [Guernsey](#)

Date / [May 2017](#)

In March the States of Guernsey approved the reform of Guernsey's insolvency laws. The reforms afford greater protection to creditors and investors. The necessary legislative amendments are currently being drafted although it is unclear when they will be finalised.

The current regime for voluntary liquidation is very lightly regulated and allows non-independent liquidators to be appointed with no court oversight. There is an obvious potential for this system to be abused.

Key changes proposed in the reform include:

- Drawing a distinction between solvent and insolvent voluntary liquidations;
- Administrators to call at least one meeting of the creditors within a set period of time following their appointment;
- Power for administrators to make distributions to all types of creditors where the distributions are in keeping with the objects of the administration;
- A statutory duty to report director misconduct / bring disqualification proceedings against delinquent directors;
- Where there is an insolvent voluntary liquidation a requirement that:
 - a. an independent liquidator be appointed, subject to the court having the power to approve a non-independent liquidator and notice of the appointment be sent to all creditors; and
 - b. reports be provided to creditors and investors.

These reforms are significant and sensible and are to be welcomed as they will create a more standardised approach and give the court greater oversight over insolvent companies.

As part of its role in setting high professional standards for those working in this sector, the local industry body for insolvency specialists "The Channel Islands Association of Restructuring and Insolvency Experts" (ARIES) (a member of INSOL International) has produced a series of guidance notes, the "Guernsey Insolvency Practice Statements" ("GIPS"), which are largely based on the current UK Statements of Insolvency Practice ("SIPS") albeit that there are far fewer of them. They are designed to complement the proposed legislative reforms and, pending the implementation of those reforms, provide guidance where there is currently uncertainty.

The five GIPS cover:

- **GIPS 1** – An introduction to the regime and the fundamental ethical principles
- **GIPS 2** – Investigations into the affairs of an insolvent company
- **GIPS 3** – Directors' reports and disqualification of directors
- **GIPS 4** – Convening and holding creditors' meetings where there is an insolvent liquidation
- **GIPS 5** – Pre-packaged sale of businesses

OFFSHORE LAW SPECIALISTS

It is hoped that the GIPS will set an industry standard for best practice. Clearly, the people most likely to use the GIPS are those appointees already involved in ARIES and already operating at a high standard. Their impact will be far greater if non-regular appointees adhere to them. Encouraging a wider audience may prove challenging although the clear structuring of the GIPS and the use of plain English makes them easy to follow. Hopefully this will encourage all practitioners to make good use of them. Furthermore, adoption of the GIPS by local practitioners will standardise practice. It is hoped that the court will become familiar with the principles and over time will come to expect them to be followed.

GIPS 1 – general principles

A framework of standards

This statement makes it clear that the GIPS are not statements of law and are not legally binding. However, they are intended to run parallel to the law and provide practitioners with a clear framework of standards with which they are expected to comply.

Fundamental ethical principles

A helpful list of “fundamental ethical principles” is set out against which the GIPS must be interpreted, namely integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.

GIPS 2 – investigations into insolvent entities

This statement provides step by step guidance as to how investigations into the failure of insolvent entities should be conducted. No such guidance has existed previously. This is reflective of increased levels of scrutiny over corporate governance within the Island, emanating out of the Guernsey Financial Services Commission (“GFSC”) in particular.

The approach is pragmatic rather than prescriptive and practitioners are encouraged to “*use their professional judgment to determine the extent of investigations that are to be undertaken*”. Ongoing engagement with creditors to ascertain their views about actual and prospective investigations is encouraged.

Preliminary enquiries

Guidance is given as to what preliminary enquiries should be made of the officers of the company, the directors and the extent that the company’s records should be reviewed.

Where the practitioner believes that there are grounds for further investigations or possible action she/he is exhorted to seek the views of the creditors on any further investigations.

Further investigations

Where it is agreed to conduct further investigations, detailed guidance is given as to the more far reaching enquiries that will need to be taken.

Potential action

Helpfully, practitioners are reminded to consider adverse costs insurance in the case of potential action.

GIPS 3 – disqualification of delinquent directors

This statement deals specifically with the disqualification of delinquent directors. Again a pragmatic approach is encouraged: “*practitioners should not take a pedantic view of isolated minor compliance failures but should form an overall view of the director’s conduct when deciding whether a report is appropriate*”.

Reporting

Where there are concerns about a director’s conduct, it is suggested that a report is prepared and submitted to the Guernsey Registry and, in the case of regulated companies, the GFSC within six months of the administrator’s appointment. Guidance is provided as to the content of the report. Very helpfully a template report is provided which it is hoped will encourage practitioners to adopt the guidance.

Reminder of the law of defamation

There is a reminder as to the need to have regard to the laws of defamation and some brief guidance as to when discussions are appropriate and when caution must be exercised. This is to be welcomed as it may well be that practitioners are not always alive to this issue.

Disqualification orders

Where it appears that the conduct of a director makes him unfit to be concerned in the management of a company the practitioner is advised to make an application to the Court for a disqualification order. Advice is given as to the preparation of affidavit evidence where proceedings are instituted. Historically, there have been very few cases in Guernsey of disqualifications being sought following insolvency proceedings and it will be interesting to see if the number of applications for disqualification orders increases pursuant to the issuing of this guidance.

GIPS 4 – creditors’ meetings

Currently in Guernsey, there is no requirement to hold a creditors’ meeting in either a voluntary or compulsory winding up. This will change when the proposed reforms are implemented.

Initial meeting within 42 days

This statement seeks to ensure that, in insolvent situations, at least one meeting is proposed within 42 days of the liquidator’s appointment (unless having regard to the known assets and liabilities of the company, the likely result of the liquidation and any other relevant matters, it is not necessary for a meeting to be held).

In circumstances where a meeting is not held, guidance is given as to the content of the notice to be sent to the creditors informing them of this decision.

Convening of the meeting

Practical guidance around the convening of the meeting is offered. Again it is very creditor focused, for example, the date and time must be fixed with the convenience of the creditors in mind. When choosing a venue for the meeting, a place which is convenient for creditors should be chosen. Where there are creditors outside of the jurisdiction in which the meeting is being held, telephone facilities should be put in place and care should be taken to ensure that accommodation facilities for those who wish to travel to the meeting are adequate.

Conduct of the meeting

There is detailed guidance on the information to be provided at the meeting and the conduct of it.

Informal creditors liquidation committee

There is an interesting provision which provides that should the creditors wish to form an informal creditors' liquidation committee the liquidator may allow it. Unlike in other jurisdictions, there are no provisions under Guernsey law for the formation of a creditors' committee and as such, these committees will fall outside the scope of the statutory regime.

GIPS 5 – pre-packaged sale

This statement is largely based on the equivalent UK Statements of Insolvency Practice, SIP16.

What is a pre-packaged sale?

The term "pre-packaged sale" refers to an arrangement under which the sale of all or part of an insolvent company's business or assets is negotiated with a purchaser prior to the appointment of an administrator or liquidator, but who then facilitates the sale immediately or shortly after appointment. Pre-packs are a controversial subject. It is imperative that the administrator or liquidator acts with objectivity and professionalism so as not to bring both themselves and the profession into disrepute. They must be able to demonstrate that they are acting in the interests of the creditors as a whole.

Historically, the Royal Court has only sanctioned one pre-pack in Guernsey in *Esquire Realty Holdings Limited* 17.04.2014 Royal Court (unreported). In doing so, it made it clear that it had been comforted by the parties' compliance with the UK Statement of Insolvency Practice, SIP16 (as it was then). In his judgment, the Bailiff stated that any pre-pack in Guernsey should follow the SIP16 regime in the future. For this reason, GIPS 5 very closely maps SIP16.

Differentiating between roles

The guidance makes it clear that a practitioner must clearly differentiate between any pre-appointment role in which they provide advice to the company, and the functions and responsibilities of the administrator or liquidator following their formal appointment. The nature of these two distinct roles must be explained to the directors and creditors.

Expected standards of conduct

Very detailed guidance is given as to how a practitioner should conduct himself / herself including the need to:

- Make it clear to directors/parties connected with the purchaser that it is not his/her role to advise them;
- Keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale;
- Keep a detailed record of the alternatives considered;
- Obtain valuations from independent valuers and/or advisors carrying adequate professional indemnity insurance; and
- Market the company appropriately. Very high level advice is given which interestingly includes the suggestion that online communication should be included by default and any decision not to engage in such marketing should be justified.

Conclusion

The GIPS are a positive step that will help both office-holders and creditors better understand the insolvency process and should raise standards without unnecessarily increasing costs. Additionally, pending the implementation of the reforms to the Guernsey insolvency laws, they provide valuable guidance on matters where the law is currently silent.

Useful links

- The GIPS are available to download from the [ARIES website](#)
- A [video of GIPS training seminar](#) provided by ARIES on 27 March 2017
- [Guernsey Insolvency Law Consultation February 2016](#)
- [Direction on Administration and Liquidation Costs and Procedure](#)
- [A dedicated Commercial Court for Guernsey](#)



FIND US

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272

E guernsey@careyolsen.com



FOLLOW US

Visit our restructuring
and insolvency team at
careyolsen.com



PLEASE NOTE

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen (Guernsey) LLP 2019