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Recognition of Insolvency Appointments in Guernsey following Brexit and the Corporate Insolvency and Governance Act 2020 (CIGA)

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Recognition of UK insolvencies in Europe after Brexit[1] is navigating uncertain waters. Following the completion of Brexit, the UK has left parts of the EU's private international law realm, including the application of Regulation (EC) 1346/2000 on Insolvency proceedings (the **EU Insolvency Regulation**). Therefore, since January this year, any reciprocal statutory cooperation in insolvency law matters between the UK and the EU has ceased.

Whilst insolvency practitioners grapple with how they will now seek the assistance they need within the EU to perform their statutory functions as insolvency office holders, it is worth revisiting how that assistance can be sought in Guernsey.

Happily, the changes occasioned by Brexit do not trouble Guernsey, as the Bailiwick was never a member of the EU, and therefore the EU Insolvency Regulation never applied here.

Instead, cooperation between the UK and Guernsey was enshrined in section 426 of the UK Insolvency Act 1986 (the **Insolvency Act**), through its extension to the Bailiwick of Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989 (the **Guernsey Order**). As a result, the Royal Court of Guernsey has long been afforded a very effective mechanism for providing judicial assistance to the courts of England & Wales, Scotland, Northern Ireland, the Isle of Man or Jersey in insolvency matters.

How does section 426 recognition work?

Section 426(4) of the Insolvency Act provides for reciprocal assistance of courts of the UK and any other relevant country or territory (including Guernsey) in relation to insolvency law matters. It operates by way of a two-stage process. For insolvencies commenced in Guernsey, it requires firstly an application to the Royal Court to issue a letter of request seeking assistance from the English court. Thereafter, a separate application is made in the English court for an order giving effect to the letter of request, which will be granted at the English court's discretion. Unless there are very strong compelling reasons not to grant the application, it is generally expected that the application will succeed.

If the English court grants the request, it has flexibility to decide whether to apply English or Guernsey insolvency law. This allows the potential for officeholders to access powers which are not ordinarily available under Guernsey law, but which an officeholder in England & Wales would have at hand. In practice, by way of example, this has enabled Guernsey sworn-in liquidators to use investigative powers which are not enshrined in Guernsey law but are available under the English insolvency regime.

The process works in effectively the same manner for English office holders seeking recognition in Guernsey, with an incoming request very likely to be granted, unless it were to offend public policy. This form of recognition is well established before the Royal Court, and is a powerful tool for office holders. The ability to use "either/or" powers from the requesting or receiving jurisdiction offers a significant advantage over simple recognition at common law which must be utilised by office holders from any other jurisdiction.

The broad position under common law is that Guernsey will co-operate in foreign insolvency proceedings, particularly

1. By which we mean the end of the transition period on 31 December 2020 as agreed in the UK-EU Withdrawal Agreement effective from 31 January 2020.

where there is a sufficient connection between an office holder, appointed in the jurisdiction where the company is incorporated or individual domiciled, and the company or individual has submitted to the jurisdiction of the court by which the appointment was made. However, the extent of the assistance that can be granted is more limited to the use of only those powers available under Guernsey's domestic law.

What is CIGA and how might it play a role in restructuring Guernsey companies?

The UK Corporate Insolvency and Governance Act, 2020 (**CIGA**) came into force on 26 June 2020, and represent the most significant change the UK's insolvency law for almost 20 years. Many of the measures contained therein were expedited to help combat the financial impact of restrictions introduced to tackle the COVID 19 pandemic. The changes include a new moratorium of up to 40 days for distressed but viable companies, restrictions on the termination of contracts for the supply of goods or services because the company has entered into a restructuring or insolvency process, and a raft of Covid-related measures assisting businesses to stem the tide of the current pandemic. The most significant change from a Guernsey perspective may, however, prove to be the introduction of the Restructuring Plan (**RP**) by way of Clause 7 and Schedule 9 of CIGA, which introduce a new Part 26A into the Companies Act, 2006.

The English law scheme of arrangement has proved to be a very popular restructuring tool leading to the UK becoming a major destination for international restructurings. The English Court's willingness to accept jurisdiction over foreign companies has facilitated this further. An RP is not dissimilar to a scheme, but it requires a company to be experiencing financial distress prior to its use. The RP also crucially provides for a cross-class cram down of rights where those classes can be shown to be "*out of the money*".

Detail as to the mechanics of an RP is beyond the scope of this note, but the appetite for its use was demonstrated by the ground-breaking restructuring of Virgin Atlantic's business by way of the first RP. We anticipate increasing use of the procedure in major international restructurings where there is a sufficient connection to England and Wales.

Can a Guernsey Company Use an RP?

Any Guernsey company wishing to avail itself of the provisions of CIGA and particularly an RP, may be able to do so if it is able to show a "*sufficient connection*" to England & Wales. Whilst the legal test is ultimately a matter of English law, we understand it is the same as the tests applied by the English court in determining whether it can wind up an overseas entity in England – a relatively low hurdle to entry.

Although ultimately a question of English law, it has been shown that where a Guernsey company has in place English law governed financing, this should be sufficient to satisfy an English court that there is a sufficient connection to England for the purposes of availing that company of the English Court's jurisdiction.

Passing the "sufficient connection" gateway, and thereby gaining access to the English court, is, however, only part of the process. Companies also need to show that the RP as ordered by the English court will be given practical effect in Guernsey, *i.e.* will or can the Royal Court provide assistance by enforcing the terms of the RP locally. Demonstrating this will require the company to obtain either affirmative local law advice or possibly actual recognition of the RP in Guernsey.

Can an RP be recognised in Guernsey?

Guernsey has no statutory equivalent to an RP. The RP also falls outside of the scope of section 426 of the Insolvency Act, because it forms part of English Company Law, and not the Insolvency Law regime. Furthermore, Guernsey is not a signatory to any other international treaties which might assist. Consequently, if the English court grants an RP in respect of a Guernsey company, any recognition of that order in Guernsey has to be considered on common law principles.

Recognition may be granted by the Royal Court of Guernsey on common law principles where a final and conclusive judgment or order is awarded by a foreign court (in this case, the English High Court) and where that foreign court has jurisdiction to award that judgment or order (e.g. the parties submitted to the jurisdiction of the English court), and provided that the judgment or order was not obtained by fraud or recognition or would otherwise offend public policy.

Notwithstanding the absence of a direct statutory equivalent, it is likely that the Royal Court would be amenable to granting recognition of a Part 26A RP which only compromised English law governed debts – i.e. on the basis that the English court had jurisdiction to adjudicate on that compromise arrangement because all of the parties had submitted to the English court's jurisdiction. This is particularly the case where a company's creditors who are subject to the compromise arrangements are likely to be deemed to have agreed to English governing law and jurisdiction by virtue of the finance documents in place. The Guernsey Royal Court will usually seek to give assistance to the English court in such situations, and we see no reason why the Royal Court would not adopt such an approach in relation to the recognition of the RP in this case, particularly given that doing so will be in accordance with the rules of private international law.

However, if the effect of an RP cannot sit within the common law rules on recognition of judgments, for example where an RP purports to deal with creditors with rights arising under laws other than those of England & Wales and/or who have not participated in the debt compromise arrangements, then recognition would be more challenging. This is because any attempt to compromise debts arising under any law but that of England & Wales by way of the RP may offend private international law.

Of course, Guernsey statutory provisions in relation to Schemes of Arrangement closely follow the English law equivalent, and therefore where recognition may not be possible, then running a Guernsey scheme instead of or parallel to an RP may well prove to be the sensible alternative.

Continued

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