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COUNTRY COMPARATIVE GUIDES 2019

The Legal 500 Restructuring & Insolvency country comparative guide – Q&A

Guernsey

CAREY OLSEN

Contents

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BIGGER PICTURE

Security and enforcement

What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Immovable property is defined as property that cannot be moved from one place to another and which follows or is associated with the land.

Other than rentes foncières (that is, perpetual ground rents payable as a fixed annual sum and redeemable at the will of the debtor), security over real estate in Guernsey is taken as a hypothèque (that is, a legal right over the debtor's property in favour of the creditor), by either:

- **Rente hypothèque**, securing a fixed annual sum; or
- **Hypothèque conventionnel** (bond).

In practice, rentes hypothèque are almost unknown and the bond has become the dominant form of security over real estate. The bond is a personal obligation to create a charge over the corpus of the debtor's assets (but in practice focused on immovable property) by acknowledging the debt to the creditor and (if appropriate) including a covenant to repay the sum with interest. The bond can be either a:

- **General charge**: A general charge confers priority to the creditor over all other claimants to the immovable property belonging to the debtor at the time the bond is registered; or
- **Specific charge**: A specific charge confers priority to the creditor only over the immovable property specified in the bond.

A bond must be in writing and must be consented to by the debtor before the Royal Court of Guernsey sitting as a contract court (Contract Court) before being registered at the registry of the Royal Court (Greffe).

Documents (other than a testamentary disposition) consented to before the Contract Court do not need to be signed by the parties. However, this is frequently required by a creditor.

Following ratification by the Contract Court:

- The bond is assessed for document duty of 0.5% of the secured amount, the fees of the Contract Court and registration fees.
- The document duty and fees are paid.
- The bond is registered in the Greffe, and available for public inspection to anyone wishing to conduct a search against the debtor.

A bond which is not ratified by the Contracts Court is invalid. Non-registration of the bond at the Greffe will render the security ineffective.

Movable property

Security may be taken over moveable property in Guernsey, with such property being either tangible or intangible in nature.

Tangible movable assets

The most common forms of security over tangible movable property are:

- Lien. This is the right to retain another's property if an obligation is not discharged.
- Pledge. This is a bailment or deposit of personal property with a creditor to secure repayment for a debt or engagement.
- A landlord's right to priority for unpaid rent which is secured by movable property on the demised premises (tacite hypotheque).
- Reservation of title clause.
- Mortgage (for example, over a ship and aircraft).

Intangible movable assets

The most common form of security over intangible movable property in Guernsey is a security interest under the Security Interests (Guernsey) Law, 1993 (the Security Interests Law). This can be created by a security agreement over any intangible movable property (other than a lease). The security interest can be created by the secured party being in possession of, under a security agreement:

- certificates of title (such as securities); or
- policy documents (like a life insurance policy).

If title to collateral is assigned, express notice in writing of the assignment must be given to the assignees.

To be valid, a security agreement must:

- be in writing;
- be dated;
- identify and be signed by the debtor;
- identify the secured party;
- contain provisions regarding the collateral sufficient to enable its precise identification at any time;
- specify the events which constitute default; and
- contain provisions regarding the obligation, payment or performance to be secured, sufficient to enable it to be identified.

Failure to comply with any of these requirements does not necessarily render the security agreement void, but takes it outside of the scope of the Security Interests Law.

What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?

Enforcement of Bonds

Bonds are classified as movable property in Guernsey and do not confer any legal title in the immovable property owned by the debtor at the date the bond is registered. However, any successor in title of that immovable property is, by virtue of the bond's prior registration, on notice of the creditor's claim and becomes guarantor to the creditor of the bond. Therefore, the successor will be made party to any enforcement proceedings to either make good the value of the claim or surrender the property to the enforcement proceedings.

However, any successor in title who was a bona fide purchaser for value at arm's length more than three years before commencement of proceedings can limit his liability to the price paid by him for the property to the defaulting debtor. In addition, a successor in title to immovable property acquired by the debtor after the bond's registration date is not held to be on notice and is, therefore, not subject to the rule which would otherwise make him guarantor.

Saise Procedure

The saisie process is rooted in ancient customary law and has developed over several hundred years. The procedure is set out in the Saisie Procedure (Simplification) (Bailiwick) Order, 1952 (1952 Order) which simplified the saisie procedure but did not change the underlying substantive law.

Saisie relates to realty (i.e. real estate) and is a procedure whereby the realty of an insolvent person or entity may be distributed between two or more creditors, who would otherwise be in competition. Saisie proceedings only concern realty, the appropriate procedure for personalty (i.e. moveable property) in Guernsey being désastre.

If a creditor commences or joins saisie proceedings, the creditor's right to be paid transfers from the debtor to the realty. Regardless of the extent to which the debt is satisfied, the creditor has no further remedy against the debtor and, in particular, no recourse against the debtor's personalty. In contrast, désastre proceedings do not extinguish recourse to any realty belonging to the debtor.

The saisie procedure involves the following three distinct stages:

- Preliminary Vesting Order;
- Interim Vesting Order; and
- Final Vesting Order.

The broad effect of the process is to marshal all claims against a debtor's realty and allow each creditor, staring with lowest ranked, to elect if they wish to have the realty vested in them on the condition that they pay in full all higher ranking creditors. If they do not do so, they renounce any claim over the realty. The creditor who chooses to accept the realty is granted the final vesting order which acts as a conveyance of the property to the creditor. If the vesting results in a windfall to the creditor above its claim, it is entitled to retain the sum rather than repay to the debtor.

The saisie procedure contained in the 1952 Order can generally be completed within approximately six months. The process is court driven and places a substantive burden on the creditor that initiates it.

Enforcement of Security Interest Agreements

The Security Interests Law governs the manner in which security is created over Guernsey situs intangible moveable property (including shares but excluding leases) and the way in which such security may be enforced.

Prior to enforcement a secured party should check any factors which could affect the marketability/transferability of the collateral. This will also inform the methodology for valuation and manner of sale of the collateral.

A power of sale (or, in the case of a limited group of collateral e.g. money, application) is the only means of enforcing a security interest contemplated by the Security Interests Law. The ability of a secured party to enforce its security other than by exercising the statutory power of sale is untested in the Guernsey courts.

Quasi-enforcement: exercising rights under the shares/other security to take control

Where share security has been taken, such quasi enforcement may involve using voting rights under the share security to appoint new directors to the subject company, so that the new directors can cause the subject company to use whatever rights are available to it (as the case may be as a parent company) to procure a sale of the assets or underlying assets.

Commonly the security agreement will provide that voting rights are exercisable by the secured party after an event of default (or similar contractual trigger event). Those voting rights may be used to, amongst other things, replace a board of directors, amend articles or voluntarily liquidate a company.

It is worth bearing in mind that this action may be susceptible to legal challenge if the exercise by the secured party of its contractual rights enabling it to take control of a company can be characterised as an enforcement of security other than by exercising its power of sale under the Security Interests Law (and which may accordingly contravene Guernsey law) rather than a straightforward exercise of a contractual right.

There is very little if any Guernsey case law in the above areas, and none at all on the quasi-enforcement addressed above.

Guernsey security documents do not contain receivership provisions as receivers are not part of Guernsey law (save in respect of cellular companies).

Local insolvency proceedings

What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

Solvency in Guernsey is measured against the solvency test set out in section 527 of the Companies (Guernsey) Law 2008, as amended (the Companies Law).

A company satisfies the statutory solvency test if the:

- company is able to pay its debts as they become due. A company is deemed unable to pay its debts if either:
  a. Her Majesty's Sergeant has served on the company a written demand for payment of a due debt of more than £750 and the debt remains outstanding for 21 days after the demand has been made; or
  b. the court is satisfied that the company is otherwise unable to pay its debts.
- value of its assets is greater than the value of its liabilities. In determining whether this is the case, the directors can rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances, and must have regard to both:
  a. the company's most recent accounts; and
  b. all other circumstances that the directors know, or ought to know, affect the value of the company's assets and liabilities.

If a company fails the solvency test, there is no explicit statutory obligation to initiate proceedings, although directors' fiduciary duties may require them to consider doing so where the company has no prospect of avoiding an insolvent liquidation. Failing to do so may result in personal liability for directors under the statutory provisions relating to, inter alios, fraudulent trading, wrongful trading and misfeasance.

What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

Compulsory Liquidation
Pursuant to sections 406 to 418 of part XXIII of the Companies Law, a company may be wound up by the court and a liquidator appointed. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority.

Supervision and control
The court and liquidator supervise the procedure. On hearing a compulsory winding-up application, the court may grant the application (on such terms and conditions as it considers appropriate), dismiss the application, or make such other orders as it thinks fit.

On the making of a compulsory winding-up order, the court will appoint a liquidator nominated by the applicant or, where no person has been nominated, make such appointment as it thinks appropriate. The liquidator(s) is an officer of the Royal Court and must be sworn into office.

On the making of an order, all powers of the company's directors cease an the company must cease to carry on business except in so far as is necessary for the beneficial winding-up of the company.

The liquidator can:

- bring or defend civil actions on behalf of the company;
- carry on the business of the company to the extent beneficial for winding up the company;
- make capital calls (that is, demand money promised by an investor);
- sign all receipts and other documents on behalf of the company;
- do any other act relating to the winding-up; and
- do any court-authorised act.

A liquidator of a company can seek the court's directions in relation to any matter regarding the winding-up.

Protection from creditors

There is no statutory moratorium on creditors' claims on the making of a compulsory winding-up order. However, a creditor can apply to the court on the making of an application (that is, before the winding-up order is made) for an order restraining an action or proceeding pending against the company.

Court Involvement/Length of procedure

In practice, the Court will allow the appointed liquidators to undertake their role without interference but will step in to provide directions as and when required.

A compulsory liquidation is concluded by way of a hearing in front of a Commissioner of the Royal Court. The Commissioner will examine the final accounts of the liquidation, fix the fees of the liquidators and approve the distributions to be made.

The Companies Law contains no provision as to the length of liquidation. In practice, the court does not impose time frames.

Voluntary Liquidation

Pursuant to sections 391 to 405 of Part XXII of the Companies Law, the members of a solvent or insolvent company can decide that it should be wound up and appoint a liquidator. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority. Unlike a compulsory liquidation, a voluntary liquidation is an out-of-court process.

A company can be voluntarily wound up by ordinary resolution if either:

- the period (if any) fixed by the memorandum or articles for the duration of the company expires; or
- an event (if any) occurs on which the memorandum or articles provide that the company should be dissolved.

Alternatively, any company can be wound up voluntarily if it passes a special resolution to the effect.

Supervision and control

The liquidator realises the company's assets and discharges the company's liabilities. Having done so, he distributes any surplus among the members according to their respective entitlements. A voluntary liquidator is not controlled by the court. From the commencement of a voluntary winding-up the company ceases to carry on business unless beneficial for winding up the company. The company's corporate state and powers continue until dissolution. On the appointment of a liquidator, all powers of the directors cease, except to the extent that the company (by ordinary resolution) or the liquidator approves their continuance. Any person who subsequently purports to exercise any powers of a director is guilty of an offence.

A company being voluntarily wound up can, by special resolution, delegate to its creditors the power to:

- appoint a liquidator; and
- enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in which they are to be exercised. A creditor or shareholder of a company which has entered into such an arrangement can, within 21 days from completion of the arrangement, apply to the court for an order that the arrangement be set aside. The court can set aside, amend, vary or confirm the arrangement.

A member of a company can also apply to the court for directions concerning any aspect of the winding-up. If a resolution for a voluntary winding-up has already been passed, the court can still make an order that the company be compulsorily wound up. This application is unusual but might be made by a creditor who wishes the process to be supervised by the court.

It is important to note that any legal person may, currently, be appointed as liquidator in a voluntary liquidation. Consequently, there is no requirement for independence and may be no formal supervision of the liquidator. Conversely, the procedure may be used in respect of insolent companies and there is a risk of abuse in such circumstances. One proposed change to the Guernsey law in this area is to introduce a requirement for independence in the choice of appointee in insolvent situations.

Protection from creditors

There is no statutory moratorium on creditors' claims on the making of a voluntary winding-up order. Unsecured creditors can prove in a liquidation, although they are only paid once all claims have been proved and the final dividend declared. Secured creditors can also enforce their security.

Length of procedure

The Companies Law contains no provision as to the length of liquidation. However, after one year from the date of a voluntary winding-up, and in each further year, the liquidator must summon a general meeting if the winding-up is not complete. At the meeting, the liquidator should set out an account of his acts and dealings, and of the conduct of the winding-up during the preceding year.

As soon as the company's affairs are fully wound up, the liquidator should both:

- Prepare an account of the winding-up, giving details of the liquidation and the disposal of the company's property, among other things; and
- Call a general meeting to present and explain the account.

After the meeting, the liquidator must give notice to the Registrar of Companies of the holding of the meeting and its date. The Registrar of Companies publishes the notice along with a statement that the company will be dissolved. The company is dissolved three months after the notice is delivered.

Administration is, strictly, an insolvency procedure in Guernsey but is dealt with below.

How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?

After satisfaction of the monies owed to secured creditors the following ranking applies to the distribution of company assets on liquidation pursuant to section 1 of the Preferred Debts (Guernsey) Law, 1983 and section 419(1)(a) of the Companies Law 2008:

- The fees and expenses of the winding up process;
- Preferential debts;
- Ordinary Debts (typically trade creditors);
- Postponed Debts (two categories of creditor are postponed until the claims of all other creditors for valuable consideration in money or money's worth are satisfied under the Partnership (Guernsey) Law, 1995: a creditor who lends money to a sole trader or firm on the terms that the rate of interest payable on the loan varies with the profits of the business; and sellers of the goodwill of a business in consideration of a share of the profits); and
- Surplus Assets.

Preferential debts in Guernsey include unpaid rent owed to local landlords (in priority to all other preferential debts), limited amounts of salary, accrued holiday remuneration, Guernsey income tax and class 1 social insurance contributions.

Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Preferences

A liquidator may apply to the court for an order to set aside a transaction entered into by a company if:

- it was entered into at a time when the company was insolvent; or
- the company becomes insolvent as a result of the transaction.

Any payment made within six months (or two years in the case of a "connected party") immediately preceding the application for a compulsory winding up (or a resolution for voluntary winding up) is vulnerable to be set aside.

A company is deemed to have given a preference to a person where:

- "that person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities"; and
- the company, "does anything, or permits anything to be done, which improves that person's position in the company's liquidation".

It is also important to consider whether the company was (and ultimately the directors as decision makers were) influenced by the necessary "desire" to prefer. In practice, establishing a desire to prefer will be a factual exercise to show that the company was influenced by an intention to produce the result of putting one or more creditors in a better position than the general body of creditors.

Any transaction with a "connected party" during the reference period which would constitute a preference is presumed to be outside of the ordinary course of business and made with the requisite desire to prefer.

If a preference has been given, the court has wide ranging powers to make any order it thinks fit to restore to the position of the company to where it would have been absent the preference. The range of possible orders includes making directors personally liable.

Transactions at an Undervalue/Fraudulent dispositions

While there is no codified law relating to transactions at an undervalue (as there is in the UK), similar actions may be available to liquidators under Guernsey's customary law.

One possibility is to claim that the directors committed an equitable wrong, i.e. establish that the recipient of the company's assets had knowledge that the directors were acting in breach of their fiduciary duties (by selling company assets at an undervalue) and that the knowledge was such that the recipient's 'conscience' was so affected that it would be impermissible to allow them to retain the misappropriated asset. As such, a claim may be founded by suggesting the recipient was a constructive trustee of the company's assets.

Another possibility may be for a liquidator to bring a customary law Pauline action. In essence, a Pauline action is concerned with setting aside a transaction undertaken to defraud creditors where the debtor was insolvent at the time or as a result of the transaction.

The critical elements to such an action would be that:

- the debtor must have been insolvent on a balance sheet basis at the time of the transaction; and
- the debtor carried out the transaction with the intention of defrauding creditors.

A Pauline action has been held in Jersey to be an action personnelle mobilière, for which the limitation period for bringing a claim in Guernsey is six years. There have been two Guernsey cases decided on principles akin to the Pauline action, the remedy for which is restitutionary in nature meaning that, if the action is successfully established, the transfer of assets is set aside such that the assets become available to satisfy the creditor's claim. There is no entitlement to compensation.

What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

See above and below regarding automatic stays in compulsory and voluntary liquidation an administration. Such stays would not have automatic extra-territorial effect absent recognition and specific relief to that effect in the foreign jurisdiction. However, it is unlikely that a Guernsey court would permit a foreign unsecured judgment creditor to enforce against the assets of a company that is being wound up since, by doing so, it would be permitting that creditor to gain an unfair advantage in the liquidation process over the other creditors. Allowing enforcement in this scenario would also effectively result in the judgment creditor circumventing the rule that the judgment debt ranks as unsecured and pari passu.

Local restructuring proceedings

What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

Administration is the primary form of corporate rescue procedure in Guernsey.

Initiation

An application must be made to the court, supported by an affidavit seeking an order that the company be placed into administration and setting out the reasons why it should be placed into administration.

The court can grant an administration order if it both:

- is satisfied that the company does not satisfy, or is likely to become unable to satisfy, the solvency test.
- Considers that the making of an order may achieve either:
  a. the survival of the company as a going concern;
  b. a more advantageous realisation of the company's assets than would be effected on a winding-up.

An administration order can only be made by the court.

Supervision and control

The administrator takes into his custody or control all of the property to which the company is, or appears to be, entitled. The administrator manages the company's affairs, business and property in accordance with any court directions.

The administrator can do all things necessary or beneficial for the management of the company's affairs, business and property. The administrator can apply to the court for directions in relation to:

- the extent or performance of any function; and
- any matter arising in the course of his administration.

The administrator is deemed to act as the company's agent in performing his functions.

The administrator is primarily responsible for the creation and implementation of the restructuring plan so as to ensure that the purpose of the administration order is fulfilled. The directors are not automatically removed from office but they may not exercise their powers in a way that interferes with the performance of the administrators' function.

Protection from creditors

During the period between the presentation of an application for an administration order and the making of such an order, or the dismissal of the application (and during the period for which an administration order is in force):

- no resolution can be passed or order made for the company's winding-up; and
- no proceedings can be commenced or continued against the company except with the court's leave (or, if an administration order is in force, with the administrator's leave). Rights of set-off and secured interests, including security interests and rights of enforcement, are unaffected.

On the making of an administration order, any extant application for the company's winding-up is dismissed.

Length of procedure

The Companies Law does not state how long an administration order can remain in force. The court can therefore make an administration order on any terms as it thinks fit, though courts rarely impose time frames on administration orders.

Role of Stakeholders

Whilst administration is driven by the office holder, secured creditors have a particularly important role to play in the process. Given that there is no moratorium on secured creditor enforcement, an administrator will require the buy in of secured creditors if any restructuring or rescue plan is to be successful.

That will often lead to a significant level of pre-appointment dialogue with secured creditors and perhaps the creation of an informal creditors' committee post-appointment.

Schemes of Arrangement

A scheme of arrangement (a Scheme) is a court-sanctioned arrangement between a company and its members or creditors (or any class of them) pursuant to sections 105 to 112 of the Companies Law. A Scheme could be used for reorganisation or restructuring provided that the relevant parties are in agreement and the Court is sufficiently satisfied that it is appropriate in the circumstances.

In an insolvency context, a Scheme can provide a useful mechanism for formulating an arrangement between a class of creditors and may be used in conjunction with an administration to obtain a moratorium on proceedings against the company.

What is the process?

The process for obtaining sanction of the court for a Scheme is broadly the same as that in the UK. The steps to be taken are as follows:

- Application

  The company files an application with the court to convene a meeting of the members of the company (or a class of members) for the purpose of considering and voting on the proposed Scheme.

- Notice

  Notice of the meeting must be sent to each creditor or member and must be accompanied by a statement explaining the effect of the Scheme and any material interests of the directors of the company. Every notice summoning the meeting that is given by advertisement must either include such a statement or state where and how creditors or members entitled to attend the meeting may obtain copies of such a statement.

- Meeting

  At the Court-convened meeting of creditors / members, a majority in number representing not less than 75 per cent in value of the members (or class thereof) present and voting (in person or by proxy) must approve the Scheme before it can be sanctioned by the Court.

- Court sanction

  A further application is then made to the Court seeking sanction of the agreed Scheme. In exercising its discretion, the Court may consider whether:

  a. the interests of different creditors or members are such that they should be treated as belonging to a different class thereof;

  b. each creditor / member (or class thereof) was properly represented by those attending the convened meeting, and whether the majority is acting in good faith in the interests of the creditor / member (or class thereof) and not oppressively towards the minority; and

  c. the Scheme is such that an intelligent and honest man might approve.

Once sanctioned by the Court, the Scheme becomes binding on all creditors / members (including secured and preferential creditors).

Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

The Companies Law does not expressly preclude a company subject to insolvency proceedings from obtaining additional finance.

Administration

Administrators have a specific power to raise or borrow money to assist in achieving the purpose for which the administration order was made under section 379(2) of the Companies Law. Such borrowing is likely to be classified as an expense of the administration and afforded priority accordingly.

Liquidation

In a compulsory or voluntary liquidation a liquidator can only carry on the company's business, which may include obtaining additional finance, to the extent it is beneficial for winding up the company (which would only be the case in a limited set of circumstances). While it is strictly possible to obtain additional finance in liquidation, in practice it is rare.

Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

There are no formal mechanisms under Guernsey law that provide for any of the above.

Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?

There is currently no statutory basis for the formation of a creditor committee as part of any restricting process. That said, committees have been formed using informal protocols in Guernsey cases. There are proposals for the introduction of creditors' committee procedures in the administration process as part of wider reforms to the Guernsey regime.

Existing contracts and assets / business sales

How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?

The commencement of a winding up or administration (whether compulsory or voluntary) does not automatically trigger a termination of existing contracts although they may be frustrated by the procedure.

The previous contractual arrangements of the company are likely to remain in force including retention of title clauses and set-off provisions.

There is no disclaimer process in Guernsey at present but a proposal to introduce it has been approved by the States of Guernsey. Legislation is also being drafted to ensure the continuity of key supplies to a company in administration.

What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

The terms of sale of any business or its assets are likely to be individually negotiated on a case by case basis. In a sale of shares, there may be residual liabilites in the insolvent company that are acquired by a purchaser. On a sale of assets, it is common for office holders to give no representations or warranties as t the title being acquired.

Secured creditors are afforded significant protection under Guernsey law and it is very unlikely that security could be released without their consent. Credit bidding is permitted.

Historically, the Royal Court has only sanctioned one pre-pack in Guernsey in Esquire Realty Holdings Limited (unreported). In doing so, it made it clear that it had been comforted by the parties' compliance with the UK 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.

Liabilities of directors and others

What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?

Directors owe both fiduciary and non-fiduciary duties to the company. The fiduciary duties of a director include to:

- act bona fide in the best interests of the company;
- act for proper purposes/not to act for improper or collateral purposes;
- exercise independent judgement; and
- avoid conflicts of interest.

Whether a director has fulfilled his fiduciary duties to the company will be tested (predominantly) subjectively, that is to say, it is contingent upon the director's state of mind.

A directors' duty of skill and care, however (which is a non-fiduciary duty), is measured both objectively and subjectively. In determining the scope of the duty, a court will consider:

- the director's actual knowledge, skill and experience (subjective test); and
- the knowledge, skill and experience that may be expected of someone fulfilling that director's role (objective test).

A director's duty of care and skill cannot be diminished on the basis of the director's actual knowledge and experience (as was once the position at common law), but instead, the bar can only be raised where a director has such experience and skill that one would have expected him/her to have acted differently in the circumstances.

When the company is "in the zone of insolvency", the actions (or inaction) of directors have potential to prejudice the position of the company's creditors. In those circumstances, directors still owe their duties to the company but must discharge them predominantly with the interests of creditors in mind.

In certain circumstances, a liquidator may seek orders from the Court that an officer must account for (or contribute towards) any losses suffered by the company as a consequence of the director's conduct either prior to, or after the company became insolvent. Those remedies may also affect third parties were the ambit of remedies incudes any order necessary to restore the insolvency company to the position it would have been in (see for example preferences above).

Misfeasance/Breach of Duty

Where in the course of the winding up of a company it appears that any director (a) has appropriated or otherwise misapplied any of the company's assets, (b) has become personally liable for any of the company's debts or liabilities, or (c) has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company, the liquidator (or any creditor or member of the company) may apply to the Court for an order against the director in his personal capacity. Any claim must be brought within six years from the date of breach.

If a claimant is successful in proving misfeasance or a breach of duty, the court may order the delinquent director to (a) repay, restore or account for such money or property; (b) contribute sums towards the company's assets; (c) pay interest upon such amount, at such rate and from such date; as the court thinks fit in respect of the default, whether by way of indemnity or compensation or otherwise.

Wrongful Trading

Where a company has gone into insolvent liquidation at some time before the commencement of the winding up of the company, and a director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation, the liquidator (or any creditor or member of the company) may apply to the Court for a declaration that the director shall be liable to contribute to the company's assets.

It will, however, be a defence for a director to demonstrate that he/she took every reasonable step to minimise the loss to creditors, and such action was taken at the appropriate time.

Fraudulent Trading

Pursuant to section 432 of the Companies Law, if any business of a company is carried on with intent to defraud creditors, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that matter is guilty of an offence.

If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors, the liquidator may apply to the Court for an order that the director contribute to the company's assets. The director may also be criminally liable. The phrases "with intent to defraud creditors" and "for any fraudulent purpose" require a finding of actual dishonesty. If a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment on those debts, it can be inferred that the company is carrying on business with intent to defraud.

Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?

See above.

Foreign debtors and recognition issues

Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or its it under consideration in your country?

Guernsey is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency 1997 and is not a member of the EU (so Regulation (EC) 1346/2000 on Insolvency proceedings (Insolvency Regulation) does not apply). However, the Royal Court has a long history of providing assistance to overseas insolvency office holders in appropriate circumstances.

Recognition can essentially be divided into two types:

Firstly, section 426 of the UK Insolvency Act 1986 has been extended to Guernsey by the Insolvency Act 1986

(Guernsey) Order, 1989. As a result, the Royal Court is able to provide judicial assistance to the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man or Jersey in insolvency matters. The procedure under section 426 involves the office holder applying to the court in their home jurisdiction for an order that the home court sends a letter of request to the Guernsey Court for assistance. Generally the Guernsey Court must comply with the request unless it offends public policy or the outcome is oppressive. In addition, section 426(5) provides the court with the means to apply the insolvency law of either Guernsey or the foreign jurisdiction in relation to similar matters falling within its jurisdiction.

The second type of recognition is under the common law. This is an area that has been subject to substantial development in other jurisdictions in recent decisions, particularly that of the Privy Council in Singularis. However, the broad position, remains that Guernsey will co-operate in foreign insolvency proceedings, particularly 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. Although the Royal Court still retains discretion under the common law, where there is a sufficient connection the court will typically grant the relief sought albeit the availability of "as if" type relief is tempered so that the Guernsey court cannot grant relief unless it has a common law power to do so.

Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?

No. The provisions of the Companies Law only apply to Guernsey registered companies. A proposal to introduce the ability to wind up foreign registered companies has been approved.

Corporate groups

How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?

Guernsey recognises and maintains the limited liability of companies. Only in very specific circumstances would debts/assets be pooled across a group in insolvency. However, a group company may be liable by virtue of challenges to antecedent transactions.

Opinion

Is it a debtor or creditor friendly jurisdiction?

Guernsey has historically been and remains a creditor friendly jurisdiction on insolvency.

Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?

The States of Guernsey do not offer financial support to distressed businesses. There is little political will to interfere in restructuring proceedings save to ensure that the legislative framework is up to date and effective.

What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

Guernsey's statutory regime is "light touch". The absence of specific statutory detail can, occasionally, cause issue in large restructurings. Equally, the creditor friendly nature of the jurisdiction makes debtor led work outs difficult outside of a consensual process. However, the existing regime has been used flexibly to deal with complex commercial scenarios with the support of the Court.

On 9 February 2017 the Committee for Economic Development recommended the enactment of amendments to Guernsey's existing insolvency regime. On 31 March 2017 Guernsey's legislative body directed that legislation necessary to give effect to the reforms should be drafted. The draft is expected in late 2017. The key reforms are as follows:

- The creation of a basic set of insolvency rules covering the key procedural issues that not currently legislated for.
- The ability to end an administration by dissolution. The current system requires liquidation if a company cannot be rescued.
- The expansion of office holders' investigatory powers.
- A potential increase in the level of reporting required by office holders.
- The introduction of statutory provisions dealing with transactions at an undervalue.
- The introduction of disclaimer.
- The ability to wind up foreign registered entities.
- Better oversight for insolvent voluntary liquidations.

About Carey Olsen

Carey Olsen is a leading offshore law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey from a network of nine international offices.

We provide legal services in relation to all aspects of corporate and finance, trusts and private wealth, investment funds, insolvency, restructuring and dispute resolution.

Our clients include global financial institutions, investment funds, private equity and real estate houses, multinational corporations, public organisations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

We work with leading onshore legal advisers on international transactions and cases involving our jurisdictions.

In the face of opportunities and challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with consistently high levels of client service, technical excellence and commercial insight.

Our Restructuring and Insolvency practice

Our restructuring and insolvency lawyers apply their knowledge of insolvency, corporate and banking law, regulatory guidance and litigation to the full spectrum of cross-border restructuring, recovery and insolvency matters involving our offshore jurisdictions.

We work in partnership with the world's leading insolvency practitioners, onshore law firms, accountancy and forensic practices, advising the whole spectrum of stakeholders, including liquidators, receivers, creditors, investors, directors and professional service providers. Our institutional client base includes private equity, venture capital, banking, real estate, financial services, corporate and private trusts and investment managers.

Our lawyers have been involved in a very significant number of the major formal insolvency proceedings in recent years in the jurisdictions in which we practice, and have played a key role in the development of the law in many key areas. They have a practical and deep technical understanding of the issues that can arise in restructuring situations, whether around merger, acquisition, reorganisation, workout or recapitalisation activities. They focus their advice on furthering our clients' commercial aims; typically preserving the assets of a business or the value of an investment, and building a viable restructuring transaction, exit strategy or litigation plan.

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The Legal 500 & The In-House Lawyer

Comparative Legal Guide Guernsey: Restructuring & Insolvency (3rd edition)

This country-specific Q&A provides an overview to restructuring and insolvency laws and regulations that may occur in Guernsey.

This Q&A is part of the global guide to Restructuring & Insolvency (3rd edition).

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